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MELVIN B. MCCLINTOCK, APPELLEE, V. NEMAHA VALLEY SCHOOLS, APPELLEE, IMPLEADED WITH COMMISSIONER OF LABOR, APPELLANT.

253 N. W. 2d 304

Filed May 11, 1977. No. 40975.

Equity: Appeal and Error: Motions, Rules, and Orders. To review errors of law occurring upon the trial of an equity case a motion for a new trial is necessary.

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

James R. Jones and Richard H. Williams, for appellant.

Michael J. Donahue of Witte, Donahue & Faesser, for appellee McClintock.

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

SPENCER, J.

This is an appeal from the District Court which reversed a decision of the Nebraska Appeal Tribunal, Department of Labor, which denied unemployment assistance benefits. The Commissioner of Labor prosecutes this appeal. It involves the construction of a teacher's employment contract. We affirm.

The judgment of the District Court was entered on June 21, 1976. Defendant, Commissioner of Labor, did not file a motion for a new trial until July 14, 1976. The motion, which was not timely filed, was overruled on July 16, 1976. Notice of appeal was filed on July 20, 1976, or within 30 days of the judgment.

There is no factual dispute herein. The issue presented is one of law. Plaintiff was employed by the Nemaha Valley Schools under a teaching contract. The contract is not included in the record. From the testimony we conclude that the contract was to begin on or about August 22, 1974, and end on or about

May 23, 1975. It required work of 185 days, exclusive of holidays and vacations. Salary was to be paid in 12 equal installments. If the contract was terminated, the compensation to be paid thereunder should be an amount which bore the same ratio to the yearly salary specified as the number of days of service to the date of such termination bore to 185 days. Plaintiff worked the full 185 days, so the contract salary was earned.

Plaintiff was notified in January of 1975 that due to decreased enrollment his contract would not be renewed, and his services would be terminated at the end of the school term. The term ended May 23, 1975. Plaintiff requested payment in full, which the school district paid. The judgment of the District Court makes a specific finding that one of the conditions of plaintiff's contract provided that if the contract was terminated, then plaintiff would be entitled to all remaining compensation due under the contract.

The Commissioner of Labor argues that the plaintiff was not unemployed for the reason that he was hired for a period of 1 year, and the payment at the end of the work period was advance payment for the summer period. A determination of this issue requires the construction of the contract between the parties. This is a question of law.

The Commissioner argues that this is a civil action, equitable in nature, and as such a motion for a new trial is not a prerequisite in order for this court to search the record. He cites in support of this proposition Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387 (1952), a workmen's compensation case.

We call attention to the following from the Peek case: "As stated in Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739: 'All of the provisions of our Civil Code are applicable and controlling in a workmen's compensation case as they are in any other

civil action equitable in nature. See Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366.' See, also, Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250.

"Further, this court has concluded that the filing of a motion for new trial is not necessary in order to obtain review of a workmen's compensation case upon the merits in this court. Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352.

"In the light of the foregoing, the applicable rule, as in equity cases, must be that in order to review errors of law which allegedly occurred during the trial of a workmen's compensation case, a motion for new trial must be timely filed, assigning such errors therein, and they must also be subsequently assigned and discussed in the brief filed in this court on appeal, or they will not ordinarily be considered. Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482."

The instant case presents purely a question of law — the construction of the contract. The contract, however, is not before us. From the record we can glean that it provided as set out above. It was, however, before the appeal tribunal. None of the exhibits are included in the transcript of the testimony. Section 48-638, R. R. S. 1943, provides in part as follows: "With his answer or petition, the commissioner shall certify and file with the court a certified copy of the records of the case, including all documents and papers and a transcript of all testimony taken in the matter, together with the appeal tribunal's findings, conclusions, and decisions therein." It was the Commissioner's duty to bring up a full transcript. This, however, is immaterial herein because the Commissioner, who is seeking to review an error of law, did not file the necessary motion for a new trial to give the District Judge an opportunity to correct his error if one was made, an issue we do not reach.

We affirm the judgment of the District Court on the basis that the Commissioner failed to file a motion for a new trial. Under our holdings the question presented is not properly here for determination. We accept the contention of the Commissioner. This is a civil action, equitable in nature. He contends that no motion for a new trial is necessary in equity cases. This court has held that a motion for a new trial is necessary in such cases if it is desired to review alleged errors of law occurring at the trial. See Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447 (1946). To review errors of law occurring upon the trial of an equity case a motion for a new trial is necessary.

We affirm the judgment of the District Court.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

While I believe the court reached the right result in this case, I disagree with the holding that a motion for new trial is required to review the decision in an equity case where the case is to be decided as a matter of law upon the pleadings and evidence.

The rule has been that a motion for new trial is necessary in an equity case only to obtain a review of alleged errors of law occurring at the trial. Where the facts have been stipulated and the alleged errors are questions of law no motion for new trial is required. Furnas County Farm Bureau v. Brown, 112 Neb. 637, 200 N. W. 451. It has never been the rule that a motion for new trial was required where the error alleged was that the trial court decided the case erroneously.

The question is what are "errors of law occurring at the trial." This has been generally held to mean rulings during the trial on evidentiary matters, matters of pleadings, and similar questions. Neither Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387, nor Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447, nor any other previous Nebraska decision of

which I am aware, support the rule announced in this case.

As stated in Peek, a workmen's compensation case, no such alleged errors of law were presented for review. This court decided that case on the merits by a review of the evidence and the applicable statutes. In Oertle, a divorce case, the lack of a motion for new trial prevented the appellant from obtaining a review of the trial court's refusal to allow the appellant to amend her petition and the ruling on an offer of testimony. It did not prevent a review of the decision of the trial court which, on trial de novo, was affirmed.

A change in a rule of practice should be made prospectively to save the rights of any litigant whose case has already been decided by the District Court.

McCOWN, J., joins in this dissent.

MELVIN E. WINKELMANN ET AL., APPELLANTS, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

253 N. W. 2d 307

Filed May 11, 1977. No. 40978.

1. **Administrative Law: Appeal and Error: Parties.** In an appeal from a ruling of an administrative agency, the agency is usually considered a necessary, or at least a proper, party.
2. _____: _____: _____. Where the subject matter of the appeal does not give rise to issues affecting the public interest generally, the administrative agency, if made a party, need take no active part in the litigation, but may leave it to the parties directly concerned.
3. **Administrative Law: Appeal and Error: Evidence.** On an appeal from the Nebraska Liquor Control Commission, this court shall determine whether the findings of the commission are supported by substantial evidence and whether the District Court and the commission followed the proper statutory criteria.
4. **Administrative Law: Intoxicating Liquors.** The power to regulate and control alcoholic liquors is vested exclusively in the Nebraska Liquor Control Commission except as otherwise provided by statute.

5. **Administrative Law: Governmental Subdivisions: Licenses and Permits.** A recommendation by the appropriate governmental unit upon the issuance of a liquor license is not binding upon the Nebraska Liquor Control Commission.
6. **Administrative Law: Hearings: Evidence: Orders.** The Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders upon 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.
7. _____: _____: _____: _____. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

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

Richard J. Bruckner, for appellants.

Paul L. Douglas, Attorney General, and Robert R. Camp, for appellee Nebraska Liquor Control Commission.

Thomas P. Kelley of Kelley & Kelley, for appellee Boal, Inc.

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

WHITE, C. THOMAS, J.

This is an appeal from the granting of a Class D Liquor License to Boal, Inc., by the Nebraska Liquor Control Commission.

Robert G. and Allene L. Schaffer own Boal, Inc., which previously held a Class C liquor license at a location in downtown Plattsmouth, Nebraska. The lease on the premises used by Boal, Inc., expired in May 1975 and could not be renewed. On April 30, 1975, the Class C liquor license expired. The city council of Plattsmouth voted to place the license "in abeyance" until Boal, Inc., could find a new location. On August 11, 1975, the city council amended its zoning ordinance to allow the issuance of a liquor license in an area including the intersection of 15th

and Hill Streets. Shortly thereafter, Boal, Inc., filed an application with the Nebraska Liquor Control Commission for a Class C liquor license at that location. Boal proposed that a service station be remodeled to accommodate a small bar and off-sale liquor establishment. The city council, in September 1975, passed a resolution approving the issuance of the license. Protests were filed and the commission held a hearing on October 1, 1975. The application was denied.

On October 23, 1975, Boal, Inc., again applied for a Class C liquor license for the same location. The city council again recommended the issuance of the license. A hearing was set for January 21, 1976. At the hearing, Boal, Inc., amended the application to ask for only a Class D liquor license. A Class C license allows both on and off-sale liquor while a Class D license allows only off-sale liquor. Following the hearing, the Class D license was approved.

The protestants at the hearing appealed to the District Court asking for a reversal of the commission's action. Both Boal, Inc., and the commission were listed as defendants. The commission filed an answer but did not make an appearance. The court ruled that "the recommendation by the Council for a Class C license included therein by implication a recommendation for the lesser license." It then held that the action of the commission was neither arbitrary nor capricious. The protestants appeal to this court.

Appellants initially argue that judgment should have been granted against the commission due to the failure to appear and to present evidence. The argument is based upon a contention that the commission is an indispensable party. In Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589 (1950), the plaintiffs, police officers, were dismissed from the force by a ruling of the Omaha police civil service commission. On appeal it was argued that the po-

lice civil service commission was an indispensable party. We held: "The police civil service commission and its members were doubtless proper, but in no sense indispensable parties." In 73 C. J. S., Public Administrative Bodies and Procedure, § 178, p. 524, it is stated: "* * * the agency which made the order in question is usually considered a necessary, or at least a proper, party, * * *." See, also, 2 Am. Jur. 2d, Administrative Law, § 742, p. 641. The above-quoted section also provides: "Where the subject matter of the appeal does not give rise to issues affecting the public interest generally, the agency, if made a party, need take no active part in the litigation, but may leave it to the parties directly concerned." The protestants and the applicant for the license were the concerned parties in this case. The commission properly refused to take an active part in the litigation.

The appellants next argue that the action of the commission in granting a Class D license to Boal, Inc., was arbitrary and capricious. The standard of review in an appeal from the Liquor Control Commission is to determine whether the findings of the commission are supported by substantial evidence and whether the District Court and the commission followed the proper statutory criteria. See The 20's, Inc. v. Nebraska Liquor Control Commission, 190 Neb. 761, 212 N. W. 2d 344 (1973).

We have held that the power to regulate and control alcoholic liquors is vested exclusively in the Nebraska Liquor Control Commission except as specifically provided otherwise by statute. See, Hadlock v. Nebraska Liquor Control Commission, 193 Neb. 721, 228 N. W. 2d 887 (1975); City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803 (1967). According to statute, the commission must allow the appropriate governmental unit a chance to make a recommendation upon the issuance of a license. § 53-131, R. R. S. 1943.

The recommendation, however, is not binding upon the commission. See City of Lincoln v. Nebraska Liquor Control Commission, *supra*.

Appellants argue that the granting of the license was arbitrary and capricious because the commission did not receive any recommendation from the city council of Plattsmouth concerning a Class D liquor license. The city council did, however, recommend the issuance of a Class C liquor license. The District Court held, and we agree, that the recommendation for a Class C license implied a recommendation for a Class D license. If a particular location is suitable for both on and off-sale liquor, then surely it is suitable for off-sale liquor only.

Appellants also contend that the commission's action in the issuance of the license was not supported by sufficient evidence. The Nebraska Liquor Control Commission, after an administrative hearing, 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. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. See, J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694 (1975); Hadlock v. Nebraska Liquor Control Commission, *supra*.

The evidence shows that the license in question is to be located in a remodeled service station located in a commercial district on a highway which passes through Plattsmouth. The location was within the area zoned by the city council as suitable for the sale of alcohol. The city council recommended that a business with off-sale liquor be allowed at that location. The applicant did not have a history of violating liquor regulations. In summary, the record contains ample evidence to support the action of the commission.

The judgment of the District Court is affirmed.

AFFIRMED.

HERSCH BUILDINGS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. BETTY J. STEINBRECHER, ADMINISTRATRIX OF THE ESTATE OF CLARENCE G. STEINBRECHER, DECEASED, APPELLEE AND CROSS-APPELLANT.

253 N. W. 2d 310

Filed May 11, 1977. No. 40979.

1. **Contracts: Burden of Proof: Evidence.** Ordinarily a party suing to recover an alleged overpayment on a contract has not only the burden of proving the overpayment but also the burden of proving that the overpayment was involuntary.
2. _____: _____: _____. In an action against a contractor to recover alleged overcharges by the contractor the plaintiff has the burden of proving that it was overcharged.
3. **Trial: Instructions: Burden of Proof.** It is error to give the jury instructions which place the burden of proof on the wrong party, or contain inconsistent and conflicting paragraphs relating to the burden of proof.

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

Wright & Simmons, for appellant.

Nichols & Meister, for appellee.

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

MCCOWN, J.

This is an action to recover amounts allegedly overpaid on an oral construction contract. The jury returned a verdict for the plaintiff in the sum of $6,182.61. The plaintiff has appealed and the defendant has cross-appealed.

In 1966, Hersch Buildings, Inc., entered into an

oral contract with Clarence G. Steinbrecher, a contractor, to build a packing and rendering plant for Hersch on a basic cost plus 8 percent basis. Steinbrecher finished his construction work in 1967, after total billings to Hersch of $176,586.75. Hersch paid a total of $173,434.70 to Steinbrecher and paid another $13,969.23 to plumbers and electricians for total construction payments of $187,403.93.

In 1970, the action involved here was begun by Steinbrecher, as plaintiff, against Hersch Buildings, Inc., as defendant, to foreclose a mechanic's lien in the amount of $3,152.04, allegedly still due to him on the contract. Hersch Building, Inc., answered and counterclaimed, alleging that the oral construction contract was cost plus 8 percent, with a $150,000 maximum limit on total costs. Hersch alleged that Steinbrecher had commenced construction of the packing plant but had never completed it, and had failed to construct the plant in workmanlike manner. Hersch alleged that it had overpaid Steinbrecher by mistake in the sum of $23,434.70, and had paid $14,969.95 to plumbers and electricians which Steinbrecher should have paid, and prayed for judgment against Steinbrecher in the sum of $38,404.65. Steinbrecher denied the allegations of the cross-petition.

In 1975, Steinbrecher moved to dismiss his petition to foreclose the mechanic's lien, and Hersch Buildings, Inc., moved that its cross-petition be transferred to the jury docket and set for trial. The District Court dismissed Steinbrecher's petition to foreclose the mechanic's lien and transferred the Hersch cross-petition against Steinbrecher to the jury docket, and set it for trial. Thereafter Steinbrecher died and the action was revived against the administratrix of his estate.

By a pretrial order in April 1976, Hersch Buildings, Inc., the original defendant, was designated as the plaintiff, and the administratrix of Steinbrecher's estate was designated as the defendant.

At the trial, in addition to evidence as to the quality of the workmanship and the alleged $150,000 maximum contract limitation, there was evidence as to overhead costs, personal labor by Steinbrecher at the job site, "shop charges" for materials Steinbrecher had on hand, and credit for certain cash discounts. Whether or not these items were legitimate charges under either version of the contract was in dispute.

At the conclusion of the plaintiff's evidence, the court sustained defendant Steinbrecher's motion to dismiss any claim for damages for work done in an unworkmanlike manner, and the case was submitted to the jury under the remaining issues set forth in the original cross-petition. The jury returned its verdict for the plaintiff Hersch in the sum of $6,182.61. Plaintiff has appealed and defendant has cross-appealed.

The assignments of error center around the failure of the instructions to properly place the burden of proof. Instruction No. 6 directed the jury that before plaintiff could recover from the defendant it must prove by a preponderance of the evidence each of the following propositions: (1) That it had an agreement with defendant to build a packing plant as alleged; (2) that it was to pay defendant for his work, his actual costs for labor performed or material furnished, plus 8 percent of that amount, but that the total cost was not to exceed $150,000; and (3) that it paid to defendant, and separately to plumbers and electricians, by mistake certain amounts in excess of $150,000.

Instruction No. 10 was as follows: "Shop charges and overhead may not be included in the cost of labor and materials or supplies unless you find that the parties specifically agreed otherwise.

"If you find that plaintiff and defendant agreed on a cost plus agreement, defendant must compute his fee based on the amount actually spent for labor and

materials or supplies, furnished by him, that actually went into and became a part of the finished product.

"Defendant must credit plaintiff with all discounts and credits received by him unless you find that the parties specifically agreed otherwise."

During its deliberations the jury submitted a question to the court: "If we find against the plaintiff on instruction # 6, but for the plaintiff on instruction # 10, or a portion thereof, are we to decide the dollar amount of the settlement?" After consultation with counsel for both parties, the court's answer to the jury was "yes."

Instruction No. 9 instructed the jury that if a person pays money to another on the supposition that a specific fact is true which would entitle the other person to the money, but which fact is untrue, and the money would not have been paid if the person paying it had known that the fact was untrue, the person paying the money may then recover it back from the person to whom it was paid. Instruction No. 9 then stated: "It is up to you the jury to determine from the evidence whether the plaintiff paid any sums of money by mistake."

Instruction No. 11 was: "Defendant may not charge plaintiff wages under a cost-plus contract for supervising the construction but may charge for work actually done by him on the job unless you find that the parties specifically agreed otherwise. The burden is on defendant to prove what work was actually done by him on the job."

In essence, the case was an action for money had and received by the defendant, allegedly paid by plaintiff by mistake. In the posture in which the case was tried, the burden was on the plaintiff Hersch to prove all facts essential to a recovery on the cross-petition.

In accordance with the rules relating to the burden of proof in civil actions generally, the burden is on

one seeking to recover payments made to prove the facts entitling him to recovery. 70 C. J. S., Payment, § 160, p. 376. Ordinarily a party suing to recover an alleged overpayment on a contract has not only the burden of proving the overpayment but also the burden of proving that the overpayment was involuntary. Illinois Central R. R. Co. v. Midwestern Grain Co., 308 F. Supp. 323. That case involved a claim and cross-claim, and the rule was applied to the cross-claim, and both claims were dismissed for failure to meet the burden of proof. All payments are presumed to be voluntary until the contrary is made to appear, and the burden rests on the party seeking to recover a payment to prove that it was involuntary. 40 Am. Jur., Payment, § 282, p. 896.

In Stanolind Oil & Gas Co. v. Bridges, 160 F. Supp., 798, the court held that in an action by an oil company against a contractor to recover alleged overcharges by the contractor the oil company had the burden of proving that it had been overcharged, even though the contractor had the records and books.

In the posture of the case before us the plaintiff clearly had the burden of proving that it had been overcharged, and that its overpayments were made by mistake, and were therefore involuntary. The case did not rest solely on whether or not the oral contract had a $150,000 maximum cost limitation. The instructions, however, placed the burden on the defendant to prove that any challenged charges were proper rather than placing the burden on the plaintiff to prove that such charges were improper. The instructions here were confusing and inconsistent, and they concern the burden of proof. The jury's request for clarification as to instructions Nos. 6 and 10 points up the actual confusion which resulted. This court has consistently held that it is error to give the jury instructions which place the burden of proof on the wrong party, or contain incon-

sistent and conflicting paragraphs relating to the burden of proof. Kaspar v. Schack, 195 Neb. 215, 237 N. W. 2d 414; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

The judgment is reversed and the cause remanded to the District Court.

REVERSED AND REMANDED.

IN RE APPLICATION OF MOORE'S TRANSFER, INC., OF NORFOLK, NEBRASKA. MOORE'S TRANSFER, INC., APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE.

253 N. W. 2d 313

Filed May 11, 1977. No. 40999.

1. **Public Service Commissions: Common Carriers: Appeal and Error.** Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska Supreme Court on appeals from the Nebraska Public Service Commission.
2. **Public Service Commissions: Common Carriers.** Withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought.
3. _____: _____. General fears of potential diversion as contrasted with specific evidence indicating probable harm do not constitute proof that harm will result to competitive carriers because of an application.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Gailyn L. Larsen of Peterson, Bowman, Coffman & Larsen, for appellant.

No appearance for appellee.

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

SPENCER, J.

This is an appeal from a Public Service Commission (PSC) decision denying an application for authority to extend present operating rights. All protests filed with the PSC against the application had been withdrawn prior to the hearing. No brief was filed on behalf of the PSC, so the appeal was unopposed in this court. We reverse the denial of the application.

Applicant's present authority enables it to truck general commodities except those requiring special equipment from Norfolk, Nebraska, to points within a 155-mile radius thereof. The application involved a request for authority to extend present operating authority as it applied to the transportation of building materials, iron and steel, and iron and steel articles from Norfolk, Nebraska, to all points in the State of Nebraska.

Protests to the granting of the application were initially filed by five carriers. Those protests were withdrawn prior to the hearing by virtue of a voluntary restriction of the scope of the application. This restriction excluded the transportation of those commodities which because of their size and weight require the use of special equipment. It also specifically restricted against the transportation of traffic originating at the plant sites and facilities of Nucor Steel and Vulcraft Division of Nucor Corporation, at or near Norfolk, Nebraska.

After the objections were withdrawn the PSC notified applicant of its intent to process the application through its short form procedure, as provided for in its rules for an unopposed application. Subsequently, without explanation, it changed its decision and set a hearing at Norfolk, Nebraska, for April 29, 1976. This hearing was continued to and held May 19, 1976.

No objections or protests were of record and no one intervened in the proceedings. Six witnesses

testified in support of the application and five affidavits conforming to the form used for unopposed applications were filed in its support. The testimony indicated that the service requested was needed in order to, among other things, accommodate the shipping needs caused by the expansion of the growing industries within the shipping area.

One commissioner cross-examined the witnesses, obviously in the interests of two parties who were not objectors in the proceeding but who were present at the hearing. One of them had filed an objection but had withdrawn it when the applicant agreed to the restriction which was made a part of the application. The other one at no time filed an objection or intervened in the proceeding. The cross-examination of the witnesses established that by interlining they had been able to meet most of their needs in the past. The testimony indicated interlining promoted delays and was not entirely satisfactory service.

The PSC found the applicant, Moore's Transfer, Inc., fit, willing, and able properly to perform the service proposed and to conform to the PSC's rules and regulations. Over a vigorous dissent it also found: (1) that the proposed operations will not serve a useful purpose responsive to a public demand or need; (2) that any existing public demand or need for motor common carrier services in the area involved in this amended application can and will be served as well by existing carriers; and (3) that a granting of this application could result in a diversion of traffic from existing carriers contrary to the public interest.

It is obvious to us that these latter findings are not sustained by the record and are wholly arbitrary, capricious, and unreasonable. We can best characterize the findings of the PSC by quoting the following from the dissenting opinion of Commissioner Eric Rasmussen: "The majority Opinion further states that any existing public need of the shippers

could be served by existing carriers. It is difficult to see how such a conclusion was reached when there was no evidence of record to indicate what service the existing carriers could provide, as the application was unopposed. One Commissioner, even admitted at one point, that the Commission did not know whether the existing shippers possessed the requisite authority to supply the shipper's needs (T. 83), but discounted the shipper's testimony on the basis of a statement by him that, if they did have the authority, he saw no reason why they could not serve his needs (Order - p.4). Thus, the Commission rejected his testimony on the basis of an unsubstantiated assumption that such authority was, indeed, possessed by existing carriers. Thus, in view of the fact that there was no evidence of record to establish that the existing carriers could serve the shippers' needs, that there are acknowledged deficiencies in the services offered by existing carriers, and that, in many cases, the existing carriers have exhibited no interest in serving the shippers' needs, there could be no finding and should be no finding that any existing public need could be served by existing carriers.

"There is absolutely no evidence in this proceeding that a grant of authority under this application will result in a diversion of traffic from existing carriers contrary to public interest. This is especially true in view of the fact that the application was unopposed at the time of the hearing, all protests having been previously withdrawn. In fact, 'withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of authority sought.' West Bros., Inc., Ext. - U. S. Highway 11, 98 M. C. C. 572, 574 (1965).

"The testimony and affidavits presented show that a substantial number of businessmen in Norfolk, Nebraska, believe that a useful purpose and need exist

now and will exist in the future for the services which Moore's plans (sic) to provide. Secondly, the fact that a significant number of Norfolk's businessmen testified in support of the application indicates (sic) that they believe that the existing carriers, even though they have provided satisfactory service for the most part, cannot perform and will not be able to perform as well as the Applicant. Finally, it is obvious that the services that the Applicant will provide will not endanger or impair the operations of existing carriers. If such a threat did exist, then those affected carriers would have protested, continued their protest, or intervened. The Applicant in this case has more than met his burden of proof.

"It is interesting to note that there has been absolutely no evidence presented against the application of Moore's Transfer. Yet, ample opportunity existed for protests or intervention by anyone opposed to the application. I am truly disturbed as to how the majority, in good conscience, can take the supporting testimony of a substantial group of Norfolk businessmen and interpret them to say that no demand exists. To do so, is to ignore all of the evidence."

We also quote the following from the dissenting opinion:

"I should also like to point out that the appearance of Abler Transfer, Inc. and especially Clark Bros. Transfer is highly irregular if not illegal. Clark Bros. protested the application and then withdrew, yet they were allowed to make a statement at the hearing. Abler could have protested or intervened up until the time of the hearing, yet they choose not to do so. Both should not have been allowed to give a statement.

"In view of the above evidence, it is extremely difficult to see how the majority, in the instant proceeding, could reject the testimony and affidavits of eleven (11) supporting shippers, and yet place such

great emphasis upon the adverse effect which a grant of authority would have upon competitive carriers who did not even care to protest the application. In so doing, and in allowing questionably entered testimony from the competitive carriers in opposition to an unopposed application, the Commission has arbitrarily departed from established procedures in a capricious manner which was not only detrimental to the interests of the Applicant in this proceeding, but which will also have a serious adverse effect on future proceedings of the Commission. There must be a rational basis for the conclusion as derived from the evidence. A review of the evidence reveals that the majority decision is in conflict with the great weight of evidence. Such lack of rational basis and the total disregard of precedent makes the action of the majority arbitrary, capricious and unreasonable. In light of the facts and evidence presented, this application should be granted."

Rule 11 of the PSC provides in pertinent part as follows: "(2) * * * Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding. * * *

"(7) * * * Without meeting the requirements of (rules covering a formal protest) any person *other than a competing carrier* * * * may appear at a hearing on his own behalf only to make a statement on the record." (Italics supplied.)

Rule 12 of the PSC provides in pertinent part as follows: "(2) Petition: When Filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except to become a party of record to participate in oral argument or briefs only as to the evidence adduced and the law applicable thereto."

We have previously held that rulings by the Interstate Commerce Commission in dealing with the

subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska Supreme Court on appeals from the Nebraska Public Service Commission. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865 (1960).

The following holdings of the Interstate Commerce Commission appear to be pertinent herein: The withdrawal of protestant carriers adds greater substance to shippers' evidence in support of an application for motor carrier authority. Southern Forwarding Co., Ext. - Bowling Green, 110 M. C. C. 66 (1969).

In the absence of evidence by competitive carriers who are parties to the proceeding, the Public Service Commission has no evidence of record upon which a determination can be made as to whether or not such carriers can adequately serve the public need. Connecticut Limousine Service, Inc., Ext. - Buses, 105 M. C. C. 609 (1967).

Withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought. West Bros., Inc., Ext. - U. S. Highway 11, 98 M. C. C. 572 (1965).

General fears of potential diversion, as contrasted with specific evidence indicating probable harm, do not constitute proof that harm will result to competitive carriers because of an application. Caravan Refrigerated Cargo, Inc. - PUR - Bilyeu Refrigerated Transport Corp., 109 M. C. C. 843 (1972).

As noted previously, all formal protests to the application were withdrawn. One of these protests had been filed by a carrier permitted to make a statement. It would appear from Rules 11 and 12 that neither carrier should have been permitted to make a statement under the rules of the PSC. In any event, the substance of the statements were not sufficient to permit the PSC to reach the result it did.

A very significant consideration in this case should have been that Moore's already held authority which in effect gave it the ability to handle general commodities. This included the commodities involved in the application from Norfolk to points within approximately 155 miles thereof. The purpose of the application was to enable Moore's to handle a specified group of commodities from Norfolk to all points in Nebraska instead of being limited to the described radial territory. This would give it the capability of serving the extreme southern and western portions of the state for the specified group of commodities.

The PSC here was not confronted with an application involving some type of new service. On its face, the requested extension of authority was minimal. In view of this fact and the further fact that applicant demonstrated it was accommodating a public need, we cannot understand the decision of the PSC.

We are in full agreement with the dissenting commissioner that the denial herein was arbitrary, capricious, and unreasonable. The withdrawal of protests and the fact that no one intervened in this proceeding is a clear indication that existing motor carriers did not expect to suffer any material detriment from the grant of the authority sought.

From a review of the record there was absolutely no evidence of any kind presented in this proceeding by any party, including the PSC majority, of any possible real injury to existing carriers whatsoever. We do not see how there could be a legitimate finding that a granting of this application would result in a diversion of traffic contrary to the public interest. When the evidence is viewed in its proper context, it is obvious to us that the PSC should have granted the application.

We reverse the judgment of the Nebraska Public Service Commission herein and remand the cause

with directions to grant the authority requested as restricted.

REVERSED AND REMANDED WITH DIRECTIONS.

JEFFREY LEE REESE BY DELANO G. REESE, APPELLEE, V. MITZI MAYER ET AL., APPELLANTS.

253 N. W. 2d 317

Filed May 11, 1977. No. 41009.

1. **Motor Vehicles: Highways.** When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. § 39-635(1), R. R. S. 1943.
2. _____: _____. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is the right to proceed in a lawful manner in preference to the vehicle on the left.
3. _____: _____. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way.

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

Ray C. Simmons, for appellants.

Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellee.

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

BOSLAUGH, J.

This is an appeal in an action for damages arising out of an automobile accident. The case originated in the small claims court. In the District Court, the plaintiff recovered a judgment in the amount of $299.87. The defendants have appealed to this court.

The accident happened at about 10 p.m., on January 24, 1975, at the intersection of 20th Street and Yager Road in Fremont, Nebraska. Both streets were approximately 26 feet wide. There were no stop signs or other traffic control devices at the intersection. The weather was clear but the streets were very icy.

The plaintiff, Jeffrey Reese, testified that he was driving south on Yager Road at approximately 15 or 20 miles an hour when he saw the Mayer automobile approaching from the east. At that time both automobiles were approximately 60 feet from the intersection. The plaintiff applied his brakes, sounded his horn, and attempted to turn aside. The Mayer automobile did not slow down and the right front of the plaintiff's automobile struck the right rear of the Mayer' automobile. The plaintiff's automobile stopped in the middle of the intersection. The Mayer automobile stopped about three-fourths of a block from the intersection. The cost of repairs to the plaintiff's automobile amounted to $299.87.

The defendant, Mitzi Mayer, testified that she was driving west on 20th Street at approximately 20 miles per hour when she saw the plaintiff's automobile about a block north of the intersection. The front of her car was then about 10 feet away from the intersection. She sounded her horn and proceeded into the intersection without reducing her speed. She believed the plaintiff did not slow down and she did not see him turn either way. She was unable to judge the speed of the plaintiff's automobile except that it appeared to be going twice as fast as her automobile. At the time of the impact her automobile was almost completely across the intersection. Her automobile stopped about a third of a block west of the intersection.

A witness to the accident testified that when the defendant's automobile was about 10 or 15 feet east of the intersection, the plaintiff's automobile was 40

feet north of the intersection. This witness estimated the speed of the defendant's automobile at 15 or 20 miles an hour and the speed of the plaintiff's automobile at 30 or 35 miles an hour. The defendant's automobile did not slow down but the plaintiff tried to stop. The impact was "just a light thump."

The appeal to the District Court was a trial de novo to the court. § 24-527, R. R. S. 1943. Since the trial court found in favor of the plaintiff, the evidence must be considered in the light most favorable to the plaintiff, all controverted issues of fact must be resolved in his favor, and he is entitled to the benefit of every inference that may reasonably be drawn from the evidence. Since this is a law action, the finding of the trial court is equivalent to the verdict of a jury and will not be set aside unless clearly wrong.

The evidence was such that the trial court could find that the two vehicles approached the intersection at approximately the same time. The defendant, as driver of the vehicle on the left, was required to yield the right-of-way to the vehicle on the right, the plaintiff's automobile. § 39-635, R. R. S. 1943. The defendant's failure to do so was evidence of negligence and sufficient to support a finding for the plaintiff.

The defendant contends the plaintiff was guilty of negligence more than slight, as a matter of law, and sufficient to bar any recovery. To support this contention the defendant makes two arguments.

The first argument is based on the testimony of the defendant and the witness to the accident. The trial court was not required to accept the testimony of the defendant or the witness to the accident, particularly as to speeds and distances from the intersection. The testimony of the plaintiff, if believed, was sufficient to support the finding and judgment.

The second argument is based on section 39-635(1), R. R. S. 1943. Prior to 1969, the statute contained a

provision that the vehicle on the right "shall have the right-of-way." This language has been eliminated and the statute now provides only that the driver on the left "shall yield the right-of-way to the vehicle on the right." In effect the defendant argues that the amendment eliminated the concept of right-of-way and that now when two vehicles approach an intersection at approximately the same time neither vehicle has the right-of-way. This argument ignores the plain language of the present statute.

Section 39-602 (80), R. R. S. 1943, defines right-of-way as follows: "Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." When section 39-635(1) and section 39-602(80), R. R. S. 1943, are construed together the meaning is clear.

When two vehicles approach an intersection at approximately the same time, the vehicle on the right has the *right to proceed* in a lawful manner in preference to the vehicle on the left. In other words, the vehicle on the right has the right to the immediate use of the intersection, and it is this use of the roadway that the vehicle on the left is required to yield to the vehicle on the right.

It should be noted that the right-of-way which the vehicle on the left is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. See, Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238; Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786.

The judgment of the District Court is affirmed.

AFFIRMED.

PETER BREWER, APPELLANT, V. WESLEY L. TRACY, APPELLEE.

253 N. W. 2d 319

Filed May 11, 1977. No. 41019.

1. **Equity: Appeal and Error.** When an equity action is appealed to the Supreme Court, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court.
2. **Contracts: Restraints of Trade: Employer and Employee.** In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
3. **Contracts: Restraints of Trade: Employer and Employee: Evidence.** Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services.
4. **Contracts: Restraints of Trade: Employer and Employee.** A contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed.

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

Baldwin & Koenig, for appellant.

David E. Cording, for appellee.

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

WHITE, C. THOMAS, J.

Plaintiff Peter Brewer operates a refuse disposal service in Hebron and Deshler, Nebraska. The busi-

ness consists of picking up waste and refuse from residences and businesses in those two towns. In June 1974 the defendant Wesley L. Tracy was employed by plaintiff Brewer and remained in his employ until September 27, 1975. The defendant Tracy drove the garbage truck and picked up the refuse at each location. The contract of employment was oral. In November 1974 the plaintiff, as a condition of continuing in his employ, required defendant Tracy to enter into an agreement "that upon the severance by said second party from the employ of the first party for any reason whatsoever either by the action of the employer or employee, said employee will not engage in the trash service business in Hebron or within 15 miles circumference of Hebron, Thayer County, Nebraska, for a period of five years from the date of such severance." It was also agreed that the defendant Tracy would not compete with any prospective purchaser of plaintiff Brewer's trash business for a like period. Shortly after resigning from the employment of the plaintiff, the defendant began soliciting customers of the plaintiff. Plaintiff brought action and secured a temporary restraining order on the 29th day of September 1975. The defendant was engaged in the trash collection business for 2 days prior to being restrained. At the conclusion of the hearing, the trial court found that the restrictions contained in the employment agreement, not to compete for a period of 5 years nor within 15 miles of the community of Hebron, Nebraska, were not reasonable as to time or space. The employer appeals.

When an equity action is appealed to the Supreme Court, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. Rambo v. Galley, 188 Neb. 692, 199 N. W. 2d 14.

In Diamond Match Div. of Diamond International Corp. v. Bernstein, 196 Neb. 452, 243 N. W. 2d 764

(1976), plaintiff employed the defendant for about 6½ years as a salesman of book matches with accompanying advertising. The contract of employment provided that for a period of 2 years after the termination of his employment, employee would not engage in a similar line of work in his sales territory. The evidence disclosed that there were 11 other competitors in the field and that it was a very highly competitive business. The employee had no knowledge of any trade secrets but only the common knowledge of other salesmen, jobbers, and other prospective customers and prices, which information was also available to all competitors. It was there stated: "In Securities Acceptance Corp. v. Brown, * * * (171 Neb. 406, 106 N. W. 2d 456 (1960)), we have held: 'There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.' * * *

" 'Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services.' "

There are 9 other communities within the 15-mile radius encompassed in the agreement to which the plaintiff did not extend service. The record is silent as to whether any solicitation was made for refuse hauling in those communities or whether, in fact, the plaintiff had the capacity to engage in refuse hauling in those communities were the business opportunities available to him.

The employee Tracy was possessed of no special skills and was furnished no list of customers not

otherwise available to the public. The obvious customers for a refuse and trash business were the residences and businesses in the cities and villages being served. The charge for residences was a flat rate and was of common knowledge in the community; however, testimony was presented that the employer would sometimes confer with the employee on the amount of refuse generated by a particular business to see if the amount charged was in line with the service being provided. Employee Tracy was paid $700 per month. The contract was one for personal service. The trial court, in its memorandum, indicated that the time elapsed between the date of the issuance of the temporary injunction September 29, 1975, and the date of trial January 15, 1976, was more than sufficient to protect the plaintiff. The court held that 5 years was an unreasonable limitation on the right of a working man to labor. We further hold that a contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed. Nothing appears in the record and no reason has been suggested to us that would justify a restriction on the defendant-employee engaging in the refuse and trash business in the nine other communities in Thayer County, Nebraska, in which neither the plaintiff-employer nor the employee ever served.

The trial court was correct. The judgment of the District Court is affirmed.

AFFIRMED.

IN RE INTERESTS OF DAVID WAYNE WORRELL ET AL., MINOR CHILDREN UNDER THE AGE OF 18. STATE OF NEBRASKA, APPELLEE, V. MARY CHRISTINA WORRELL, APPELLEE, DAVID WAYNE WORRELL ET AL., BY DONALD E. ROWLANDS, II, GUARDIAN AD LITEM, APPELLANTS.

253 N. W. 2d 843

Filed May 18, 1977. No. 40884.

1. **Courts: Trial: Appeal and Error.** On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court.
2. **Courts: Appeal and Error.** In appeals in equity from the District Court to the Supreme Court, this court reviews the issues by trial de novo on the record.
3. **Trial: Appeal and Error: Infants.** An appeal from a finding and judgment of the District Court involving dependent or neglected children under Chapter 43, article 2, R. R. S. 1943, is disposed of in this court by trial de novo on the record.
4. **Divorce: Infants: Parent and Child.** Courts may not properly deprive a parent of the 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.

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

Donald E. Rowlands, II, of Baskins & Rowlands, for appellant.

John P. Murphy, for appellee State.

Keith N. Bystrom and Scott P. Helvie, for appellee Worrell.

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

MCCOWN, J.

The appellee, Mary C. Worrell, commenced this proceeding in the county court of Lincoln County, Nebraska, to recover the care and custody of her two sons from the Lincoln County welfare office and Lincoln County probation office. Custody of the two children had been placed temporarily in those

agencies by an order of the county court under a voluntary agreement and stipulation between the mother and welfare officials. A motion to regain custody of her children made a few months later was overruled and visitation rights of the mother were limited. The mother appealed. The District Court for Lincoln County reversed the judgment of the county court, but directed that custody remain unchanged pending appeal to this court. The guardian ad litem has appealed for the children.

On March 26, 1975, Mary C. Worrell, the unmarried natural mother of David Wayne Worrell, age 3½ years, and Richard Eugene Worrell, age approximately 5 months, voluntarily sought temporary help from the Lincoln County welfare office to provide for the physical needs of her children because she was then financially unable to provide adequately for them. After consultation with the county attorney's office, it was arranged for the mother to temporarily relinquish custody of her children to the welfare office. The mother agreed and stipulated to the statement that she was presently unable on her income to provide for the physical needs of the children, and that the problem was compounded by her drinking habits. In accordance with the stipulation, the county court, sitting as a juvenile court, entered an order placing the children temporarily in the joint care and custody of the Lincoln County welfare office and the probation office of the court for temporary placement in a foster home. The understanding was that the arrangement was to be for a period of 6 months to a year. The children were placed with a couple in a foster home on April 1, 1975. The natural mother had some difficulty in arranging to visit the boys because the foster parents insisted that she could not visit unless the husband was present. She was required to arrange her visits through the welfare office, and was not always successful in getting to see her children. The foster

parents were interested in adopting the children, and at one point employed an attorney to assist in the adoption. In November 1975, it was necessary for the mother to obtain a court order to allow her to visit the children on the younger boy's first birthday.

In late summer of 1975, the deputy county attorney filed a motion for termination of the parental rights of the mother alleging that she had neglected the children, and that she was an unfit mother. A guardian ad litem was appointed for the children and the public defender represented the mother. On October 21, 1975, 2 days before the date set for hearing on the motion for termination, the deputy county attorney, with the concurrence of the public defender and the guardian ad litem, moved the court to continue the matter indefinitely for the specific reason that there was insufficient evidence to warrant the termination of parental rights. The county court continued the matter indefinitely and left the custody arrangements unchanged.

Meanwhile, the mother had been working to get her financial affairs in order. At one time she had two full-time jobs and by early December 1975, she had paid her loan indebtedness, and had rented and moved into a two-bedroom trailer house so that she would have room for the children. On December 2, 1975, the mother moved to terminate the order of temporary custody of March 26, 1975, and to regain the custody of her children.

Hearing was held in early December 1975. At that time the mother was 25 years old. She had a tenth-grade education, and had been continuously and regularly employed. The evidence for the mother was that she had always been a good mother, and that her children had always been clean and healthy, and had proper food, clothing, and medical attention. The foster mother conceded that the children were normal and healthy children when she took over their care. The evidence also was that the mother kept a clean

house, did not have a drinking problem, and that her financial resources were sufficient to make an acceptable home for her children. The mother loved her children and the affection was returned.

The evidence for the State showed that the mother was not married, and the children were born out of wedlock. A previous illegitimate child, born when the mother was 18, had been given up for adoption. The mother had attempted suicide on three occasions. The mother's evidence was that these attempts were when she was much younger, and were not serious attempts at suicide. From January to May 1975, she had lived with a man. In August of 1975, she spent 5 days in jail for "unlawfully conversing with a prisoner." This was her only arrest or conviction. The State's evidence also showed that she visited lounges and bars on occasion. There was also evidence that the older boy sometimes used "rough" language, although that term was not defined. The State also introduced evidence that the mother had lived in a number of different locations since 1971, had changed jobs frequently, and that her reputation was not good.

At the conclusion of the hearing the county judge stated: "I think I can find at this time that there's no question in the court's mind that the children could be returned to the natural mother and that there's no real fear for the safety of these children and it looks like she did a fair job of keeping them healthy but the primary concern by the court is the emotional stability of the family unit and the ability for Chris Worrell to function as a proper mother from an emotional standpoint." The county court then overruled the motion to terminate the temporary custody and limited the mother's visitation rights to 5 hours on Christmas day; 5 hours on each of the children's birthdays; and 5 hours on the second Monday of each month. The mother then appealed to the District Court.

The District Court, without taking additional evidence, reversed the order of the county court, ordered the children returned to the custody of the mother, but directed that custody remain unchanged pending appeal to this court. The guardian ad litem filed a motion for a new trial, which was overruled, and this appeal by the guardian ad litem followed.

The guardian ad litem contends that the standard for review by the District Court in a juvenile case requires the District Court to affirm the decision made by the county court, sitting as a juvenile court, unless there has been an abuse of discretion. It is also contended that the county court, as the original trial court, saw and heard the witnesses and its decision should therefore be affirmed.

Section 43-202.03, R. S. Supp., 1976, provides that in a juvenile court proceeding instituted before a county court sitting as a juvenile court, "appeal may be had to the district court as in civil cases, * * *. The county court shall continue to exercise supervision over the child until a hearing is had in the district court and the district court enters an order making other disposition. If the district court adjudges the child to be a child defined in section 43-202, the district court shall affirm the disposition made by the county court, unless it is shown by clear and convincing evidence that the disposition of the county court is not in the best interest of such child. Upon determination of the appeal, the district court shall remand the case to the county court for further proceedings consistent with the determination of the district court."

Section 24-541, R. R. S. 1943, dealing with civil appeals such as this, provides that all such appeals shall be de novo on the record. It also provides that the District Court may, in its discretion, receive additional evidence if the court determines it reasonably necessary. This court has determined the standard for review in civil cases appealed to the

District Court under that section. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50; Von Seggern v. Kassmeier Implement, 195 Neb. 791, 240 N. W. 2d 842. The specific provisions of section 43-202.03, R. S. Supp., 1976, dealing with the standard for affirmance of dispositions made by the county court, are not applicable here by their own terms.

In appeals in equity from the District Court to the Supreme Court, this court reviews the issues by trial de novo on the record. See § 25-1925, R. R. S. 1943. An appeal from a finding and judgment of the District Court involving dependent or neglected children under Chapter 43, article 2, R. R. S. 1943, is disposed of in this court by trial de novo on the record. State v. Kinkner, 191 Neb. 367, 216 N. W. 2d 165.

Regardless of the standard of review, however, the rule has been long established in this state that courts may not properly deprive a parent of the 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, 194 Neb. 271, 231 N. W. 2d 360; Miller v. Miller, 196 Neb. 146, 241 N. W. 2d 666. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

This case is unusual in the fact that the mother voluntarily arranged for the relinquishment of custody on a temporary basis because of her temporary

financial inability to properly provide for the physical needs of her children. The Juvenile Court Act itself requires, among other things, that the act shall be construed to provide for the intervention of the juvenile court in the interest of any child who is within the provisions of the act, with due regard to parental rights and capacities and the availability of nonjudicial resources, and to achieve those purposes in the child's own home whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual child in all placements and to assure every reasonable effort possible to reunite the child with his family. See § 43-201.01(2)(4), R. S. Supp., 1976.

The original relinquishment of the children was wholly voluntary, and the order granting temporary custody was by agreement and stipulation. There was no evidence and no finding of unfitness of the mother. On a motion for termination of that order, however, the State was not required to affirmatively prove that the mother was then unfit to perform the duties of a parent or had forfeited her right to custody. Instead, the county court placed the burden on the mother to show that she was fit to have custody of the children. The voluntary relinquishment and order for temporary custody, under the circumstances here, did not remove or change the State's burden to prove the unfitness of the parent in any subsequent proceeding to terminate the temporary custody. The evidence here failed to affirmatively establish that the mother was unfit to perform the duties imposed by the parental relationship or that she had forfeited that right.

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

AFFIRMED.

C I T FINANCIAL SERVICES OF KANSAS, A CORPORATION, FORMERLY KNOWN AS UNIVERSAL C.I.T. CREDIT CORPORATION, A CORPORATION, APPELLANT, V. THE EGGING CO., A CORPORATION, APPELLEE.

253 N. W. 2d 840

Filed May 18, 1977. No. 40917.

1. **Trial: Evidence.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom.
2. **Corporations: Principal and Agent: Ratification.** It is the duty of a corporation when it learns of an unauthorized act committed in its name, or one who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time.
3. **Principal and Agent: Ratification.** It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have complete knowledge of the unauthorized act and of all matters related to it.
4. **Trial: Instructions.** Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous.

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

George A. Sommer, for appellant.

Thomas Dorwart of Peetz, Dorwart, Peetz & Weinpel, for appellee.

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

WHITE, C. J.

The plaintiff, C I T Financial Services of Kansas, brought this action to recover money under an alleged lease purchase agreement between plaintiff and defendant involving a Royal Bond copier. The plaintiff sought damages in the sum of $11,593.68, plus attorney's fees and costs.

The defendant denied that it had entered into the lease purchase agreement which was the subject of the plaintiff's claim and filed a counterclaim to re-

cover payments made to the plaintiff, attorney's fees, and costs. In reply to the defendant's counterclaim, the plaintiff alleged that Richard D. Flowers was the agent of the defendant and that he acted within the scope of his authority when he entered into the lease purchase agreement on behalf of the defendant, and that, in any event, the defendant ratified the act of Richard D. Flowers in entering into the lease purchase agreement.

Prior to trial, both parties filed motions for summary judgment which were overruled. The case proceeded to a jury trial. At the close of the plaintiff's evidence, the defendant moved for a directed verdict which was overruled. At the close of the evidence, the defendant moved for a directed verdict or in the alternative to dismiss, and the plaintiff moved for a directed verdict. Both these motions were overruled. The matter was submitted to the jury, which returned a verdict for the defendant. The plaintiff filed a motion for a judgment notwithstanding the verdict or in the alternative for a new trial, which was overruled, and now appeals. We affirm the judgment of the District Court.

On appeal the plaintiff raises two contentions. First, that there was insufficient evidence to support a jury finding in favor of the defendant; and, second, that there was error in the instructions.

Our review of the plaintiff's first contention is governed by the following rules. "In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom." Schmidt v. Knox, 191 Neb. 302, 215 N. W. 2d 77 (1974). A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Grady v. Denbeck, 197 Neb. 795, 251 N. W. 2d 164 (1977).

The defendant is a manufacturing business located near Gurley, Nebraska. Prior to May 1974, the company used a Xerox brand copier. Ted Egging was president of the company prior to August 1974. Thereafter he was vice president and chairman of the board. On April 2, 1974, Ted Egging hired Richard D. Flowers, who was under his supervision while Flowers was with the defendant. About 2 weeks after Flowers' arrival at the company, Flowers had a conversation with Ted Egging concerning obtaining a Royal Bond copier. Flowers stated that they could save $100 per month with the Royal Bond copier and that it made better copies. John Egging, Ted Egging's brother, who was vice president of the company prior to August 1974 and president of the company after August 1974, stated that, "We gave him the okay to go ahead and pursue discussions with the people regarding the Royal Bond machine." Ted Egging testified that he told Flowers "to check into it and get me some details."

In April or May 1974, a Royal Bond copier was delivered to the defendant's office. The Xerox machine previously used by the defendant had been rented. John Egging testified that the payments made for the Royal Bond machine were on the basis of rent. Ted Egging stated that Flowers told him that it was just a straight rental situation. The first invoice for the machine indicated that it was "1st month rent in advance for RBC copier." John Egging stated that he assumed the proper procedures had been followed and that he did not go check with the purchasing department.

The Royal Bond copier was in use for 4 or 5 months. Supplies for the machine were purchased and monthly checks of $207.03 sent in payment for the machine.

After the defendant had some service problems with the machine, John Egging searched for a service agreement and discovered a purchase order

signed by Richard D. Flowers, as purchasing agent. John Egging testified that "Richard D. Flowers was never purchasing agent, was not authorized to sign purchase orders, never had been and never would have been, because of his position with the company." He testified that the defendant does not issue purchase orders for rental equipment, and that its policy is that it does not purchase equipment of this type.

John Egging testified that use of the machine was terminated because Flowers had done all the negotiations concerning the machine and had not followed company policy or procedure. On September 3, 1974, John Egging voided the purchase order for the reason that the signature was invalid or unauthorized, and, after failing to find a service agreement or contract, ordered rental payments stopped. On September 20, 1974, the purchasing department entered into a new agreement for the use of a Xerox machine. On September 24, 1974, the defendant's attorney wrote the plaintiff a letter advising it that the purchase order and the lease purchase agreement were being terminated and requesting that the machine be removed from the premises.

The above evidence, if believed, was sufficient to support the jury's verdict in favor of the defendant.

The plaintiff next finds error with the instructions. The plaintiff contends that the District Court erred in failing to give the plaintiff's requested instructions Nos. 4, 8, and 11, and in giving its instruction No. 11.

This assignment of error centered around the court's submission of the issue of ratification by the defendant. Plaintiff's requested instructions are predicated, as it says, upon the proposition that there was ample evidence to submit the issue to the jury as to whether the defendant should have been put on inquiry upon which it could have obtained full knowledge of the existence of the contract to pur-

chase. It contends that instruction No. 11 on the ratification issue required the defendant to have actual knowledge of this fact before it could have been held to ratify Flowers' act in signing the lease agreement. It contends that the instructions should have contained the phrase, "or was put on inquiry from which knowledge could have been obtained."

The trouble with this argument is that the evidence is conclusive the defendant had *no knowledge* even of the existence of the purported agreement until long after the payments were stopped and the use of the Royal Bond copier was discontinued. There was nothing for the defendant to inquire into. The evidence in the record is that John Egging, immediately upon hearing of the unauthorized acts of Flowers, repudiated them. This evidence, of course, negatives any issue of the defendant failing to act after it was put on inquiry as to any unauthorized acts of Flowers. In Rodine v. Iowa Home Mut. Cas. Co., 171 Neb. 263, 106 N. W. 2d 391 (1960), it is stated: "It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have *complete* knowledge of the unauthorized act and of all matters related to it." (Emphasis supplied.)

John Egging's conduct was in strict conformity with our pronouncement in Citizens Savings Trust Co. v. Independent Lumber Co., 104 Neb. 631, 178 N. W. 270 (1920), which holds that it is the duty of a corporation when it learns of an unauthorized act committed in its name, or one who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time. Summarizing, the defendant company could not have ratified the unauthorized acts of Flowers unless it had some knowledge of the subject matter. Rodine v. Iowa Home Mut. Cas. Co., *supra;* Le Bron Electrical Works, Inc. v. Livingston, 130 Neb. 733, 266 N. W. 589 (1936); American Nat. Bank v. Bartlett, 40 F. 2d 21

(1930); Drainage Dist. v. Dawson County Irr. Co., 140 Neb. 866, 2 N. W. 2d 321 (1942).

Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. Hadenfeldt v. State Farm Mut. Auto Ins. Co., 195 Neb. 578, 239 N. W. 2d 499 (1976). It is the duty of the trial court to submit to the jury all issues properly pleaded and which find support in the evidence. Fleischer v. Rosentrater, 190 Neb. 219, 207 N. W. 2d 372 (1973). Instructions to the jury are to be considered as a whole. When thus considered, if the law is correctly stated, the case fairly submitted, and the jury could not have been misled, the claim of prejudicial error in the instructions is not available. Wright v. Haffke, 188 Neb. 270, 196 N. W. 2d 176 (1972).

We have carefully examined the instructions given. When construed together they correctly state the law, and fairly submit the issues to the jury. That being the case, there was no prejudicial error by the District Court in giving any of the instructions that it did, or in refusing to give the plaintiff's requested instructions.

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

AFFIRMED.

A. BIRCHARD CARTER ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

254 N. W. 2d 390

Filed May 18, 1977. No. 40930.

1. **Property: Eminent Domain: Statutes.** The nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view.
2. **Property: Eminent Domain: Statutes: Highways.** In the ab-

sence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee.

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

Edward F. Carter, Jr., of Barney & Carter, for appellants.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, and Randall E. Sims, for appellee.

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

CLINTON, J.

The plaintiffs brought this action against the State of Nebraska, Department of Roads, alleging that they were the owners of the south 33 feet of the northeast quarter of Section 21, Township 10 North, Range 2 West of the 6th P.M., York County, Nebraska and asked the court to declare L.B. 1181, 82nd Legislature (§ 39-1320.06, R. S. Supp., 1972) and L.B. 213, 1975 Legislature, unconstitutional insofar as it prevented plaintiffs from erecting advertising signs on the property, and further prayed that the defendant be enjoined from interfering with the plaintiff's use of the land. The defendant answered and cross-petitioned, alleging that it was the owner of the south 33 feet of the northeast quarter of Section 21, Township 10 North, Range 2 West of the 6th P.M., York County, Nebraska, and prayed that the plaintiffs be required to remove existing signs on the land and that they be enjoined from permitting the erection of signs in the future. The court found that the defendant was the owner of the strip of land in question, granted essentially the relief prayed for, and found it unnecessary to decide the constitutional question on the statutes. We affirm.

The 33-foot strip in question was the north half of a county road established in 1877 under the provisions of the statutes in force at that time. In 1965, the defendant acquired by eminent domain a tract of land approximately 330 feet in width from the then owners of the southeast quarter of the northeast quarter of Section 21 for Interstate Highway purposes. This tract extended across the south side of the southeast quarter of the northeast quarter of Section 21, the south boundary of which was the north edge of the 33-foot strip which was then the north half of the existing county road. At about the same time, the defendant acquired by deed a similar tract in the southwest quarter of the northeast quarter of Section 21. The descriptions of the tracts acquired by the defendant, both in the eminent domain proceedings and in the deed, were metes and bounds descriptions which did not include any part of the county road. The south line of the description in the eminent domain proceeding, however, coincided with the north boundary of the county road and contained the recital that this boundary line was along the "existing public road right of way line."

After the acquisition of the Interstate right-of-way by the defendant, the county commissioners of York County vacated the county road in Section 21. The resolution of vacation recited: "And the land so abandoned be returned to the title owner of record."

From the former owners of the northeast quarter of Section 21, the plaintiffs obtained quitclaim deeds to the south 33 feet of the northeast quarter. These deeds are the source of their claim of title. Thereafter the plaintiffs entered into lease and license agreements with various parties permitting the construction of advertising billboards on the strip in question and in pursuance thereto some billboards were erected.

The plaintiffs argue that the description in the instruments and the proceedings by which the defend-

ant acquired title clearly excluded the south 33 feet which was the north half of the county road, and that therefore title to that strip upon vacation reverted to their grantors. The construction of the description upon which the plaintiffs base their claim is founded upon the metes and bounds description and the acreage included in an accompanying plat. If the land acquired by the defendant had not abutted the county road the plaintiffs' construction would clearly have to prevail.

In 1877 when the county road in question was created the statutes did not specify the nature of the interests which were to be acquired by the county in the eminent domain proceedings by which the road was opened. G.S., pp. 955, 956. The general rule in such instances is that the government acquires only the interest reasonably necessary for the purpose, which in this instance would be an easement for road purposes. 29 C. J., Highways, § 257, p. 540; Follmer v. Nuckolls County, 6 Neb. 204; Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661; 30 C. J. S., Eminent Domain, § 449, p. 623. In the last-cited case we said, quoting other authority: " ' "In the absence of any definition of the estate which the grantee of the power is authorized to acquire or any limitations in the granting statute, no more property can be taken than the public use requires; this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. * * *." ' 18 American Jurisprudence, 741, Section 115.' Henry v. Columbus Depot Co., 135 Ohio St. 311, 20 N. E. 2d 921."

The question to be decided, viewed by the trial court as being expressed in an opinion letter included in the transcript, was whether by reason of the eminent domain proceedings in the one instance and by the deed in the other, the means through which the Nebraska Department of Roads acquired

title to the land abutting the county road, those instruments carried with them the underlying fee in the north half of the road. We take the same view. In Seefus v. Briley, 185 Neb. 202, 174 N. W. 2d 339, although not factually the same as our case, we did state, quoting from other authority, the general rule applicable to cases where the governmental agency does not have fee title to the road, but to some lesser interest such as an easement or determinable fee, and a conveyance is made using the edge of the road to define one of the boundaries of the tract acquired. We there said: " 'The inchoate right of the grantor to land, on vacation of a street, has been held to pass by a deed although not mentioned therein. The general rule is that when the owner of land abutting upon a street or highway or upon a body of water or watercourse conveys the land, the conveyance will carry title to and fix the boundaries of the grantor's land by the center of the street or highway or the thread of the body of water or watercourse if the grantor's title extends thereto, notwithstanding the land is described as being bounded by the road, highway, or watercourse.' 23 Am. Jur. 2d, Deeds, § 258, p. 295. In Greenberg v. L. I. Snodgrass Co., 161 Ohio St. 351, 119 N. E. 2d 292, 49 A. L. R. 2d 974, the court said in the syllabus thereto: 'Where the owner of a lot abutting on a street, which street is vacated during his ownership, conveys such lot by number and without reservation of any rights in the street, such conveyance transfers, in addition to the lot, all rights which the grantor may have acquired by reason of such vacation, even though the metes and bounds description in the conveyance extends only to the side of the street.' See, also, Bradley v. Spokane & I. E. R. Co., 79 Wash. 455, 140 P. 688; Spence v. Frantz, 195 Wis. 69, 217 N. W. 700." See, also, 11 C.J.S., Boundaries, § 35, Public Highways, p. 580. "The rule is not absolute, but one of construction, effect being given to the intention of the parties in

view of the whole instrument and surrounding circumstances. In case of ambiguity, the construction must favor the grantee." 11 C. J. S., Boundaries, § 35, b, p. 581. See, also, 11 C. J. S., Boundaries, § 35 c (1)(a), p. 582, and § 104 a (4), p. 693.

This is not one of those cases which are governed by the various statutes pertaining to such matters, for example, sections 14-115, 15-701, 16-611, 17-558, and 76-275.03, R. R. S. 1943.

The present statute on vacation or abandonment of county roads, section 39-1725, R. R. S. 1943, a part of a general 1957 revision of laws pertaining to the establishment, acquisition, and vacation or abandonment of county roads, appears to give the county board broad and varying authority to determine where title passes upon vacation or abandonment. Because of the fact that defendant acquired the underlying fee to the north half of the county road when it purchased or condemned the adjacent land, it is not necessary to determine the effect of that statute.

We hold that the nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. In the absence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee.

The defendant has argued that we need not consider the merits because plaintiffs failed to file their notice of appeal on time and therefore the court has no jurisdiction. The contention is founded upon the premise that the judgment was rendered on April 30, 1976. The issue is governed by Valentine Production

Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541; and section 25-1301, R. R. S. 1943. That statute provides in part: "Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanyed by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action." In Valentine Production Credit Assn. v. Spencer Foods, Inc., *supra,* we said that the docket pronouncement must include a notation "of the *relief granted or denied* in an action." The notation on the docket sheet in this case said: "For opinion letter see file." The record shows the judgment was not entered until May 18, 1976.

AFFIRMED.

CORINNE PROCHAZKA, APPELLANT, V. WALTER PROCHAZKA, APPELLEE.

253 N. W. 2d 407

Filed May 18, 1977. No. 40976.

1. **Appeal and Error: New Trial: Time.** An appeal is limited to the issues presented by the motion for new trial; it may not include issues presented by a later motion overruled after the appeal is taken.
2. **Divorce: Evidence: New Trial: Undue Influence: Property Settlement Agreements.** Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial.
3. **New Trial: Evidence: Judgments.** A new trial will not be granted to a party for the purpose of introducing a new issue, unless the judgment cannot be sustained on the issues previously submitted.
4. **Divorce: Property Settlement Agreements: Courts.** A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court.
5. **Divorce: Property Settlement Agreements.** A property settlement agreement is not unconscionable unless it is shown to be un-

just as to one of the parties or obviously excessive in respect to the benefits or burdens on either side.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

E. Bruce Smith, for appellant.

Schaper & Schaper and Wood & Wolfe, for appellee.

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

KUNS, Retired District Judge.

This is an action for dissolution of marriage brought by Corinne Prochazka, the appellant, against Walter Prochazka, the appellee, in the District Court for Custer County, Nebraska. The appellant has appealed from an order overruling a motion for new trial following the entry of a decree of dissolution and approval of a property settlement agreement. We affirm the order of the trial court.

Appellant filed a second motion for new trial alleging newly discovered evidence; this motion had not been presented to the trial court nor ruled upon before this appeal was taken. The issues sought to be presented by such motion and the order thereon are outside the scope of this appeal and will not be considered.

The record shows that the parties were married January 10, 1960. Their only child, Jana, was born July 1, 1963. Appellee established a dental laboratory in Broken Bow, Nebraska, in 1954, with appellant as one of his employees. Following the marriage of the parties, she continued to work in the laboratory until their daughter was born; and during the entire term of the marriage, appellant kept the books and records relating to the operation of the laboratory. Appellee financed the establishment of the laboratory in the first instance with funds received from his mother; at the time of the marriage

in 1960, appellee purchased a lot and constructed a house and laboratory with funds previously earned by him, amounting to $19,500. As will be seen, the family prospered and substantial assets were accumulated.

The course of the marriage was not entirely smooth. An earlier petition for dissolution was filed and subsequently dismissed; this action was filed February 4, 1974. During the pendency of the action, pursuant to a stipulation approved by the court, the parties continued to occupy separate portions of the family home and appellee made support payments to appellant. Marriage counseling proved to be unsuccessful in restoring the marriage.

After the case was set for hearing and on the eve thereof, the parties held a night-long conference to reach an agreement for property settlement. On the day of hearing, each party signed and acknowledged the execution of the agreement as a voluntary act and deed; and appellee thereupon executed a responsive pleading in the usual form. The agreement was filed in the action and both parties testified to the execution thereof as well as to the history of the marriage and other circumstances. The appellant did not take any steps either to amend or withdraw her pleadings. The trial court found that the marriage was irretrievably broken and that the property settlement agreement was not unconscionable. The provisions thereof were incorporated into the decree. Generally, the agreement provided that appellant should receive an automobile, bank certificates of deposit, United States bonds, and an investment fund certificate, all with an aggregate value fixed by both parties of $42,022.38. Appellee was to retain the family home, laboratory equipment, two automobiles, and various bank accounts with an aggregate value, in appellant's opinion, of $71,100, or in appellee's opinion, of $57,400. The parties further agreed that certain gifts of stock and investment

certificates placed in the name of Jana Prochazka should be confirmed to her and not charged to either party. Provisions for child support were also fixed by the decree.

The appellant thereupon filed a motion for new trial upon the grounds that her assent to the property settlement agreement had been obtained by undue influence and that said agreement was unconscionable. At the hearing upon the motion, the appellant testified that she had agreed to accept the provisions of the agreement because she was led to believe that a future reconciliation would be more likely if she did not demand a larger share of the family property. These statements were wholly inconsistent with her pleadings and testimony at the original hearing, as well as being entirely inadequate to show that her will had been overcome by improper means. A new trial will not be granted to a party for the purpose of introducing an issue not previously presented, unless the judgment cannot be sustained on the issues previously heard and considered. 66 C. J. S., New Trial, § 84, p. 263. The findings and decree of the trial court in this case are supported by the pleadings and by the evidence.

The briefs of both parties refer us to prior decisions relating to the consideration of what is or is not a proper division of family property upon dissolution of a marriage. These would be appropriate precedents if the trial court had made the division of the family property in this case. Different considerations, however, apply to the action of a trial court in approving the provisions of a property settlement agreement. It is necessary to consider the terms of section 42-366, R. R. S. 1943, which provides in part as follows: "(1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written property settlement agreement containing provisions

for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.

"(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable."

This is an explicit statement of legislative policy concerning both the desirability and binding effect of property settlement agreements attendant upon the dissolution of marriage. The trial court is limited to the consideration of the economic circumstances of the parties and any other relevant evidence in reaching its conclusions whether or not the agreement is unconscionable. If the agreement is not found unconscionable, it is binding upon the court and the decree must carry such agreement into effect. By subsection (3) of said statute, if the court finds the agreement unconscionable, it may either request the parties to revise the same or may, at its option, proceed to make its own division of family property.

The appellant is unable to point to any circumstances showing the agreement to be unconscionable. She argues that, in some instances, trial courts have made more liberal provision for litigants in her position when decreeing division of family property. We have examined the record carefully and it does not show any circumstance, economic or otherwise, which operates to render the effect of the agreement unjust to either party or obviously excessive in respect to benefits or burdens on either side.

The trial court correctly overruled the motion for a new trial and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT RECORD, APPELLANT.

253 N. W. 2d 847

Filed May 25, 1977. No. 40965.

1. **Criminal Law: Trial: Evidence.** Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to show.
2. **Criminal Law: Evidence: Verdicts.** In criminal cases, where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong.

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

Thomas M. Kenney and Stanley A. Krieger, for appellant.

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

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

WHITE, C. THOMAS, J.

The defendant was tried and convicted in the District Court on a charge of first degree murder. The defendant was found guilty by a jury and sentenced to a term of life imprisonment. The defendant appeals.

The defendant asserts two assignments of error: (1) The District Court committed reversible error in admitting into evidence photographs of the deceased; and (2) the evidence was insufficient as a matter of law to prove the elements of first degree murder. We shall take the propositions in order.

The photographs, taken before the autopsy, show the victim's head. The victim's head had been partially shaved and the exhibits show the bullet wound over the left eye and stitches from a previous operation. The defendant does not seriously contest the relevancy of the exhibits, merely alleges that they are gruesome. The exhibits are unquestionably rel-

evant. They support a version of the incident given by an eyewitness. The exhibits clearly reflect that the bullet entered over the left eye, a direction consistent with the direction from which the fatal shot was fired. In State v. Wilbur, 186 Neb. 306, 182 N. W. 2d 906, this court said: "Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to represent." See, also, State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. The pictures show the victim in the same state in which he was found immediately after the crime. Unless we were to state that in all cases a picture of a victim would be prejudicial and therefore inadmissible, which we are not prepared to do, the photographs are both relevant and clearly admissible and outweigh any possible prejudice to the rights of the defendant. The assignment is without merit.

Until 10:45 p.m. on the evening of October 11, 1975, the defendant was riding around in the city of Omaha in one Domalakes' car. Two girl companions were taken to their homes; and two other girls were met at a gas station and rode with Domalakes and the defendant around the Cathedral area in Omaha. They met another girl who entered the car. The second two girls left the car and the defendant, Domalakes, and the other girl, a Chris Christiansen, resumed their riding. During this time the defendant told Miss Christiansen that he intended to rob someone that night. Miss Christiansen so testified at trial. Miss Christiansen asked to be taken home and was. Domalakes, who was granted immunity, testified that after taking Miss Christiansen home, Domalakes drove to approximately 180th and Dodge Streets in Omaha and parked on a side road waiting for someone to drive by so the defendant could shoot and rob him. About approximately 3 a. m. a car driven by the victim passed their parked car proceeding east on Dodge Street. With Domalakes

driving, the car was pursued. Domalakes drove alongside it, as if to pass, heard a shot and the breaking of glass, and observed the defendant pointing the gun at the other car while hanging out the car window. Domalakes continued to watch the vehicle from his rear-view mirror as it swerved across the street into the oncoming lane of traffic, and then into a cornfield at approximately 140th and Dodge Streets. Domalakes and the defendant drove to 132nd and Dodge Streets, buried the gun underneath some grass, and proceeded back to where the victim's car had gone off the road. Oncoming traffic frightened the parties from the scene, frustrating their robbery plans. Later the gun was recovered by Domalakes. The gun, a .22 caliber rifle, and a box of ammunition, later identified as similar to that used in the shooting, were surrendered to the sheriff by Domalakes and received in evidence at the trial. Five witnesses testified that the defendant told them at various times after the incident that he had shot someone. These included conversations with acquaintances and with an inmate in the jail after defendant's arrest some months later. The bullet taken from the deceased's body and the alleged murder weapon were examined ballistically. The ballistics expert testified that the bullet taken from the deceased could have been fired by the gun in question, an exact determination being impossible due to the damaged condition of the fatal bullet caused by the entry into the victim's skull. A chemical test and microscopic examination of the lead from the bullets given by Domalakes to the sheriff and the slug taken from the deceased indicated that they could have come from the same batch of lead and manufacturer, and by inference, from the same box of cartridges given by Domalakes to the sheriff. The pathologist testified that the cause of death was a bullet wound to the head.

The defendant, by way of defense, offered testi-

mony that he spent the night with a girlfriend, confirming, however, that the events of the early evening testified to by Domalakes were correct. Sharon Kemp, the girlfriend, corroborated this alibi testimony. It is evident that more than sufficient evidence was introduced which, if believed, would prove the defendant guilty of the crime charged.

The jury saw the witnesses and evaluated their testimony and by their verdict chose to believe the witnesses and the evidence of the prosecution. Where as here, there is evidence to justify the verdict, the verdict will not be set aside unless clearly wrong. State v. Godinez, 190 Neb. 1, 205 N. W. 2d 644. The defendant's second assignment is without merit.

The judgment of conviction and sentence of the court are affirmed.

AFFIRMED.

WHITE, C. J., not participating.

DON NELSEN CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. PATRICIA A. LANDEN, AN INDIVIDUAL, APPELLEE.

253 N. W. 2d 849

Filed May 25, 1977. No. 40982.

1. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong.
2. **Contracts.** Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
3. _____. Ambiguities in a contract are construed most strictly against its author.

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

Robert J. Becker and Thomas C. Lauritsen of Swarr, May, Smith & Andersen, for appellant.

Frank Matthews of Matthews, Kelley, Cannon & Carpenter, for appellee.

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

WHITE, C. J.

The plaintiff initiated this action by filing in the municipal court of the City of Omaha, Nebraska, a petition alleging that the defendant was indebted to the plaintiff in the sum of $3,542.90 under a written "cost plus 10%" building contract. Included in this sum was $2,400 which represented 10 percent of the $24,000 cost of the lots upon which the plaintiff contractor constructed a residence for the defendant.

The case was tried to the municipal court and that court entered judgment for the plaintiff and against the defendant in the sum of $2,400 plus costs. The defendant appealed from that judgment to the District Court. The District Court vacated the judgment of the municipal court and dismissed the plaintiff's petition at plaintiff's cost. A motion for a new trial was filed by the plaintiff and overruled. The plaintiff appeals to this court. We affirm the judgment of the District Court.

The record reveals the following facts. In August or September 1972, Jack Landen, as agent for the defendant, contacted Mr. Lou Siebold, an agent of the Maenner Company, realtor for the Regency development in Omaha, and offered to purchase, for $24,000, two lots in the Regency area. Several days later, this offer was accepted. The Maenner Company then contacted the plaintiff about building a house for the defendant and suggested to Mr. Landen that he use the plaintiff as the contractor for his house. The plaintiff was one of only two contractors in-

volved with United Benefit Life, the owner, and the Maenner Company, the realtor, in building homes in the Regency complex.

In September 1972, Mr. Landen contacted architect Stanley How and commissioned him to design a house to be built on the two lots in the Regency area. In January 1973, Mr. Landen contacted the plaintiff about building the house Mr. How was then designing. At this time the plaintiff did not own the two lots upon which the house was to be built. On January 23, 1973, the plaintiff had delivered to him the plans for the Landen house and began to work on figures for a bid on its construction.

On March 7, 1973, the plaintiff submitted to the defendant's architect an offer to build the Landen house on the subject lots for a total lump sum of $182,900. This figure included $24,000, the cost of the two lots. This offer was rejected. On March 22, 1973, the plaintiff submitted another letter to defendant's architect and offered to build the Landen home on a "guarantee job cost." According to this letter, "At completion of Townhome, contractor will total all job costs and will add a figure of 10% for contractor's supervision, overhead and profit." This letter made reference to the cost of the lots as follows:

"Means of Payment

"A. Owner to close lots with contractor within 10 days after signing of contract - amount of this item * * * $24,000."

In addition to providing for payment for the lots, it provided for payment of four "draws" at various stages of construction.

The March 22nd letter was not at that time accepted by the defendant, but was followed by a letter dated April 2, 1973. This letter specified a new contract price and listed certain items to be deleted, but made no further mention of the lots. On April 2, 1973, a written agreement, entitled, "Building Contract" was entered into by the parties. In this

agreement the plaintiff agreed to build the Landen home "on a guarantee job cost" basis as per plans and specifications contained within the three letters, which were incorporated into the agreement by reference. The agreement provided:

"Payments to contractor shall be made as follows: 1st draw - (x) - $24,000.00 - Owner to close lot with Don Nelsen Construction Company for the sum of $24,000.00 within fifteen (15) days after signing of contract."

With the exception of one provision inserted by the defendant, the entire "Building Contract" was drafted by the plaintiff.

On February 20, 1973, the plaintiff made an offer to the Maenner Company to purchase the lots upon which the Landen house was to be built. In March 1973, the defendant submitted a written offer to purchase the subject lots from the Maenner Company. On this offer, the original date is stricken out and April 13 written in in long hand. The offer was originally intended to be accepted by United Benefit Life, but this was stricken out and the plaintiff is shown as accepting the offer from the defendant. A deed conveying the subject lots to the plaintiff from United Benefit Life was filed on March 12, 1973, in the register of deeds office.

The record thus reveals that although the defendant had apparently made arrangements with the Maenner Company, the realtor, to purchase for $24,000 the two subject lots in the Regency complex from United Benefit Life, the owner, these lots were instead sold by United Benefit and the Maenner Company to the plaintiff for $24,000 which in turn sold the lots to the defendant for $24,000.

On May 13, 1974, after the house was completed, the plaintiff indicated that it was claiming a 10 percent commission on the $24,000 price of the two lots. The defendant resisted this claim, and this litigation followed.

The defendant's architect testified that his fee is 10 percent of the job costs and that in computing his fee, he did not include any percentage for the cost of the lots. He stated that based upon his experience, the term "job costs" never includes the cost of the land upon which the project is built. Mr. Nelsen testified that where a builder owns a lot and sells the lot to the purchaser and agrees to build a house for the purchaser on a cost-plus basis, it is based upon his experience, the custom of the trade in Omaha, to include the cost of the lot in that cost figure. Two other builders supported Mr. Nelsen's testimony concerning the custom in the Omaha area.

The plaintiff's position is that the agreement between the parties clearly provides that the cost of the lots was a "job cost" to be included in the "all job costs" plus 10 percent method of payment, and that even if the written contract was ambiguous in this regard, such was the intent of the parties to the agreement. The defendant's position is that the contract between the parties was ambiguous; that her interpretation was that the cost of the lots was not a "job cost"; that her interpretation is a reasonable one; and that where a contract is susceptible to two reasonable interpretations, it should be construed against the party which drafted it, the plaintiff in this case. LaPuzza v. Prom Town House Motor Inn, Inc., 191 Neb. 687, 217 N. W. 2d 472 (1974).

The District Court found that during all the negotiations, both oral and written, it was not made clear to the defendant that a percentage of the costs of the lots would be tacked onto the total of the cost-plus contract ultimately agreed upon; that the plaintiff failed to establish a trade custom for this factual situation; that the contractual relationship was not clear; and that under the circumstances the defendant could reasonably not expect to pay a 10 percent commission on the lots.

Supporting the conclusion of the District Court to

the effect that there was no covenant to include the lots as a part of the "job costs" is that labor in its ordinary acceptation is synonymous with "employment," "*job,*" or "position." See, 23 Words and Phrases (Perm. Ed.), p. 49; Mowrey v. Mowrey, 328 Ill. App. 92, 65 N. E. 2d 234. We observe that the payment of job costs implies the furnishing of a job site (land) *upon which the job is performed* by the furnishing of labor, materials, et cetera. There is nothing in this contract which would negative the ordinary distinction between *land* costs and *job* costs. We have been unable to find any authority and none is cited to the effect that land costs and job costs are generally considered as one entity. On the contrary under a "cost plus" contract, generally the contractor is not even entitled, in addition to the percentage called for in the contract, to charge for his general or overhead expenses, such as salaries, telephone service, and office supplies, or for his own time in superintending the work, et cetera. 13 Am. Jur. 2d, Building, Etc. Contracts, § 20, pp. 22, 23.

Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N. W. 2d 536 (1968).

Ambiguities in a contract are construed most strictly against its author. LaPuzza v. Prom Town House Motor Inn, Inc., *supra.*

The basic question involved in the interpretation of this contract is its meaning in light of all the facts and the circumstances. "The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong." Schuler-Olsen Ranches, Inc. v. Garvin, 197 Neb. 746,

250 N. W. 2d 906 (1977). See, also, Mickelson & Mickelson Hay Contractors v. Christensen, 197 Neb. 34, 246 N. W. 2d 655 (1976).

There was sufficient evidence to support the findings made by the District Court; its determination that the written contract was ambiguous is not in error.

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

AFFIRMED.

LLOYD V. SANDAGE, APPELLANT, V. ADOLF'S ROOFING, INC., APPELLEE.

254 N. W. 2d 77

Filed May 25, 1977. No. 41014.

1. **Workmen's Compensation: Evidence: Intoxicating Liquors.** Evidence that an employee had drunk intoxicating liquor prior to an injury and that a subsequent blood alcohol test showed a content of .175 percent, shown by expert testimony to indicate intoxication, with impairment of reflexes, depth perception, coordination, and other motor activities, is sufficient to support a finding by the Workmen's Compensation Court that the employee was injured by reason of being in a state of intoxication.
2. _____: _____: _____. Evidence that the employer knew of an employee drinking on several prior occasions over a long period, but had no knowledge of his drinking at or about the time of injury, is not sufficient to establish consent, knowledge, or acquiescence in any intoxication at the time of injury.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellant.

Robert D. Mullin and Robert D. Mullin, Jr., of Boland, Mullin & Walsh, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from a judgment of the Workmen's Compensation Court dismissing a claim made by Lloyd V. Sandage, the appellant, against Adolf's Roofing, Inc., the appellee, for compensation benefits on account of injuries sustained by the appellant. We affirm the judgment.

The record shows that appellant filed a petition in the Workmen's Compensation Court alleging that he had been injured on February 11, 1975, by falling from a roof and that such injury had been sustained in the course of his employment by the appellee. Appellee's answer admitted the occurrence of the injury, denied the remaining allegations, and alleged that appellant's injury was caused by his intoxication at the time thereof. No reply was filed, although appellant sought to avoid the allegation of intoxication by claiming that his intoxication was with the knowledge, consent, and acquiescence of the appellee. After a hearing before a single judge of the court, an award to appellant was made after which a rehearing and trial was had before a three-judge court. That court found there was proof, by a preponderance of the evidence, that the appellant was injured by reason of being in a state of intoxication, without the consent, knowledge, or acquiescence of the appellee and dismissed the appellant's petition.

Appellant contends the evidence in the record is insufficient to support the order of the compensation court. He does not specify or argue that any of the evidence was incompetent and improperly received. We therefore consider the sufficiency of the evidence to support the award.

The record shows that appellant had worked for 8 years installing roofs for the appellee; and that he was paid according to the area covered. On February 11, 1975, he was applying asphalt shingles to a roof. At about 4:20 p.m., he was observed in midair, falling from the roof. No witness observed the

appellant immediately before or during the start of the fall, from which he was rendered unconscious and received severe injuries to his spine which culminated in incomplete quadriplegia. Medical experts agreed that his disability was total and permanent. There was testimony that appellant had a history of drinking. This was known to appellee, who stated that appellant had been intoxicated while at work on not more than 5 occasions over the 8-year period and that he would not have allowed appellant to stay on the job while intoxicated. Appellee further stated that on February 11, 1975, appellant's work was good and that he did not know of any drinking by appellant on that date. Appellant himself stated that he had some vodka in his possession on that date and that he had drunk approximately 2 ounces thereof at noon. A fellow employee observed him asleep in his station wagon at about 3 p.m. There was no other testimony describing appellant's conduct or condition prior to his fall. Appellant's wife testified that she could tell the appellant had been drinking but that she did not think that he was intoxicated. A blood alcohol test made upon appellant when he was taken to the hospital showed an alcohol content of .175 percent. An expert testified such a content showed appellant to have been intoxicated at the time the test was taken, and that such a content was sufficient to impair reflexes, depth perception, coordination, and other motor activities. Appellee also testified that the roof upon which the appellant was working was "walkable" without special protection against falling.

The evidence given in the foregoing summary, although obviously not conclusive of the fact of intoxication at the time of injury, nevertheless is sufficient to support the finding of the Workmen's Compensation Court, both as to the preponderance thereof to support the affirmative defense of the appellee and as to the lack of sufficient evidence to show the

intoxication on the part of the appellant was with the consent, knowledge, or acquiescence of the appellee.

The finding and judgment of the Workmen's Compensation Court meet the standards of section 48-185, R. S. Supp., 1976, for affirmance.

AFFIRMED.

FLINN PAVING COMPANY, INC., A CORPORATION, APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 227 OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

254 N. W. 2d 78

Filed May 25, 1977. No. 41043.

1. **Trial: Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
2. _____: _____: _____. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused.

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

James F. Fenlon, for appellant.

Warren S. Zweiback of Zweiback & Laughlin, for appellee.

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

SPENCER, J.

This is an action for damages for breach of a construction contract. The jury found there had been no breach of contract entitling either party to damages. The court accepted the verdict of the jury and overruled plaintiff's motion for new trial. Plaintiff appeals, setting out two assignments of error. Both refer to the fact that the court erred in failing to instruct the jury in certain particulars. We affirm.

The conclusion we reach does not involve a discussion of the evidence. Consequently we recite only enough of the facts to understand the nature of the case. On September 9, 1974, Flinn Paving Company, Inc., a paving contractor, contracted with Sanitary and Improvement District No. 227 of Douglas County to construct a paving and storm sewer section. The contract provided that: "If satisfactory progress is made, payments shall be made by the Owner each month upon certification by the Engineer in the amount of 85 percent of the value of the work completed during the preceding month, * * *." It further provided that time was of the essence and the contractor was given 30 working days to complete the project.

The contractor commenced work on October 8, 1974. On November 7, 1974, defendant's engineer certified the work plaintiff had done in October as satisfactory. There was a dispute, however, as to whether there had been satisfactory progress on the job. A warrant was issued for the work done in October on November 15, 1974. The contractor denied it received any knowledge of the warrant until after it abandoned the contract. A warrant was ultimately received by the plaintiff, endorsed by its president, and negotiated. However, after the filing of the suit the check in payment for the warrant was returned by plaintiff and the warrant was canceled.

We do not reach the questions raised in the assignments of error. After the trial court had completed the instructions, he submitted them to counsel for their comment or objection. The purpose of an instruction conference is to give the trial court an opportunity to correct any errors being made by it. If the parties have any objection to any of the instructions, they should make them at that time. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Haumont v. Alexander, 190

Neb. 637, 211 N. W. 2d 119 (1973). The plaintiff's failure to object to any of the instructions precludes our consideration of them.

There is still another reason why the assignments of error alleged by the plaintiff are not before us. Even if objection had been made, they were not properly presented in plaintiff's motion for a new trial. Flinn made a general assignment: "The Court erred in failing to give the instructions to the jury which were proposed by the Plaintiff."

In Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100 (1948), this court stated: "An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused."

It is clear that some of the proposed instructions were properly refused. One example will suffice. An instruction was tendered that the jury should disregard the issuance of warrants since they were not admitted into evidence. This was incorrect. Exhibit 9, which is a copy of two warrants, was received in evidence. Further, the substance of some of the instructions was given. Plaintiff's motion for a new trial did not make a proper assignment of the alleged errors it now seeks to raise.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

CONNIE JEAN ALLEN, APPELLANT AND CROSS-APPELLEE, V. LONNIE DEAN ALLEN, APPELLEE AND CROSS-APPELLANT.

253 N. W. 2d 853

Filed May 25, 1977. No. 41054.

1. **Divorce: Property.** This court is not inclined to disturb a division of property made by the trial court unless it is patently unfair on the record.

2. **Divorce: Infants: Parent and Child.** In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.

3. _____: _____: _____. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Donald H. Bowman and Michael O. Johanns of Peterson, Bowman, Coffman & Larsen, for appellant.

Ralph J. Fischer of Everson, Noble, Wullschleger, Sutter & Fischer, for appellee.

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

SPENCER, J.

This is an action for dissolution of marriage, custody of a child, and division of property instituted by the wife against her husband. The wife, Connie Jean Allen, appeals alleging the court erred in granting custody of the child to her husband. The husband, Lonnie Dean Allen, cross-appeals alleging the court erred in not awarding sufficient property to him in its division of property. We affirm.

The parties herein were married August 15, 1969. A son, Roy Maxwell Allen, was born to the parties on May 4, 1974. There is no contest on the dissolution of the marriage. The sole issues presented are the two referred to above: The custody of the child and the division of property.

All the real estate of the parties was awarded to petitioner, subject to encumbrances. She had inherited from her grandfather an undivided one-half interest in the southwest quarter of Section 17, Township 1 North, Range 10 East of the 6th P.M.,

Pawnee County, Nebraska, which she held at the time of the divorce. She also inherited a one-half interest in other land which was sold on contract in 1973. At the time of the trial she had received all her money on this sale, approximately $18,000, some of which was invested in the other properties.

The homestead of the parties was purchased for $12,000 in March 1974, from the petitioner's grandparents. It actually had a value of $22,000 at the time of purchase. Petitioner made a downpayment of $1,200 and a promissory note was executed for the balance. At the time of trial, there was a balance due of $8,400 on the note. Petitioner testified that she made all the payments on this property. The parties remodeled the premises extensively. At the time of the trial it had an approximate value of $39,000. Petitioner testified she spent approximately $7,500 for remodeling purposes and in addition another $5,000 on furniture for the home. The respondent did much of the work on the remodeling. This property had been in petitioner's family for three generations.

The other real estate awarded to the petitioner was a property in Beatrice, which was purchased by her on June 24, 1976, after this action was commenced. The sale price was $23,000, with a cash downpayment from her own funds of $4,600. The balance was financed by her through the State Federal Savings and Loan Association.

Respondent states he does not want any part of petitioner's inheritance. During the marriage respondent earned $39,700 and the petitioner $19,700. Respondent also concedes that she could be credited with most of the farm and interest income of $7,429, for a total of $27,129. Respondent does not object to the transfer of the property to the petitioner, but argues a proper adjustment would result in an award to him of approximately $8,000.

The following finding in the decree of the trial

court is pertinent herein: "That by virtue of the settlement of the property rights of the parties heretofore set forth in these findings and further taking into account the contributions of respondent by way of labor to the improvements on the residence property of the parties near Holmesville, Nebraska, neither party should recover alimony from the other in this cause."

This court is not inclined to disturb a division of property made by the trial court unless it is patently unfair on the record. Van Bloom v. Van Bloom, 196 Neb. 792, 246 N. W. 2d 588 (1976). On the record herein we cannot say that the distribution made reaches that standard. We see no reason to disturb the division of property made by the trial court.

Petitioner appeals from the granting of custody of the minor child of the parties to the respondent. No purpose will be served by detailing the evidence adduced on the custody issue. The court specifically found that both parties were fit to have the custody of said child, but on the evidence awarded the custody of the child to the respondent, subject to specific visitation rights by the petitioner. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89 (1974). Usually the trial court is in the best position to make this determination.

Our law is clear. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. This case does not reach that standard.

The judgment of the trial court is affirmed. Costs

on this appeal are taxed to the party incurring the same.

AFFIRMED.

WHITE, C. THOMAS, J., participating on briefs.

ALOIS LABENZ, APPELLEE, V. LEONARD LABENZ, APPELLANT.

253 N. W. 2d 855

Filed May 25, 1977. No. 41060.

Banks and Banking: Statutes. The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public.

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

Robak & Geshell, for appellant.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellee.

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

SPENCER, J.

This is an action brought under the Securities Act of Nebraska by a purchaser of unregistered and undelivered corporate stock against the salesman to recover the purchase price of the stock. The District Court sustained a motion for a directed verdict for the plaintiff. Defendant appeals, setting out seven assignments of error which may be condensed to his allegation that he was exempt under section 8-1111 (1) and (9), R. R. S. 1943. We affirm.

Defendant was a securities salesman for International Commodities Company, Inc. (International), a Nebraska corporation. On September 12, 1973, defendant induced plaintiff, who was his first cousin, to subscribe for 1,000 shares of capital stock of International at $5 per share. Plaintiff signed a so-called

preincorporation subscription agreement and gave defendant a check payable to International in the amount of $5,000. The corporation was already in existence, having been incorporated July 19, 1973.

International cashed plaintiff's check but never issued the shares. The corporation was dissolved on August 2, 1974, for nonpayment of taxes. Plaintiff thereafter instituted this action against defendant.

Section 8-1118 (1), R. R. S. 1943, provides, so far as material herein: "Any person who offers or sells a security in violation of section 8-1104 * * * shall be liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per annum from the date of payment, costs, and reasonable attorneys' fees * * *."

Section 8-1104, R. R. S. 1943, makes it unlawful to offer or sell unregistered securities unless the security is exempt from registration or the security is sold in an exempt transaction. The securities in this case were not registered with the Department of Banking. Defendant makes no claim that they were exempt from registration. He does contend that the transaction was exempt under subdivisions (1) and (9) of section 8-1111, R. R. S. 1943.

Section 8-1111 (1), R. R. S. 1943, provides an exemption for any isolated transaction. The facts in this case show defendant offered and sold stock of the same issue to seven persons over a period of a short time. Under the circumstances, it is clear to us the sale of the unregistered securities to plaintiff was not an isolated transaction within the meaning of section 8-1111 (1), R. R. S. 1943.

Section 8-1111 (9), R. R. S. 1943, provides as follows: "Any transaction pursuant to an offer directed by the offerer to not more than ten persons, other than those designated in subdivision (8) of this section in this state during any period of twelve consecutive months, whether or not the offerer or any of

the offerees is then present in this state, *if* (a) the seller reasonably believes that all the buyers are purchasing for investment, and (b) *no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer,* except to a broker-dealer registered under the provisions of sections 8-1101 to 8-1124." (Emphasis added.)

Defendant was not a registered broker dealer. It also is undisputed that his contract with International provided for a commission of 8 percent of the value of the stock sold. He did in fact receive a check from International for the sale he made to plaintiff. Defendant cashed this check, but owing to the insolvency of the corporation the check was returned unpaid. Because of this fact defendant argues that he is within the exemption set forth in the preceding paragraph.

The trial court properly directed a verdict against the defendant herein. We refuse to place the restrictive interpretation upon the language of subdivision (9) of section 8-1111, R. R. S. 1943, contended for by defendant. The section contemplates a situation where no remuneration *is to be given* to the offerer in any form. Defendant was expecting to be paid. He actually accepted a check of International in payment for his commission on the transaction. The fact that he did not receive payment on the check does not change the situation. We agree with the Oregon court. The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public. Marshall v. Harris, 276 Ore. 447, 555 P. 2d 756 (1976).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MONTE L. BOBO, APPELLANT.

253 N. W. 2d 857

Filed May 25, 1977. No. 41075.

1. **Criminal Law: Trial: Evidence.** Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian.
2. **Criminal Law: Evidence: Conspiracy.** A statement is not hearsay if it is offered against a party and is a statement made by a coconspirator of the party during the course and in furtherance of the conspiracy.
3. _____: _____: _____. Before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded with directions.

Dwight E. Smith of Smith & Wertz, for appellant.

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

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

BRODKEY, J.

In an information filed in the District Court for Cheyenne County on February 18, 1976, Monte L. Bobo, the defendant and appellant herein, was charged under section 28-4,125 (1), R. R. S. 1943, with knowingly or intentionally possessing marijuana, with intent to distribute, deliver, or dispense that controlled substance. Trial was had, commencing on July 6, 1976, and the jury found the defendant guilty as charged. Defendant has now ap-

pealed to this court, contending that the trial court committed reversible error in admitting in evidence hearsay testimony and an exhibit; and in determining that there was sufficient evidence to sustain the conviction. We reverse.

The primary evidence against the defendant was the testimony of David Waegli, who testified as follows. In November 1975, Waegli was a student at Western Nebraska Technical College near Sidney, Nebraska, and was employed as a "cooperating individual" by the Nebraska State Patrol. Waegli's job was to make buys of controlled substances for the State Patrol. On November 12, 1975, Waegli and one Bruce Grimbley drove from the college to Sidney in order to purchase a bag of marijuana. Grimbley, who was driving, told Waegli they were going to the defendant's house.

When they arrived, Waegli waited in the car while Grimbley went to the door. Waegli observed the defendant come to the door, and defendant and Grimbley went inside after talking a few minutes. Approximately 10 to 15 minutes later, Grimbley returned to the car and gave Waegli a clear plastic bag containing what appeared to be marijuana, which Waegli placed inside his shirt. Waegli acknowedged at trial that he did not observe the defendant giving Grimbley the bag, nor did he know whether persons other than the defendant were inside the house. Waegli testified he had never been to defendant's house before, had never talked to him, and was uncertain whether he had ever seen the defendant prior to this occasion. At this point in Waegli's testimony, the county attorney asked Waegli what Grimbley said to him at the time the bag was handed to Waegli, but the trial court sustained defendant's objection to the question on the ground of hearsay.

Waegli stated that he and Grimbley then left Sidney to return to the college. On the way, they en-

countered several acquaintances, one of whom was Brian Bitner. Bitner gave Waegli some money. Waegli first testified that this money was for the purchase of alcohol, but later indicated that the money was for the purchase of marijuana. Waegli and Grimbley then returned to the defendant's house, and on this occasion Waegli entered the house with Grimbley.

Waegli testified that the defendant was the only one in the house at that time, and that the defendant had no marijuana. In a short time, however, the defendant's brother arrived; he had a bag of marijuana like that which Waegli received after the first buy. This second bag was given to Waegli, and Waegli gave the money for the bag to Grimbley, who gave it to the defendant. Waegli placed the second bag inside his shirt, as he had the first bag.

Waegli and Grimbley then left, and went back to the college. When they returned, Waegli gave Bitner one of the bags of marijuana, but he did not know which one, as both bags he had placed inside his shirt were similar in appearance; and Waegli was unable to state which bag was from the first buy, and which was from the second buy. Waegli kept the bag he retained in his home overnight, and then turned it over to a local police detective the next morning.

The county attorney, at the conclusion of Waegli's direct testimony, again asked Waegli whether, at the time Grimbley gave the first bag of marijuana to him, Grimbley stated where he got the bag. The defendant again objected on the ground of hearsay. This time the trial court overruled the objection, stating that it found there had been sufficient evidence adduced to establish a conspiracy between the defendant and Grimbley so as to allow Waegli's conversation with Grimbley to be admissible in evidence. Waegli then testified that when Grimbley returned to the car after the first buy, he handed the

bag of marijuana to Waegli, and stated that it belonged to Waegli. The following questions were then asked by the county attorney and answered by Waegli: "Q. Did he have any other conversation with you when he handed it to you? A. Well, just that he had boughten (sic) it there, from Mr. Bobo. Q. He told you that he had bought if from Mr. Bobo? A. Yes, pretty sure." Grimbley himself was not present at trial, and was not available for questioning.

Other evidence adduced by the State consisted of testimony by various law enforcement officials and a laboratory technician. Their testimony established that the bag of leafy substance which Waegli turned over to the police was in fact marijuana, and that the contents of the bag had remained unchanged from the time it was given to the police detective by Waegli to the time of trial. This bag of marijuana was admitted into evidence as exhibit 1, over the objection of the defendant, who contended that the State had failed to establish a chain of possession of the bag from the time the defendant allegedly possessed it, to the time of trial. After the State rested, the defendant's motion to dismiss on the ground of insufficient evidence was overruled.

The defendant then produced alibi evidence. Two witnesses for the defendant were persons who lived with the defendant at the time he allegedly made the sales of marijuana. They and another witness testified that they thought the defendant was with them in Colorado at the time the crimes herein allegedly occurred, but all of them acknowledged that they were not sure of the date, and none could be absolutely sure that they were in Colorado on November 12, 1975, the date of the crimes, or whether it had been on another date close in time to November 12, 1975. The defendant's brother testified that he had not been in the defendant's house on the day in question, and that he had never seen Waegli or talked to

him prior to trial. At the close of all evidence, the defendant's motion for a directed verdict and to dismiss were overruled. As stated previously, the jury found the defendant guilty as charged.

In his assignments of error, defendant contends that the District Court erred in (1) admitting into evidence the hearsay testimony of Waegli concerning the statements made by Grimbley to Waegli at the time the first buy was completed; (2) admitting into evidence the bag of marijuana Waegli retained and turned over to the police, because there was insufficent evidence to show the chain of possession of that evidence; and (3) determining that there was sufficient evidence to sustain the conviction. These assignments of error will be discussed together because they are interrelated. The defendant's basic contention is that the hearsay testimony of Waegli was inadmissible, and that, without such testimony, there was insufficient evidence to show the chain of possession of the bag of marijuana retained by Waegli from the time it was allegedly possessed by the defendant to the time of trial.

It is elementary that objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. See, 29 Am. Jur. 2d, Evidence, § 774, p. 844; State v. Allen, 183 Neb. 831, 164 N. W. 2d 662 (1969); State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164 (1971); State v. Langer, 192 Neb. 525, 222 N. W. 2d 820 (1974).

In the present case, Waegli delivered one of the bags he obtained to Bitner, and that bag was not available for introduction as evidence at the trial.

There is no evidence in the record that the bag delivered to Bitner contained marijuana. Waegli did not know which bag he retained after the two separate purchases were made. The State concedes that as a result of that situation it had the burden of proving that the defendant was guilty of possessing marijuana, with intent to deliver the same, in both transactions. It was not possible for the State to prove the requisite chain of possession of the one bag of marijuana it had as evidence in regard to only one of the transactions, as it was unknown whether the bag the State had was the product of the first transaction, or the second.

Waegli admitted at trial that he did not see the defendant give the first bag of marijuana to Grimbley. Waegli only observed Grimbley going to defendant's house, the defendant answering the door, and Grimbley and the defendant going inside. When Grimbley returned to the car he gave to Waegli the first bag of marijuana. Waegli did not know whether persons other than the defendant were in the house. The only other evidence which would indicate that the defendant possessed, with the intent to deliver, the first bag of marijuana, was Waegli's testimony that Grimbley stated that he had purchased the bag from the defendant. The State apparently concedes that this testimony of Waegli was critical to prove that the defendant had possession of the first bag of marijuana, as it does not even contend that there was other evidence than this testimony to prove this fact. The defendant contends that the testimony was inadmissible as hearsay, and that the reception of this evidence was reversible error.

Section 27-801 (4) (b) (v), R. R. S. 1943, provides that a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." This was the rule in Nebraska even prior to the enactment of section 27-801

in 1975. See, State v. Adams, 181 Neb. 75, 147 N. W. 2d 144 (1966); O'Brien v. State, 69 Neb. 691, 96 N. W. 649 (1903). Rule 801 of the Federal Rules of Evidence contains the same provision, and the federal rule is like the Nebraska rule. See United States v. Yow, Jr., 465 F. 2d 1328 (8th Cir., 1972). To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects; and if the statements took place after the conspiracy had ended, or if merely narrative of past occurrences, they are not admissible. State v. Watson, 182 Neb. 692, 157 N. W. 2d 156 (1968); Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824 (1937); Zediker v. State, 114 Neb. 292, 207 N. W. 168 (1926). See, also, 4 Weinstein's Evidence, paragraph 801 (d) (2) (E) (01), p. 801. The coconspirator exception to the hearsay rule is applicable regardless of whether a conspiracy has been charged in the information or not. United States v. Yow, Jr., *supra*.

The rule is well established that before the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. See, State v. Merchants Bank, 81 Neb. 704, 116 N. W. 667 (1908); United States v. Nixon, 418 U. S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); Annotation, Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statements of Coconspirators, 46 A. L. R. 3d 1148 at 1157. The purpose of requiring that the conspiracy be established by independent evidence is to prevent the danger of hearsay evidence being lifted by its own bootstraps, i. e., relying on the hearsay statements to establish the conspiracy, and then using the conspiracy to permit the introduction of what would otherwise be hearsay testimony in evidence. See, Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680

(1942); People v. Braly, 187 Colo. 324, 532 P. 2d 325 (1975).

In the present case, the trial court concluded, after hearing Waegli's direct testimony, that sufficient evidence of a conspiracy between Grimbley and the defendant had been adduced as to permit Waegli's testimony of Grimbley's statements to be admitted in evidence. To establish a conspiracy there must be evidence of an agreement or understanding between the conspirators. The trial court did not specify exactly what the defendant and Grimbley had conspired to do. The State, in its brief, states as follows: "The conspiracy upon which the appellee relies would appear to include four persons. Brian Bitner, for whom the purchase was being made and to whom the marijuana was subsequently delivered, Mr. Grimbley, who actually made the purchase, the appellant who sold the marijuana to Grimbley, and the cooperating individual, Waegli." In so stating, we believe that the State has failed to distinguish between the two separate transactions involved in this case. Bitner, the individual to whom Waegli gave one of the bags of marijuana, was not involved in any way in the first transaction. The statement at issue, however, was made at the conclusion of the first transaction. There is absolutely no evidence that the first purchase was made by Waegli for the benefit of Bitner. In fact, the contrary appears to be true. After the first buy, Grimbley and Waegli were returning to the college, and met Bitner on the way. It was only then that Bitner gave Waegli money for the purchase of alcohol, which money was later used by Waegli to purchase the marijuana. Furthermore, there is absolutely no evidence in the record that the defendant or Grimbley was aware that any marijuana was to be delivered to Bitner, or any other person. Thus, the fact that Bitner received marijuana from Waegli is relevant only to the second transaction, and not to

the first. There was no evidence that the two transactions in this case were connected or part of a common scheme.

As we view the issue presented, the question is whether the State showed that a conspiracy existed between the defendant and Grimbley to sell the first bag of marijuana to a third person, in this case Waegli. The only independent evidence of such a conspiracy was that Grimbley went to the defendant's home, went inside, and returned with a bag of what appeared to be marijuana. There is no evidence of what transpired inside the house, or whether any other persons were inside. There is no evidence that the defendant was the one who provided the marijuana to Grimbley, or that the defendant agreed to sell marijuana to a third person through Grimbley.

Although no prior cases with analogous facts have been decided by this court, there are numerous cases in other jurisdictions which hold that such evidence is insufficient to show a conspiracy and therefore insufficient to trigger the coconspirator exception to the hearsay rule. In United States v. Stroupe, 538 F. 2d 1063 (4th Cir., 1976), a government agent attempted to purchase amphetamine from one Wright. Wright took the agent to the defendant's home, the agent waited in the car while Wright went inside, and Wright returned to the car with the amphetamine. When Wright handed the amphetamine to the agent, he pointed to the defendant, who had come outside his home with Wright, and stated: "That is my man I got the stuff from." Two weeks later Wright also made a statement to the agent indicating that the defendant had sold the amphetamine to Wright. The court held that the statements by Wright were inadmissible under the coconspirator exception to the hearsay rule because there was not sufficient independent proof to show that the defendant had conspired with Wright to sell ampheta-

mine. The court noted that the agent did not hear the defendant say anything about drugs to Wright, did not know whether other people were in the defendant's home, and did not see the defendant deliver amphetamine to Wright.

Similarly, in United States v. Tyler, 505 F. 2d 1329 (5th Cir., 1975), the evidence of an alleged conspiracy between the defendant and another person to distribute cocaine was held insufficient where the only independent proof of the conspiracy was that the other person visited the defendant's apartment shortly before he delivered cocaine to a government agent. In People v. Braly, *supra,* the court found that the defendant's presence in a house where a crime occurred was not sufficient evidence to establish a conspiracy between the defendant and other persons in the house at the time of the crime. Other cases with facts similar to those in the present case also hold that the evidence was insufficient to establish a conspiracy and permit admission of testimony under the coconspirator exception to the hearsay rule. See, Glover v. United States, 306 F. 2d 594 (10th Cir., 1962); Panci v. United States, 256 F. 2d 308 (5th Cir., 1958); Ong Way Jong v. United States, 245 F. 2d 392 (9th Cir., 1957); People v. Garcia, 201 Cal. App. 2d 589, 20 Cal. Rptr. 242 (1962); Annotation, 46 A. L. R. 3d, § 22(b), p. 1209.

Under the above authorities, we find that in the present case there was not sufficient independent evidence to establish a prima facie case of conspiracy between the defendant and Grimbley to sell the first bag of marijuana to Waegli. Other than the statements by Grimbley, Waegli had no independent knowledge of who sold Grimbley the first bag, or of what transpired in the defendant's house when Grimbley went there the first time. We reject the State's contention that both transactions were a part of a common conspiracy to deliver marijuana to Bitner, for, as stated previously, the evidence indicates

that the second transaction was unplanned at the time of the first transaction, and was entirely distinct and separate from the first transaction. Were this not so, Waegli, the cooperating individual, undoubtedly would have turned both bags of marijuana over to the authorities, instead of only one bag.

There is a further reason for holding the testimony concerning Grimbley's statements inadmissible in this case. As previously stated, statements by a coconspirator may only be used against a party when made in furtherance of the objects of the conspiracy. § 27-801 (4) (b) (v), R. R. S. 1943. The alleged statement by Grimbley of which Waegli testified, was made at the time, or shortly after, Grimbley gave the first bag to Waegli. The statement did nothing to further the object of a conspiracy between the defendant and Grimbley to sell marijuana to Waegli. The statement was not made toward the accomplishment of the alleged common object, and was therefore inadmissible under the coconspirator exception to the hearsay rule. See, Stagemeyer v. State, *supra;* Zediker v. State, *supra;* United States v. Yow, Jr., *supra.* Therefore, even if it were conceded that the evidence established a conspiracy, the statements were inadmissible because they were not made in furtherance of the conspiracy.

We conclude that it was error to admit into evidence the testimony of Waegli concerning the statements attributed to Grimbley. The State does not contend that there was sufficient evidence to connect the defendant with possession of the first bag of marijuana, with intent to deliver it, without that testimony. Having failed to prove, with admissible evidence, the defendant's guilt involving both transactions, an essential requirement because of Waegli's failure to keep the two bags separate and his inability to identify and distinguish between the one bag produced at trial and the one he delivered to Bitner, it was error to admit the bag retained by Waegli

in evidence at the trial. Although the State proved the defendant's involvement in regard to the second transaction, it could not prove that the bag retained by Waegli was the product of the second transaction, and therefore could not prove the requisite chain of possession of the second bag.

In light of the above conclusions, it is unnecessary to discuss other contentions of the defendant. The defendant's conviction is hereby reversed because inadmissible evidence was received at trial and considered by the jury, and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. VINCENT LEE MICHON, APPELLANT.

254 N. W. 2d 80

Filed May 25, 1977. No. 41077.

Criminal Law: Probation and Parole: Sentences. An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

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

T. Clement Gaughan and Toney J. Redman, for appellant.

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

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

BRODKEY, J.

The defendant and appellant herein, Vincent Lee Michon, was charged with sexual assault in the first degree and with being a habitual criminal in an information filed in the District Court for Lancaster

County on February 24, 1976. The defendant pled nolo contendere to the charge of first degree sexual assault, and the charge of being a habitual criminal was dismissed on motion of the county attorney. The defendant was sentenced to 3 years imprisonment in the Penal and Correctional Complex. He has now appealed from that sentence, contending that the trial court abused its discretion in imposing it, and that it is excessive. We affirm the sentence of the trial court.

Section 28-408.03, R. R. S. 1943, provides that a person convicted of sexual assault in the first degree shall be punished by imprisonment in the Penal Complex for not less than 1 year nor more than 25 years. The defendant was sentenced to a definite term of 3 years, which in effect was an indefinite term of 1 to 3 years under section 83-1,105 (2), R. S. Supp., 1976.

Defendant contends that he should have been given a sentence of probation because he would benefit most from a program of rehabilitation rather than imprisonment. He is 24 years old, has a wife and infant child, and was employed at the time of the offense. He has the equivalent of a high school education. The defendant's record, however, shows that he has four prior felony convictions, and has previously been sentenced to confinement in the Penal Complex. He also has a juvenile record indicating clashes with the law over a long period of time.

This court has repeatedly held that a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Tweedy, 196 Neb. 253, 242 N. W. 2d 631 (1976). Similarily, 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 (1974). In this case the defendant received the minimum sentence

provided for by the statute. In light of the serious nature of the crime to which defendant pled nolo contendere, and of defendant's previous felony convictions, it was not error for the trial court to impose the sentence which it did. There was no abuse of discretion and the sentence was not excessive. Therefore, the sentence of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VERNON C. MCKENNEY, APPELLANT, IMPLEADED WITH BRADLEY T. OLSON, APPELLEE.

254 N. W. 2d 81

Filed May 25, 1977. No. 41102.

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

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

Keith N. Bystrom and Scott P. Helvie, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee State.

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

MCCOWN, J.

The defendant pleaded guilty to possession of marijuana with intent to deliver and was sentenced to 6 months in the county jail. The defendant appeals on the ground that he should have been granted probation.

The defendant and a codefendant were both arrested and charged with possession of marijuana with intent to deliver. The officers found 18 pounds

of marijuana in the defendant's luggage. Admittedly defendant intended to sell the marijuana. Both individuals claimed the other was the prime instigator. Both pleaded guilty. Both received the same sentence.

The penalty for possession of marijuana with intent to deliver is imprisonment in the Penal and Correctional Complex for not less than 1 year nor more than 5 years, or a fine of not more than $2,000, or imprisonment in the county jail for not more than 6 months, or both such fine and imprisonment. The defendant contends that it was an abuse of discretion to refuse to grant him probation because of his age and the fact that this was his first felony offense and was a nonviolent one.

The defendant is 26 years old, single, and is a high school graduate. He has no prior felony record. His presentence report reveals only minor misdemeanors and traffic offenses. The defendant was a drug user as well as a seller. The probation officer, for that reason, believed he would have difficulty completing the terms of any probation and recommended against it.

The record establishes that the District Court specifically considered the mitigating factors, as well as the fact that the sale of controlled substances was involved, and determined that some imprisonment was appropriate. The record fully supports the determination made by the District Court. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wounded Head, *ante* p. 58, 251 N. W. 2d 668.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVA EUGENE SYPOLT, ALSO KNOWN AS GENE SYPOLT, APPELLANT.

254 N. W. 2d 82

Filed May 25, 1977. No. 41120.

Appeal from the District Court for Adams County: FREDERIC R. IRONS and NORRIS CHADDERDON, Judges. Affirmed.

Stephen A. Scherr, for appellant.

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

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

BOSLAUGH, J.

The defendant was charged with issuing a check in the amount of $184.45 upon the State Bank of Trenton, at Trenton, Nebraska, when he knew that he had no account or deposit in the bank. Upon a plea of guilty he was sentenced to imprisonment for 3 to 5 years. He has appealed and contends the sentence is excessive.

The defendant is 27 years of age and has an arrest record commencing in 1966. He was convicted of forgery in 1967 and again in 1970. He was convicted of joy riding in 1968 and of motor vehicle theft in 1973. He has served at least three prison sentences.

The penalty provided by the statute is imprisonment in the county jail for not to exceed 1 year, or in the Nebraska Penal and Correctional Complex for not to exceed 10 years, or a fine of $50 to $5,000. § 28-1212, R. R. S. 1943. In view of the defendant's record, there is no basis upon which it could be said that the sentence imposed was excessive. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARL WALDO LACY, APPELLANT.

254 N. W. 2d 83

Filed May 25, 1977. No. 41121.

1. **Criminal Law: Post Conviction.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used to secure a further review of issues already litigated.
2. _____: _____. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal.
3. **Criminal Law: Sentences: Presentence Reports.** In the determination of a proper sentence, the trial court may consider police reports of crimes which have not resulted in conviction.

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

Scott P. Helvie and Keith N. Bystrom, for appellant.

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

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

WHITE, C. THOMAS, J.

This is an appeal from a denial of post conviction relief. The defendant asserts: (1) That the trial court erred in considering the record of an arrest contained in the presentence report in sentencing the defendant; and (2) that the trial court violated the constitutional rights of the defendant by sentencing him to a term of 5 to 8 years imprisonment while sentencing an accomplice, who had plead guilty to the offense, to 3 years imprisonment.

This court, on direct appeal, upheld the conviction and affirmed the sentence in State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650. The facts are set out in that case and will not be repeated here. We shall discuss the assignments of error in reverse order.

The second assignment of error, that of disparity of sentence, was raised and considered by this court

on direct appeal. It was decided adversely to the defendant. The matter was thoroughly briefed and argued, and discussed by this court. The defendant's arguments were rejected including those alleging a constitutional basis for relief. The matter will not again be considered here. "A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110. The defendant's second assignment of error is without merit.

The first assignment of error relates to the consideration by the trial court of a police report contained in the presentence investigation of the police department of Mount Clemens, Michigan, of a charge of an assault with a deadly weapon committed by the same defendant. After an argument the defendant, according to the report, is alleged to have reached in his pocket, pulled a gun, and shot a victim in the right leg. The defendant was held in the Macomb County jail for a period of 38 days before the charge was dismissed. The reason for the dismissal is listed as failure of the complaining witness to sign a complaint. The trial court informed the defendant that it was considering the presentence investigation and the report of the crime and that the report indicated that the defendant had in fact committed the crime. This was the second incident in the defendant's history concerning use of a firearm. As indicated in the previous case of State v. Lacy, *supra,* the gun used in the Nebraska crime belonged to the defendant.

The trial court's use of the police report was well known to the defendant at the time of the sentencing and could have been raised on direct appeal. "A defendant in a post conviction proceeding * * * may not raise questions which could have been raised on the

direct appeal * * *." State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715.

" ' "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, *police reports, affidavits,* and *other information including his own observation of the defendant. A presentence investigation has nothing to do with the issue of guilt.* * * *"

" 'Due process is not violated by the Nebraska procedure. This is definitely a universal practice, as evidenced by the following from Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337. "* * * A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. * * *" ' " State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670.

In Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, the United States Supreme Court held that Williams' prior arrests and activities which had not resulted in convictions were within the scope of the information which a sentencing court could properly consider. We hold the defendant's first assignment of error, even if the same were properly before this court, is totally without merit.

The judgment of the District Court denying the petition for post conviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY J. NICHOLS, APPELLANT.

254 N. W. 85

Filed May 25, 1977. Nos. 41150, 41151.

Criminal Law: Sentences. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion.

Appeals from the District Court for Lancaster County: DALE E. FAHRNBRUCH and SAMUEL VAN PELT, Judges. Affirmed.

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

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

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

MCCOWN, J.

This is a consolidated appeal from two separate convictions for burglary. On the first conviction defendant was sentenced to a term of 1 to 2 years imprisonment and the court ordered that the sentence was to be consecutive to any sentence imposed on the second conviction, for which sentence had not been pronounced. On the second charge the court sentenced defendant to a term of 1 to 3 years imprisonment and ordered that the sentence be served prior to the sentence entered on the first conviction.

Defendant pleaded guilty to a charge of burglary for an offense which occurred in August 1975. On February 2, 1976, defendant was placed on 3 years

probation for that offense. One charge of revocation of probation for possession of amphetamines was dismissed on August 26, 1976. On October 6, 1976, defendant was charged with a violation of probation for possession of a firearm on August 21, 1976. On October 12, 1976, after dismissal of other probation violation charges under a plea bargain, the defendant pleaded guilty to the probation violation charge for possession of a firearm. He was sentenced to 1 to 2 years imprisonment on October 28, 1976, for the burglary conviction of 1975, to be served consecutively to any sentence imposed on a 1976 burglary offense then pending.

On October 5, 1976, while the above matters were pending, defendant was charged with a burglary which occurred on September 9, 1976. On October 12, 1976, another judge of the District Court accepted defendant's plea of guilty to that burglary. On November 1, 1976, a 1 to 3 year sentence was imposed for that burglary to be served prior to the sentence for the 1975 burglary.

Defendant contends that his sentences were excessive and that they should have been concurrent rather than consecutive. We disagree.

A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wounded Head, *ante* p. 58, 251 N. W. 2d 668.

The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15. There was no abuse of discretion here.

AFFIRMED.

GENEVIEVE (JOHNSON) RIEF, APPELLANT, V. DAVID A. FOY, APPELLEE.

254 N. W. 2d 86

Filed June 1, 1977. No. 40998.

1. **Motor Vehicles: Highways.** One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway.
2. **Motor Vehicles: Highways: Negligence.** If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence.
3. _____: _____: _____. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded for a new trial.

John J. Respeliers of Respeliers & DiMari, for appellant.

D. Nick Caporale and Michael G. Helms of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

BOSLAUGH, J.

This action arose out of an automobile accident that happened in Omaha, Nebraska, around 9 p.m., on April 15, 1974. The plaintiff, Genevieve Rief, had backed her automobile out of the driveway at 3702 North 60th Street intending to go south on 60th Street. The accident happened when the rear of her automobile was struck by the defendant's automobile which was southbound on 60th Street. The jury found against the plaintiff and awarded the defendant $4,000 on his counterclaim. The plaintiff has appealed.

The evidence shows that 60th Street is a four-lane street running north and south with a speed limit of

35 miles per hour. The residence at 3702 North 60th Street is located on the northwest corner of 60th and Pratt Streets. The driveway runs east and west. There is a hill on 60th Street which crests a short distance north of the driveway. Photographs taken with a camera located 54 inches above the surface of the street show that traffic approaching from the north has a clear view of 60th Street in front of 3702 North 60th from a point 220 feet north of the driveway. From a point 320 feet north of the driveway only a part of the upper portion of a vehicle would be visible to traffic proceeding south on 60th Street.

Both automobiles had their headlights on and there was a street light at the southwest corner of the intersection. It had been raining on the night the accident happened, but the evidence is in conflict as to whether it was still raining at the time the accident occurred.

The plaintiff testified that she looked to the north and to the south, saw no traffic approaching, and then backed slowly into the right lane or curb lane on 60th Street. After she had started to move forward to proceed south on 60th Street she saw the defendant's automobile approaching from the north in the same lane. When she first saw his automobile it appeared to be almost half a block away. The defendant's automobile struck the rear and right side of the plaintiff's automobile which then spun around and stopped, facing to the north.

The defendant testified that he had been bowling from 6:30 to 8:30 p.m. While bowling, he drank two or a "few" beers. He left the bowling alley and turned on to 60th Street at Ames Avenue. The weather was drizzly, he had his windshield wipers on, and the street was wet. He estimated his speed at 40 miles per hour and claimed his automobile was "hydroplaning." He did not see the plaintiff's automobile until he was about 30 feet away. The plaintiff's automobile was facing west and blocking both

lanes so he turned into the center lane, applied his brakes, turned his "wheel" to the right and struck the plaintiff's automobile with the side of his automobile. His automobile left no skid marks and came to rest on the sidewalk against a retaining wall and a traffic light pole located just south of the driveway. The defendant does not remember anything after the impact.

Susan Mann was driving north on 60th Street at the time the accident happened. She saw the plaintiff's automobile backing from the driveway when she was half a block or a block south of the scene of the accident. There was no southbound traffic in sight north of the driveway at that time. As she passed the plaintiff's automobile, which was then still backing out of the driveway, she noticed the defendant's automobile which seemed to be going faster than 35 miles per hour. She did not see the impact because she was "a little bit farther north" than the scene of the accident at the time of the impact, but she heard the impact and stopped, and went back to the scene of the accident.

The case was submitted to the jury on issues of negligence, contributory negligence, proximate cause, and damages. The plaintiff contends the trial court erred in submitting the issue of the plaintiff's contributory negligence to the jury and the trial court should have directed a verdict for the plaintiff on the issue of liability. The specifications of contributory negligence submitted to the jury were improper lookout and failure to yield the right-of-way.

Since the plaintiff was entering 60th Street from a private driveway she was required to yield the right-of-way to all traffic approaching on 60th Street. § 39-638, R. R. S. 1943; Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786. She was also required to maintain a lookout for approaching traffic, especially from the north, and see all traffic which was within the

limit of danger. If she failed to see another vehicle, which was favored over her, when it was within the limit of danger she was guilty of negligence. Under the facts and circumstances in this case we think the evidence presented a jury question as to the plaintiff's contributory negligence and the issue was properly submitted to the jury.

The petition alleged the defendant was negligent in traveling at an excessive speed, and in failing to maintain a proper lookout and to have reasonable control over his automobile. The defendant admits that he was traveling at a speed in excess of the posted limit under conditions which adversely affected visibility and his ability to control his automobile. Although his headlights were on and the area was lighted by street lights, he failed to see the plaintiff's automobile until he was 30 feet away, although he should have been able to see the plaintiff's automobile when he was between 200 and 300 feet north of the driveway. We think the evidence established as a matter of law that the defendant was unable to stop in time to avoid a collision with an object within his range of vision. See Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584. He was guilty of negligence as a matter of law that was more than slight and which was sufficient to bar his recovery. It was error for the trial court to submit his counterclaim to the jury.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

KUNS, Retired District Judge, dissenting in part.

I concur in the opinion except that part which remands the cause for a new trial. In my opinion, the judgment should be reversed and the cause be remanded with directions to dismiss.

STATE OF NEBRASKA, APPELLEE, V. DONALD B. CHILDRESS, APPELLANT.

254 N. W. 2d 89

Filed June 1, 1977. No. 41113.

Criminal Law: Sentences. A sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

William M. Berlowitz, for appellant.

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

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

SPENCER, J.

Defendant, Donald B. Childress, who pled guilty to the offense of driving while under the influence of intoxicating liquor, third offense, prosecutes this appeal from a sentence of 1 to 3 years in the Nebraska Penal and Correctional Complex. Defendant's only assignment of error is that the sentence is excessive. We affirm.

Defendant premises his contention that the sentence is excessive on the fact that since his conviction he has made a sincere effort to rehabilitate himself. The difficulty is that defendant's attempts are much too late. The presentence and medical reports show that instead of being defendant's third offense, the one involved herein is actually his sixth. In 1972, he was twice convicted of driving while under the influence. On April 1, 1973, he was put on probation for 12 months for the same offense. On November 2, 1974, he was fined by the Adams County court for driving while under the influence. On July 11, 1975, he was put on probation in Adams County for the same offense. The present offense occurred on

April 29, 1976, or less than 1 year from the last offense.

Defendant has been on probation four times since 1968, when he was put on probation for joy riding and a high speed chase. In 1969, he was put on probation for stealing property of the value of less than $100. On February 7, 1974, he was put on probation by the District Court for Lancaster County for 2 years for assault with intent to commit rape. One of the conditions of that probation was that he should abstain from the excessive use of alcoholic beverages. During that probation period he had two convictions for driving while under the influence. He was released from probation on February 10, 1976. The fourth probation was the one of July 11, 1975, by the District Court for Adams County, which was imposed while he was still on probation for the 1974 offense.

Pursuant to a plea bargain, two other counts, a misdemeanor charge of willful destruction of property and a felony charge of fleeing to avoid arrest, were dismissed, as was another driving while under the influence charge in the county court.

This court has repeatedly said that a sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15 (1976).

The court did not abuse its discretion herein. It gave the defendant a minimum sentence on his record. To have again placed defendant on probation would have been an abuse of the judicial process.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH HAWKMAN, APPELLANT.

254 N. W. 2d 90

Filed June 1, 1977. No. 41125.

1. **Criminal Law: New Trial: Time.** A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect.
2. **Criminal Law: New Trial: Statutes: Words and Phrases.** The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground.
3. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Cherry County: LLOYD W. KELLY, JR., and HENRY F. REIMER, Judges. Affirmed.

Magnuson, Magnuson & Peetz, for appellant.

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

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

SPENCER, J.

Hawkman pled guilty to assault with intent to commit a robbery, stabbing with intent to wound or maim, assault with intent to inflict great bodily injury, and attempting to steal an automobile. He was sentenced to 5 to 15 years on the first three offenses and 1 year on the fourth, all sentences to run concurrently. Defendant pro se filed a motion for a new trial and a request for appointment of counsel. Counsel was appointed and an amended motion for a new trial was filed. The motion for new trial was overruled and defendant prosecutes this appeal. We affirm.

Defendant acknowledges that his motion for a new

trial was filed out of time. Our law is well settled. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Betts, 196 Neb. 572, 244 N. W. 2d 195 (1976). Defendant seeks to avoid the consequences of this rule by alleging that he was unavoidably prevented from filing the motion within time.

Section 29-2103, R. R. S. 1943, provides that a motion for a new trial must be filed within 10 days after the verdict was rendered unless unavoidably prevented. As early as Roggencamp v. Dobbs, 15 Neb. 620, 20 N. W. 100 (1884), this court said: "The words 'unavoidably prevented' are equivalent in meaning to circumstances beyond the control of the moving party, and do not excuse mere neglect."

In Stanosheck v. State, 168 Neb. 43, 95 N. W. 2d 197 (1959), we said: "The words 'unavoidably prevented' as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground."

There is nothing in this record which would permit us under our law to find that the defendant was unavoidably prevented from filing a motion for a new trial. Hawkman's pro se motion was filed after he entered the Penal and Correctional Complex. He attempts to sustain his position by pleading ignorance of the requirement and ineffectiveness of counsel.

Hawkman, by failing to file a motion for new trial within time is precluded from raising in this appeal any of the questions he seeks to raise except excessiveness of sentence. Hawkman was on probation on a felony committed in South Dakota at the time of the offense herein. Defendant, in an attempt to secure the keys to the vehicle, used a knife on its owner who sustained cuts in the struggle.

The sentencing judge, considering the fact that all

the acts charged arose out of the same transaction, made the sentences concurrent. The sentences imposed are well within the statutory limits. This court has repeatedly said that a sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15 (1976). There was no abuse of discretion herein.

The judgment of the trial court is affirmed.

AFFIRMED.

MAURICE HYATT, APPELLANT, V. KAY WINDSOR, INC., APPELLEE.

254 N. W. 2d 92

Filed June 1, 1977. No. 41130.

1. **Workmen's Compensation: Evidence: Burden of Proof.** Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment.
2. **Workmen's Compensation: Statutes: Words and Phrases.** Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition.
3. **Workmen's Compensation: Evidence.** In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case.
4. **Workmen's Compensation: Evidence: Burden of Proof.** The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
5. **Workmen's Compensation: Evidence: Judgments.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
6. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the

evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Jerome P. Grossman and Howard Kaiman, for appellant.

John R. Timmermier of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case in which plaintiff seeks to recover benefits for a heart attack. The single-judge Workmen's Compensation Court at the initial hearing, and the three-judge Workmen's Compensation Court on rehearing, held that plaintiff had failed to prove that the heart attack and its resulting disabilities arose out of and in the course of his employment by the defendant, and dismissed the petition. Plaintiff has appealed.

The plaintiff, Maurice Hyatt, was 65 years of age and had been employed by various clothing firms as a traveling salesman of women's wear for approximately 30 years. He had worked for the defendant, Kay Windsor, Inc., since June 1, 1975. Plaintiff usually carried approximately 8 sample bags which weighed 40 to 45 pounds each. Plaintiff serviced four or five accounts daily and carried his sample bags between his car and the stores or showrooms.

On December 11, 1975, plaintiff decided to carry 4 sample bags rather than 8 and doubled the samples in the bags so that each bag weighed approximately 80 pounds. Plaintiff commenced loading the bags into his automobile. While loading the second one, he felt a pain in his left arm and became ill. His wife took him to his doctor's office and, after examination, he was sent by rescue unit to the hospital

with a severe heart attack. While he was in the hospital he suffered another heart attack on December 15 or 16, 1975. He remained in this hospital until January 4, 1976, but was unable to return to his regular work.

Plaintiff's medical history included a previous heart attack in July 1974. He had suffered from hypertension since 1945, and had taken medication for hypertension since 1954. He was also a diabetic. Plaintiff's father died as the result of a heart attack. Plaintiff's mother died from a diabetic condition, and plaintiff's brother also has hypertension.

Plaintiff's doctor, a cardiologist, testified that if a person who is normally accustomed to, and capable of, handling 40 to 50 pounds lifted double that weight, the additional weight could be responsible for precipitating a heart attack. A cardiologist for the defendant testified that if the carrying of the additional weight was an unusual exertion for the plaintiff it might be a contributing factor, but that if the exertion was what he normally performed it would not be. He thought that there was probably more than a single factor involved, and that plaintiff's preexisting physical and heart condition was most important. The cold and windy weather may also have been a precipitating factor as well. Plaintiff's doctor could recall no specific mention of the lifting incident until sometime in March 1976, nor do the medical records of the hospital reflect any mention of a lifting incident or excessive strain. Neither doctor had any personal knowledge of the weight of the sample bags.

The Workmen's Compensation Court, at the initial hearing and on rehearing, found that plaintiff had failed to maintain the burden of proving that the heart attack and resulting disabilities were the result of an accident and injury arising out of and in the course of his employment by the defendant, and dismissed plaintiff's petition.

Plaintiff contends that the Workmen's Compensation Court erred in failing to find that his heart attack was a direct result of carrying the sample bags on December 11, 1975, and in failing to find that the injury arose out of and in the course of his employment by the defendant.

Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. The terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. § 48-151(2) and (4), R. R. S. 1943.

In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment and that issue must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Reis v. Douglas County Hospital, 193 Neb. 542, 227 N. W. 2d 879. In the "heart cases" the problem is causation, and whether the injury is the result of personal rather than employment risk. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

Obviously issues of causation are for determination by the fact finder. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. We have consistently held that the verdict of a jury, even when the evidence is contradic-

tory, will not be set aside on appeal unless clearly wrong. Moser v. Jeffrey, 194 Neb. 132, 231 N. W. 2d 106. We now hold that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.

In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Salinas v. Cyprus Industrial Minerals Co., 197 Neb. 198, 247 N. W. 2d 451.

The findings of fact of the Workmen's Compensation Court are not clearly wrong. Instead the evidence is clearly sufficient to support the findings and action of the Workmen's Compensation Court.

AFFIRMED.

SPENCER, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM HOLTHAUS, APPELLANT.

254 N. W. 2d 95

Filed June 1, 1977. No. 41139.

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

Donald L. Marti, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

PER CURIAM.

Defendant pled guilty to a felony charge of issuing an insufficient fund check with intent to defraud. § 28-1213, R. R. S. 1943. He was sentenced to a term of 18 months to 5 years in the Nebraska Penal and Correctional Complex. On this appeal he urges that the sentence is excessive and that he should have been placed on probation as this is his first conviction.

We have very carefully read the arraignment proceeding and the presentence investigation report. Defendant was first charged with obtaining money under false pretenses. § 28-1207, R. R. S. 1943. He pled not guilty to that charge. Both charges arose out of the same essential facts. After the plea of guilty to the check charge, the false pretense charge was dismissed.

It will serve no purpose to outline the details of the devious scheme by which the fraud was accomplished. However, it involved the use of an innocent third party as a tool and was obviously coldly calculated. As a result of his actions he fraudulently obtained $16,000. With the proceeds he bought a Ferrari automobile, which he then sold, and thereafter fled to Canada where he was apprehended.

He urges that he has reformed and is desirous of making restitution for this and other lesser frauds. The trial judge observed the defendant and heard his protestation of reform and was in the best position to make a judgment on his sincerity. The crime and the conditions of its commitment seem to merit the punishment imposed.

AFFIRMED.

ELLSWORTH A. CLYDE, ALSO KNOWN AS ELSWORTH CLYDE, ET AL., APPELLANTS, V. LLOYD BUCHFINCK, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ELIZABETH K. EVANS, DECEASED, ET AL., APPELLEES.

ALVINA AVERY, APPELLANT, V. LLOYD BUCHFINCK, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ELIZABETH K. EVANS, DECEASED, ET AL., APPELLEES.

254 N. W. 2d 393

Filed June 8, 1977. Nos. 40839, 40840.

1. **Pleadings: Demurrer.** A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover.
2. _____: _____. A demurrer reaches only defects which appear on the face of the petition, and admits all allegations of fact which are relevant, material, and well pleaded, but does not admit the pleader's conclusions of law.
3. _____: _____. A demurrer reaches an instrument filed with the petition and made a part thereof, but does not admit any construction placed on any instrument pleaded and set forth in the petition.
4. **Pleadings: Demurrer: Judgments.** When a demurrer is interposed stating several grounds, the trial court should, when sustaining the demurrer, specify the grounds upon which it is sustained, so that this court will be informed in regard to where the complaint is deficient.

Appeals from the District Court for Grant County: HUGH STUART, Judge. Reversed and remanded.

Mingus & Mingus and Luebs, Tracy, Dowding, Beltzer & Leininger, for appellants.

Reddish, Curtiss & Moravek, for appellees.

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

BRODKEY, J.

These are appeals from District Court determinations in two separate cases, which have been consoli-

dated on appeal. In both cases plaintiffs sought to establish rights in personal and mixed property under a will. The District Court sustained demurrers to the petitions, and dismissed them without prejudice. Plaintiffs have appealed, contending that it was error to sustain the demurrers and dismiss the petitions; and that procedural irregularities occurred in regard to the disposition of the demurrers. We reverse and remand for further proceedings.

For the purpose of simplification and clarification, the two cases involved in this appeal will be referred to as "Clyde" and "Avery." Although both cases raise similar issues on appeal, there are differences between them, and we will, therefore, set out the facts in each case separately.

Plaintiffs and appellants in the Clyde case are five grandchildren of Alven Evans, who seek to establish rights in certain mixed and personal property under the will of Alven Evans, which was admitted to probate on June 10, 1940. At the time of his death, Alven Evans was survived by his wife, Elizabeth K., and five children, Darwin Evans, Alta Dykes, Zena Clyde, Emmerson Evans, and Tyndell Evans. Two of these children, Alta Dykes and Zena Clyde, died in 1946 and 1965 respectively, predeceasing their mother, Elizabeth K. Evans. The plaintiffs and appellants in this case are the five children of Zena Clyde.

Elizabeth K. Evans died in 1972, leaving a will which left her property to her children who survived her. Subsequently, Emmerson Evans and Tyndell Evans died in 1973. Both these children left heirs, who are defendants in this case. Lloyd Buchfinck, the current special administrator of the estate of Elizabeth K. Evans, and Leroy Evans, who was initially the administrator of that estate, are also named defendants, as were also Darwin Evans, the only living child of Alven and Elizabeth K. Evans, and Nedra Higgins, the daughter of Alta Dykes.

Subsequent to the death of Elizabeth K. Evans in 1972, plaintiffs filed a petition in the District Court for Grant County on August 6, 1974, alleging three causes of action. The petition sets forth the identity and relationship of the parties, and alleges that Alven Evans executed a will, which was admitted to probate in 1940. A copy of this will is attached to the petition, and made a part thereof.

In the first cause of action, plaintiffs allege that by virtue of the will of Alven Evans, Elizabeth K. Evans became "possessed of a life estate with the power of disposition for her personal use and enjoyment, for full and adequate valuable consideration, that any of said property remaining including accumulations therefrom, not disposed of for full, adequate valuable consideration by the said Elizabeth K. Evans, at the time of her death became the property of the five children" of Alven Evans. It is further alleged that all the personal and mixed property in the possession of Elizabeth K. Evans at the time of her death had belonged to Alven Evans at the time of his death, or constituted accumulations, therefrom. A list of this property is attached as an exhibit to the petition. Finally, in the first cause of action, the petition alleges that Lloyd Buchfinck, administrator of the estate of Elizabeth K. Evans, has refused to recognize the claim of the plaintiffs under the will of Alven Evans; has wrongfully disposed of some of the property by the wrongful payment of taxes; has refused to request any instruction from a court in regard to his duties; and has fraudulently conspired with others to deny the rights of the plaintiffs.

In the second and third causes of action, plaintiffs repeat most of the allegations of the first cause, and further allege that Elizabeth K. Evans, both prior to and subsequent to the execution of the will of Alven Evans, was fully informed that she was to take charge of the property of Alven Evans and run

his ranch; and that upon her death all that property and accumulations therefrom were to be divided among the five children of Alven and Elizabeth K. Evans, or among the heirs of those children. It is further alleged that Elizabeth K. Evans accepted this trust.

Plaintiffs pray that the District Court impose a trust upon the property described in the petition in favor of the plaintiffs and other owners of the property; that the administrator of the estate of Elizabeth K. Evans be ordered to account for all property coming into his hands; and that judgment be rendered against him for all property he had wrongfully disposed of.

On September 9, 1974, certain of the defendants filed a demurrer to the petition on the ground that it did not state a cause of action. Hearing was had on the demurrer on January 23, 1975, but no ruling thereon was made until December 18, 1975, on which date the District Court sustained the demurrer. Plaintiffs then filed a motion for new trial, moving to vacate the decision sustaining the demurrer. In their motion, plaintiffs contended that the sustaining of the demurrer was in effect a grant of summary judgment, which was improper; that the court erred in failing to set out the specific grounds upon which the demurrer was based; that the court erred in failing to allow plaintiffs to amend their pleadings; and that the decision to sustain the demurrer was contrary to the law and the evidence, and constituted an abuse of discretion on the part of the trial court. In their motion, plaintiffs requested that the trial court set out the specific reasons for the sustaining of the demurrer, and that they be given the right to amend their petition. Plaintiffs did not, however, tender a proposed amended petition.

While plaintiff's motion for new trial was pending, the defendants moved to dismiss the petition. The trial court overruled plaintiffs' motion for new trial

and dismissed the petition without prejudice. Plaintiffs filed a second motion for new trial, moving the court to vacate the dismissal of the action, but this motion was never ruled on by the trial court. Plaintiffs then appealed to this court.

The sole plaintiff in the Avery case is Alvina Avery, a grandchild of Alven Evans, and a child of Zena Clyde. The defendants are Lloyd Buchfinck and Leroy Evans, as current and former administrators of the estate of Elizabeth K. Evans, and as individuals. In the petition, as amended, plaintiff alleges that Elizabeth K. Evans had no property of her own at the time of her death, and that all property in her possession was trust property acquired under the will of Alven Evans. The allegations in regard to the will of Alven Evans in this case are similar to those in the Clyde case. Plaintiff alleges that the two defendants have wrongfully and tortiously taken and detained mixed and personal property in the possession of Elizabeth K. Evans at the time of her death, and have disposed of that property in November 1973. It is further alleged that the defendants have taken charge of certain real estate which constituted earnings from the Evan's Ranch operation, and that they have denied plaintiff and other rightful owners possession of that real estate. Plaintiff prays for money damages against the defendants.

In December 1974, defendants filed a demurrer to the amended petition on the following grounds: (1) There was another action pending between the same parties for the same cause; (2) there was a defect of parties defendant; and (3) the amended petition did not state facts sufficient to constitute a cause of action. The proceedings thereafter were similar to those in the Clyde case. The demurrer was sustained in December 1975. Plaintiff filed a motion for new trial, moving to vacate the decision to sustain the demurrer, and defendants moved to dismiss the

petition. The trial court sustained the motion to dismiss and overruled the motion for new trial. Plaintiff filed a second motion for new trial, but no ruling was made thereon.

At the time the trial court dismissed the petitions in both cases, it made the following statements: "The demurrers were sustained upon several grounds, among which were that it was the Court's opinion that amendment was not a practical or a viable alternative; and for that reason the trial docket sheet entered by the Court dismissed the action. * * * Therefore, with the lack of amendment, or the lack of tender of an amendment, and the multiple reasons for sustaining the demurrer, I feel now that the case should be dismissed, and they are therefore dismissed without prejudice." At no time did the trial court specify its reasons for sustaining the demurrer in either case.

The assignments of error by appellants in both cases are the same. The appellants first contend that the sustaining of the demurrers and the dismissal of the petitions were contrary to law and therefore erroneous. Secondly, appellants contend that the procedure followed in sustaining the demurrers was contrary to law, stating that (1) the arguments pertaining to the demurrers were analogous to ones for summary judgment, and were not directed to the allegations of the demurrers themselves; (2) the District Court erred in failing to inform the plaintiffs of the grounds upon which the demurrers were sustained; (3) the District Court erred in not allowing plaintiffs to amend their petitions; (4) it was error to dismiss the petitions without granting plaintiffs the opportunity to amend their petitions; and (5) the District Court erred in not ruling on plaintiffs' motions for new trial filed subsequent to the dismissal of the petitions.

The rules in regard to demurrers are well settled in this state. Section 25-806, R. R. S. 1943, sets forth

the grounds for demurrers, including the ground that "the petition does not state facts sufficient to constitute a cause of action." A demurrer on this ground is regarded as a general demurrer, which "tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover." Lee v. Brodbeck, 196 Neb. 393, 243 N. W. 2d 331 (1976). See, also, Kuester v. State, 191 Neb. 680, 217 N. W. 2d 180 (1974); Martindale v. State, 181 Neb. 64, 147 N. W. 2d 6 (1966). A demurrer reaches only defects which appear on the face of the petition, and admits all allegations of fact which are relevant, material, and well pleaded, but does not admit the pleader's conclusions of law. Johnsen v. Parks, 189 Neb. 712, 204 N. W. 2d 804 (1973); First National Bank v. Morgan, 172 Neb. 849, 112 N. W. 2d 26 (1961).

A demurrer reaches an instrument filed with the petition and made a part thereof, but does not admit any construction placed on any instrument pleaded and set forth in the petition. See, Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75 (1961); Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150 (1953); 61 Am. Jur. 2d, Pleading, §§ 276, 280, pp. 685, 690; 71 C. J. S., Pleading, §§ 257, 261, pp. 502, 530. Therefore, in determining whether a demurrer should be sustained, the trial court may construe an instrument made a part of the petition. See Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874 (1950).

An examination of the petitions in the present cases indicates that plaintiffs' claims to an interest in the property in question are grounded upon an interpretation of the will of Alven Evans. In their briefs on appeal, the parties set forth extended arguments in regard to the construction of the will of

Alven Evans, and in effect urge this court to construe that will. On the record presented in these cases, however, we decline to construe the will, and remand the case for further proceedings for the following reasons.

In the Clyde case, defendants do not contend that plaintiffs have not set out sufficient facts in their petition to permit construction of a will and imposition of a trust. See, generally, 96 C. J. S., Wills, § 1090, p. 770. Instead, defendants contend that examination of the will of Alven Evans shows that plaintiffs have no interest in the property in question, particularly in any accumulations from the personal property Elizabeth K. Evans received from her husband upon his death. Defendants' objection to the petition in Clyde, therefore, is essentially that plaintiffs' interpretation of the will is erroneous. The same contention is set forth in the Avery case, and in addition defendants argue that a cause of action for conversion or wrongful detention of property cannot lie against the administrators of the estate of Elizabeth K. Evans.

The difficulty this court faces in these cases is that the record does not show the trial court's reasons for sustaining the demurrers. There is no indication that the trial court in fact construed the will of Alven Evans and determined that plaintiffs have no interest in the property in question under that will. At the time the trial court dismissed the petitions in both cases, it stated that the demurrers were sustained on "several grounds," and for "multiple reasons." The trial court apparently considered the demurrers in both cases at the same time, and did not state its specific reasons for sustaining each demurrer in each case. The demurrer in the Avery case was made on several grounds, but which ground the trial court relied on is not shown by the record. Although the only ground for demurrer in the Clyde case was that the petition failed to state a

cause of action, defendants advanced more than one legal theory as to why it failed to state a cause of action.

In such circumstances, this court should not indulge in the construction of a will which has not yet clearly been construed by the trial court. As stated in In re Linford's Estate, 116 Utah 21, 207 P. 2d 1033 (1949): "When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient. We should not be required to examine all of the grounds in order to see if one or more were well taken." In this case, plaintiffs requested that the trial court specify its reasons for sustaining the demurrers. Part of plaintiffs' concern was that they did not know whether the trial court had in fact construed the will and found that they had no interest in the property under it, or whether the petitions were defective for other reasons. Plaintiffs' failure to tender proposed amendments to the petitions is understandable when they were uncertain of the grounds on which the demurrers were sustained. Without knowing the reasons for the sustaining of the demurrers, it is impossible for this court to determine whether the trial court erred in not granting plaintiffs leave to amend their petitions, as was requested in the alternative in their motions for new trial, and also in their briefs previously filed in these proceedings.

Therefore, on the record presented, we find it advisable to reverse the judgments and remand the causes to the District Court. It would be inappropriate for this court to indulge in the construction of a will where the record does not clearly show that the trial court has construed it. Although defendants in Avery attack the petition on several grounds, the record does not show why the demurrer was sus-

tained. On remand, the parties and the trial court can and should establish a clear record in regard to the issues raised in the cases, including a construction of the will, so that this court, if it should become necessary, may review the issues without speculation as to the basis for any decision reached.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

It is not clear to me why these cases should be remanded to the District Court for further proceedings. I am not aware of any rule of law that prevents this court from deciding these cases upon the basis of the issues presented by the parties.

The controlling issue appears to be a construction of the will of Alven Evans, deceased. In general terms the question is whether the will gave Elizabeth K. Evans a life interest with a power of disposition or an interest in fee simple. This is a question of law which is argued in the briefs of both parties.

Ordinarily, the reason for decision relied upon by the trial court does not affect the decision of the case by this court. In many, if not most, of the cases decided by this court the record does not show the reason for decision upon which the trial court relied. A judgment will not be reversed if the trial court reached the right result even though the reason for decision was erroneous.

The opinion in these cases decides nothing and subjects the parties to further delay and expense which is unnecessary. In my opinion the cases should have been decided upon the issues presented.

CAGLE, INC., A CORPORATION, APPELLANT, V. JERRY L. SAMMONS, DOING BUSINESS AS JERRY SAMMONS DRYWALL, ET AL., APPELLEES.

254 N. W. 2d 398

Filed June 8, 1977. No. 40990.

1. **Pleadings: Demurrer.** A general demurrer tests the substantive

legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover.

2. _____: _____. A demurrer reaches an instrument filed with the petition and made a part thereof.
3. **Contracts: Bonds: Sureties: Default.** A performance bond guarantees that the contractor will perform the contract, and a labor and material payment bond guarantees that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults.
4. **Pleadings: Demurrer.** The right to amend a petition after the sustaining of a demurrer is not absolute, and an application to amend is addressed to the sound discretion of the trial court. Before error can be predicated upon the refusal of the trial court to permit an amendment, the record must show that the ruling of the trial court was an abuse of discretion.
5. **Subrogation.** The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest or right of the one making the payment. Subrogation is never awarded to one who is merely a volunteer in paying the debt of one person to another.
6. **Pleadings: Demurrer: Judgments.** It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded.

Thomas F. Hoarty, Jr., of Fraser, Stryker, Veach, Vaughn & Meusey, for appellant.

Pilcher, Howard & Dustin, for appellees.

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

BRODKEY, J.

This is an appeal from a District Court judgment sustaining a demurrer in an action on a contract and

a surety bond on the ground that the plaintiff did not allege facts sufficient to constitute a cause of action against one of the defendants, the surety. Plaintiff has appealed, contending that the District Court erred in sustaining the demurrer and in refusing to allow plaintiff leave to amend its petition. We reverse and remand for further proceedings.

Cagle, Inc., the plaintiff and appellant herein, filed a petition in the District Court for Douglas County on February 4, 1976, alleging that it, as a general contractor, entered into a subcontract with Jerry L. Sammons on August 21, 1975, under the terms of which Sammons was to complete drywall construction on a housing project. The petition alleged that Sammons furnished a performance bond, guaranteeing payment for labor and materials utilized by him in fulfilling the subcontract, and that the bond obligated Sammons and United States Fidelity & Guaranty Company (USF&G), the defendants and appellees herein, to make payments to claimants, as defined in the bond, for labor and materials used in performance of the subcontract. The subcontract and bond were attached to and made a part of the petition.

The petition further alleged that Sammons failed and refused to perform a substantial part of the work required by the subcontract; failed to pay costs and expenses incurred in performance of the subcontract for labor and materials; and failed to pay costs and expenses for labor and materials needed to complete his obligations following his withdrawal from the project. Cagle alleged that USF&G failed and refused to reimburse plaintiff as a claimant, as defined in the bond, for "costs and expenses for labor and material which Plaintiff has paid, or become obligated to pay" as a result of the breach of the subcontract and bond by Sammons. Cagle prayed for a judgment of $44,337.16, jointly and severally, against Sammons and USF&G.

On March 5, 1976, USF&G demurred to the petition on the ground that it failed to state facts constituting a cause of action against USF&G. Hearing was had on the demurrer of USF&G, and on June 29, 1976, the trial court sustained the demurrer. In its order, the trial court stated: "The court finds as a matter of law that plaintiff does not qualify as a 'claimant' under the bond as set forth in the petition, and, accordingly, that the demurrer should be sustained. The court further finds by reason thereof that no amendment of the petition in an action on the bond against said defendant would correct the deficiency or state a cause of action, and that the action should therefore be dismissed as against United States Fidelity and Guaranty Company." Cagle's motion for rehearing and new trial was overruled, and it has now appealed to this court, contending that the District Court erred in sustaining the demurrer, in dismissing the action against USF&G, and in refusing to allow Cagle leave to amend its petition.

A general demurrer such as the one in this case "tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover." Lee v. Brodbeck, 196 Neb. 393, 243 N. W. 2d 331 (1976). A demurrer reaches an instrument filed with the petition and made a part thereof. Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75 (1961). Therefore, it was appropriate for the trial court to refer to the surety bond, which plaintiff attached to and made a part of its petition, in determining whether the petition stated a cause of action against USF&G.

The bond was a "Subcontract Labor and Material Bond," and was executed by Sammons as principal and USF&G as surety. The obligee under the bond

was Red Oak Housing Agency, which was the owner of the construction project involved in this case. USF&G agreed under the bond to bind itself to the obligee "for the use and benefit of claimants as hereinbelow defined, in the amount" of $24,000. The bond defined "claimant" as follows: "A claimant is defined as one having a direct contract with the Principal for labor, material, or both, used or reasonably required for use in the performance of the contract, * * *." The bond provided that the principal and surety agreed that every claimant "may sue on this bond for the use of such claimant." The trial court found as a matter of law that the plaintiff, under the facts alleged in its petition, did not qualify as a claimant under the bond.

Cagle contends that it does qualify as a claimant under the bond because it had a direct contract with Sammons for labor or material, or both, as required in the definition of "claimant" set forth in the bond. Cagle relies on a provision in the subcontract, which was made a part of the bond by reference, providing that in the event of Sammons' default on the subcontract, Cagle was entitled to take over the subcontract and complete the same, and to charge the cost thereof to Sammons. We do not find this argument persuasive.

Generally speaking, contractors' bonds are of two types: Performance bonds, and labor and material payment bonds. "A performance bond gurantees that the contractor will perform the contract, and usually provides that if the contractor defaults and fails to complete the contract, the surety can itself complete the contract or pay damages up to the limit of the bond. A labor and material payment bond guarantees the owner that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults." 17 Am. Jur. 2d, Contractors' Bonds, § 1, p. 192. A relevant case recognizing this distinction

is Standard Accident Ins. Co. of Detroit v. Rose, 314 Ky. 233, 234 S. W. 2d 728 (1950). In that case, the court had to construe a bond which had provisions almost exactly like those in the bond in this case. The court found that the provisions of the bond meant that the surety would guarantee that all bills for labor or materials contributed for and used by the contractor would be paid by the surety if the contractor defaulted. The court rejected the argument that the bond covered all labor and materials used in completion of the building contract after the contractor defaulted, finding that the bond covered only labor and materials provided to the contractor while he was on the job.

The bond in this case is a labor and material bond, and not a general performance bond. The bond is in no way ambiguous, and USF&G bound itself only to pay persons having a direct contract with Sammons for labor or materials used or reasonably required for use in the performance of the subcontract. The general rule is that the "surety is bound in the manner and to the extent provided in the obligation." School District No. 65R of Lincoln County v. Universal Surety Co., 178 Neb. 746, 135 N. W. 2d 232 (1965). See, also, W. T. Rawleigh Co. v. Smith, 142 Neb. 527, 7 N. W. 2d 80 (1942).

In this case Cagle did not state facts in its petition sufficient to state a cause of action against USF&G as a claimant under the bond. The subcontract provision permitting Cagle to take over the subcontract on Sammons' default and to charge the cost to Sammons does not make Cagle a claimant as defined in the bond, for in such a situation Cagle would have no direct contract with Sammons to provide labor or materials to Sammons. Therefore it was proper for the District Court to sustain the demurrer on the ground that the facts, as alleged in the petition, did not state a cause of action against USF&G. Cagle did not allege that it had a direct contract with Sam-

mons to provide labor or materials to Sammons, and the fact that Cagle could take over the subcontract on Sammons' default does not bring Cagle within the definition of a claimant as set forth in the bond.

The sustaining of a demurrer, however, does not bring the action to an end. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971). Section 25-854, R. R. S. 1943, provides that if "the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct." The right to amend is not absolute, and an application to amend is addressed to the sound discretion of the trial court. Before error can be predicated upon the refusal of the trial court to permit an amendment, the record must show that the ruling of the court was an abuse of discretion. Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871 (1963). In the present case, when the trial court sustained the demurrer, it found no amendment of the petition would correct its deficiency or state a cause of action, and dismissed the petition.

Cagle contends that it should have been permitted to amend its petition because it can allege facts which will permit recovery on the bond under the doctrine of subrogation. USF&G contends that subrogation is not available to Cagle. The parties agree that any person providing labor or materials to Sammons under a direct contract could sue on the bond. At issue is whether Cagle can be subrogated to the claims of persons who provided Sammons labor or materials, and whom Cagle paid after Sammons withdrew from the job. We note that Cagle did allege in its petition that USF&G had refused to reimburse it for "costs and expenses for labor and material which Plaintiff has paid, or become obligated to pay." Although this allegation is not specific, it could very well include payment to persons

who provided Sammons materials or labor before Sammons withdrew from the job.

"The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability." Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N. W. 2d 64 (1962). The doctrine applies where a party is compelled to pay the debt of a third person to protect his own rights or interest, or to save his own property. Luikart v. Buck, 131 Neb. 866, 270 N. W. 495 (1936); 73 Am. Jur. 2d, Subrogation, § 11, p. 605. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable. Rapp v. Rapp, 173 Neb. 136, 112 N. W. 2d 777 (1962); Jones v. Rhodes, 162 Neb. 169, 75 N. W. 2d 616 (1956); Equitable Life Assurance Society of the United States v. Person, 135 Neb. 800, 284 N. W. 260 (1939).

It is well settled, however, that subrogation is never awarded in equity to one who is merely a volunteer in paying the debt of one person to another. Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50 (1904); 73 Am. Jur. 2d, Subrogation, § 23, p. 612. A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect. Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc., 171 Neb. 681, 107 N. W. 2d 542 (1961); Scandinavian Mut. Ins.

Co. v. Chicago B. & Q. R. R. Co., 104 Neb. 258, 177 N. W. 178 (1920). Ordinarily one seeking subrogation must plead it and set forth the facts out of which the right of subrogation arises. 73 Am. Jur. 2d, Subrogation, § 140, p. 689.

USF&G contends that the doctrine of subrogation is not available to Cagle in this case because Cagle was a volunteer if it paid persons who supplied labor or materials to Sammons before Sammons withdrew from the job. The record, at this point, does not support such a conclusion. The issue raised is whether Cagle, if it did make payments to persons who supplied labor or materials to Sammons, made such payments for the protection of its own rights or interest. Luikart v. Buck, *supra*. As a general contractor in a position where its subcontractor had withdrawn from the job, Cagle may well have had to make such payments to protect its own interests in the project, to enable itself to complete its contract with the owner, or to prevent liens from being filed on the property. This court has previously held that persons may be subrogated to the rights of materialmen in situations analogous to the one allegedly presented in this case. See Karel v. Basta, 103 Neb. 191, 170 N. W. 891 (1919).

We conclude that it may well be possible for Cagle to state a cause of action on the bond under the doctrine of subrogation if it limits its claim to the value of payments it made to persons who supplied labor or materials to Sammons under a direct contract before Sammons withdrew from the job. Although Cagle's petition as filed did not state such a cause of action due to Cagle's misinterpretation of the bond as a performance bond rather than a labor and materials bond, it should be given an opportunity to amend its petition and plead subrogation and the facts out of which the alleged right of subrogation arises. We note that USF&G complains that Cagle tendered no proposed amendment in connection with

its request to amend; however, in light of the trial court's finding that no amendment could state a cause of action, we agree with Cagle that the tendering of an amendment would have been a futile and useless gesture. The trial court erred in finding that no amendment of the petition would state a cause of action. It "generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint." 61 Am. Jur. 2d, Pleading, § 285, p. 695. We feel the ends of justice will be served in this case by permitting plaintiff to amend its petition. Therefore we reverse the judgment and remand the cause to the District Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The plaintiff's theory was that it was entitled to recover on the bond because the subcontract with Sammons was a "direct contract" with Sammons. The coverage on the bond was limited to laborers or materialmen who had direct contracts with Sammons.

In my opinion the judgment should have been affirmed.

IN RE INTERESTS OF TINA MARIE BAILEY ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JULIA ANN BAILEY ET AL., APPELLANTS.

254 N. W. 2d 404

Filed June 8, 1977. No. 40991.

1. **Parent and Child: Infants.** The natural right of parents to the custody of their children is not inalienable but is subject to the public obligation to protect and preserve the best interests of such children.
2. **Juvenile Courts: Appeal and Error.** Appeals from the Separate

Juvenile Court in cases brought under Chapter 43, article 2, R. R. S. 1943, are heard de novo upon the record, with weight given to the findings of fact because the Juvenile Court heard and observed the witnesses.

3. **Juvenile Courts: Evidence.** The Juvenile Court is presumed to disregard irrelevant evidence and the admission of irrelevant evidence is not prejudicial.

4. _____: _____. The strict rules of evidence shall not be applied at any dispositional hearing. § 43-206.03(4), R. S. Supp., 1976. The trial court will exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence at such hearings; and its exercise of discretion will be upheld on appeal unless an abuse of discretion is shown.

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

John F. Thomas and Joseph S. Daly of Emil Sodoro Law Offices, and Wesley E. Hauptman, for appellants.

Donald L. Knowles and Francis T. Belsky, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from an order of the Separate Juvenile Court of Douglas County, Nebraska, terminating the parental rights of Orlo Andrew and Julia Ann Bailey, the appellants, in their three children, Tina, Patricia, and Orlo Duane Bailey.

The jurisdiction of the court was invoked by a petition by the county attorney, alleging that the appellants were unfit parents upon various statutory grounds and praying for the termination of their parental rights. The court made an adjudication, finding it had jurisdiction and that the children were dependent and neglected. §§ 43-202(2) and 43-209 (2), (3), and (4), R. S. Supp., 1976. At a later disposition hearing, it was ordered that the parental rights be terminated. The appellants appeal, assigning error

in that the judgment is not supported by the evidence and is contrary to law, and that the trial court admitted improper evidence. We affirm the judgment of the court.

At the adjudication hearing, the appellants were shown to be the parents of Tina, born December 23, 1973, Patricia, born October 5, 1974, and Orlo Duane, born August 26, 1975. After the appellants moved to Douglas County, Nebraska, they made application for assistance from various agencies that provided assistance to needy families. The assistance they requested was supplied. The father's employment was occasional and sporadic, at least partly on account of his use of alcohol. For this reason, the family was inspected and investigated frequently and many witnesses became familiar with their situation. The witness Kreader, of the Douglas County child protective services, testified that he had been in contact with the family from 200 to 250 times, either by personal visits or by telephone; that he had visited the family at each of the three residences they had occupied in Omaha, Nebraska; that he had observed each household to be consistently in a filthy condition and, at various times, to be littered with beer cans, exposed food, and children's clothing soiled with dirt, urine, and fecal matter; that the child, Tina, was frequently clad in dirty clothing and that her body was unwashed; that the child, Orlo Duane, was not wearing his medically prescribed orthopedic harness; that knives and other items potentially dangerous for children to handle were lying around within reach of the children; and that the father was drinking beer on many occasions. Other welfare workers, home cleaners, a visiting nurse, and police officers testified to the same general effect. The appellants made no significant denials of this testimony.

At the adjudication hearing, exhibit B, a copy of a letter, a neglect petition, and an order from Tomp-

kins County, New York, was offered in evidence by the State. The court overruled objections and received the exhibit into evidence. Obviously, the exhibit did not relate to the issue of the neglect of the children in Douglas County, Nebraska, and it was irrelevant at least until the disposition hearing. The Juvenile Court, however, is presumed to disregard irrelevant evidence in making the adjudication and the receipt of the exhibit was not prejudicially erroneous. State v. Miller, 189 Neb. 383, 203 N. W. 2d 97.

The right of a parent to retain the custody of children is a natural but not an inalienable right; the public has a paramount obligation to preserve and to protect the best interests of the children. Rejda v. Rejda, *ante* p. 465, 253 N. W. 2d 295; State v. Tibbs 197 Neb. 236, 248 N. W. 2d 330. It is clear from the record, and virtually undisputed, that the appellants were unable or unwilling to recognize and to discharge their parental responsibilities over a substantial period of time even with appropriate consultation, assistance, and advice. The Juvenile Court properly found that it had been established by a preponderance of the evidence that the appellants had substantially and continuously or repeatedly neglected the children and had refused to give the children necessary parental care and protection, thus bringing them within the terms of section 43-209 (2), R. S. Supp., 1976.

The appeal in this case is heard de novo upon the record; this court will give weight to the findings of fact made by the trial court because it heard and observed the parties and the witnesses. Grant v. Doeschot, 189 Neb. 121, 201 N. W. 2d 252; State v. Tibbs, *supra;* State v. A. H., *ante* p. 444, 253 N. W. 2d 283. A review of the entire record shows ample support for the findings of fact and the adjudication by the Juvenile Court.

At the dispositional hearing, the trial court re-

ceived and considered not only exhibit B previously mentioned, but also a joint report by the probation officer, child protective caseworker, and foster care caseworker, which included reports from public agencies concerning the appellants during the periods of their residence in New York and Michigan, all over the objection of the appellants. The court also received and considered medical and psychiatric reports and evaluations of the appellants. Appellants urge that their objections should have been sustained and that the exhibits should not have been received or considered. Section 43-206.03(4), R. S. Supp., 1976, provides that strict rules of evidence shall not be applied at any dispositional hearing. Under such a statute, the Juvenile Court may exercise a sound discretion in respect to determining the relevancy, competency, and admissibility of testimony to be considered at a dispositional hearing. We find no abuse of discretion by the Juvenile Court. The record shows that the finding of the court that the best interests of the children required the termination of parental rights of the appellants was fully supported by the evidence and was proper. Rejda v. Rejda, *supra*.

The judgment of the Separate Juvenile Court both as to adjudication and disposition of this action is correct and is affirmed.

AFFIRMED.

HOWARD KRAMBECK ET AL., APPELLANTS AND CROSS-APPELLEES, V. CITY OF GRETNA, APPELLEE AND CROSS-APPELLANT.

254 N. W. 2d 691

Filed June 8, 1977. No. 40997.

1. **Statutes: Condemnation: Property: Damages.** Under section 76-705, R. R. S. 1943, if any condemner shall have taken or damaged property for public use without instituting condemnation pro-

ceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

2. **Statutes: Contracts: Limitations of Actions.** Section 25-206, R. R. S. 1943, provides that an action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within 4 years.
3. **Statutes: Equity: Limitations of Actions.** Section 25-202, R. R. S. 1943, provides that an action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within 10 years after the cause of action shall have accrued.
4. **Condemnation: Property: Damages.** Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the taken property, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken.
5. **Condemnation: Eminent Domain: Damages: Limitations of Actions.** Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for 10 years, the requisite period to establish title by prescription.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded.

Peterson, Bowman, Coffman & Larsen, for appellants.

Hosford & Hosford, for appellee.

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

WHITE, C. J.

This case involves an inverse condemnation pro-

ceeding brought by the plaintiffs, Howard Krambeck and James Schram, owners of real estate in Sarpy County, Nebraska, against the defendant, City of Gretna. The plaintiffs alleged in their petition that the defendant appropriated certain of the plaintiffs' land to public use by causing effluent from a sewerage treatment plant to flow across the plaintiffs' land.

Following the filing of the plaintiffs' petition, the county court of Sarpy County appointed three freeholders of the county to serve as appraisers in the case. The appraisers viewed the plaintiffs' land and held a hearing for all interested parties. On July 11, 1975, the appraisers filed their report with the county court, assessing damages suffered by the plaintiffs at $30,000.

The defendant appealed the determination of the appraisers to the District Court. The plaintiffs filed a motion to dismiss the appeal, a petition on appeal, and an amended petition. The amended petition alleged the date of the original taking to be September 12, 1967. Thereafter the defendant filed a demurrer, alleging that the plaintiffs' cause of action was barred by the statute of limitations. On July 12, 1976, the District Court entered an order finding that the applicable statute of limitations on an action of condemnation, when instituted by a condemnee was a period of 4 years and sustained the demurrer. Plaintiffs were granted leave to amend their petition, but elected to stand on it, and the petition was dismissed. This appeal followed. We reverse the judgment of the District Court.

The factual background of this litigation is as follows: The plaintiffs are owners as tenants in common of land located approximately 1½ miles west of the City of Gretna, Nebraska. A depression runs across their land in approximately an east-west direction. At the west edge of the City of Gretna, a new sewerage plant was constructed and went into

operation after September 1967. This plant discharges treated effluent from a concrete culvert approximately 300 yards west of the treatment plant into the depression which crosses the plaintiffs' land. The plaintiffs contended that after September 1967, there was a continuous flow through the depression resulting in substantial erosion. In addition, there have been times when untreated sewage has been discharged, causing nauseous and offensive odors in the vicinity of the plaintiffs' land.

The plaintiffs' action was brought under section 76-705, R. R. S. 1943, which provides: "If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined."

The sole issue on appeal is a determination of the applicable statute of limitations to an inverse condemnation proceeding. The eminent domain statutes, sections 76-701 et seq., R. R. S. 1943, do not provide a special statute of limitations. "Where the statute provides a remedy and fixes the time within which the owner must move, a failure to move within such period is ordinarily a complete defense. In the absence of special statutory provisions regulating the time within which an owner must pursue his remedy, the time prescribed by the general statutes of limitations will ordinarily apply * * *." 30 C. J. S., Eminent Domain, § 415, p. 528.

The plaintiffs contend that the applicable statute of limitations is the 10-year period found in section 25-202, R. R. S. 1943, and that it was error for the District Court to sustain the defendant's demurrer. The defendant contends that the 4-year statute of limitations found in section 25-206, R. R. S. 1943, is applicable and that plaintiffs' claim for damages

was thus barred and the demurrer properly sustained by the District Court.

Section 25-206, R. R. S. 1943, provides: "An action upon a contract, not in writing, expressed or implied, or *an action upon a liability created by statute,* other than a forfeiture or penalty, can only be brought within four years." (Emphasis supplied.) The defendant draws our attention specifically to the emphasized language.

Article I, section 21, of the Constitution of the State of Nebraska, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision is the basis of the plaintiffs' cause of action against the defendant. The defendant's liability is not a statutorily created one, but a constitutional one. See Deitloff v. City of Norfolk, 183 Neb. 648, 163 N. W. 2d 586 (1968). The eminent domain statutes, sections 76-701 et seq., R. R. S. 1943, are procedural and themselves create no substantive liabilities.

The defendant argues that as a result of the plaintiffs having brought this action, it has incurred "liability created by statute" in that, as the condemner in the inverse condemnation proceeding it is required to pay various costs of the action, e.g., appraisers' fees (§ 76-723, R. R. S. 1943), and court costs on any appeal by a condemner (§ 76-720, R. R. S. 1943). These costs, it contends, are liabilities created by statute and thus section 25-206, R. R. S. 1943, by its terms is applicable. The costs required of a condemner under the provisions of section 76-720, R. R. S. 1943, are totally irrelevant to a determination of the applicable statute of limitations for an inverse condemnation action. While from the defendant's viewpoint these are liabilities incurred as a result of the statutory provisions, they are not liabilities created by statute as contemplated by section 25-202, R. R. S. 1943. This contention is without merit.

Section 25-202, R. R. S. 1943, in relevant part provides: "An action for the recovery of the title or possession of lands, tenements of hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued."

In Dawson County Irr. Co. v. Stuart, 142 Neb. 428, 6 N. W. 2d 602, on rehearing, 142 Neb. 435, 8 N. W. 2d 507 (1942), plaintiff, a public body, brought an action in equity against the defendants, private landowners, to quiet title to an easement across defendants' land upon which an irrigation ditch had been constructed. Defendants denied the right of plaintiff to the easement and sought damages. The trial court quieted title to the easement in plaintiff and awarded damages to the defendants. On appeal, plaintiff claimed that the statute of limitations barred defendants' right to damages. Plaintiff contended that it had obtained a prescriptive right to the easement by adverse possession for 10 years or more. This court, on appeal, reversed the award by the trial court of damages to the defendants, finding that plaintiff had obtained prescriptive rights to the easement. On rehearing, this court vacated its first opinion and affirmed the decision of the trial court. This court found, on rehearing, that there was no evidence in the record to support plaintiff's claim of prescriptive title. This court also found that the trial court's decree, quieting title in plaintiff, was not based on a prescriptive right, but on the theory of equitable enforcement of the statutory condemnation law. We held: "Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is just as if con-

demnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for ten years, the requisite period to establish title by prescription."

Eminent domain is defined generally as the power of the nation or a state, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner's consent, conditioned upon the payment of just compensation. 26 Am. Jur. 2d, Eminent Domain, § 1, p. 638. " 'Inverse condemnation' has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings." 27 Am. Jur. 2d, Eminent Domain, § 478, p. 411.

Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the property taken, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken.

We hold that the applicable statute of limitations for an inverse condemnation proceeding under section 76-705, R. R. S. 1943, is the 10-year period found in section 25-202, R. R. S. 1943. Once the condemner has obtained a prescriptive right to the interest taken, it can no longer be compelled via section 76-705, R. R. S. 1943, to pay damages.

Holding as we do, it follows that the plaintiffs' cause of action was not barred by the 4-year statute of limitations, and it was error to sustain the defendant's demurrer.

The defendant's cross-appeal is found to be without merit. What we have already said disposes of it and no further discussion is necessary.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

NANCY A. CASPER, APPELLEE, V. CHARLES T. CASPER, APPELLANT.

254 N. W. 2d 407

Filed June 8, 1977. No. 41029.

1. **Divorce: Incarceration: Parent and Child: Infants.** The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may only be exercised by visitation at the institution.
2. _____: _____: _____: _____. In the determination of custody and visitation matters, the primary concern is the best interests of the children.
3. **Divorce: Incarceration: Parent and Child: Infants: Courts.** In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Peter Toll Hoffman, for appellant.

Edna R. Atkins, for appellee.

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

WHITE, C. THOMAS, J.

The respondent Charles T. Casper appeals from the order of the District Court denying his application for an order requiring the petitioner Nancy A.

O'Tool, formerly Casper, to make available for transportation to the Nebraska Penal and Correctional Complex the five children of the parties, who range in age from 9 to 11½ years.

The respondent was convicted of murder in the commission of a robbery and is serving a life sentence in the complex. See State v. Casper, 192 Neb. 120, 219 N. W. 2d 226.

The parties were divorced after the defendant's conviction and sentence. In the decree of November 6, 1974, the court awarded custody of the minor children to the petitioner "subject to reasonable rights of visitation by the respondent."

The petitioner, in response to the respondent's application, requested the visitation rights of the respondent be terminated.

The trial court denied the applications of petitioner and respondent. The respondent appeals.

The respondent was incarcerated in the penal complex in December 1973 and shortly thereafter, in February 1974, his children began visiting him. The visits continued on a monthly or bimonthly basis until November 1975. The petitioner then refused to take the children to the penal complex and further refused to make them available to her mother who had been taking the children when the petitioner did not.

The respondent asserts here that the visitation privilege in the decree is meaningless unless his application is approved. There is no contention by the respondent that the petitioner should be responsible for the transportation of the children or the cost of such transportation.

The respondent contends that his incarceration is not an "exceptional circumstance" as would justify the denial of a right to visitation.

The petitioner and Ronald O'Tool were married on June 6, 1975. The children of the parties have since made their home with their mother and her hus-

band. The respondent is obviously unable to, and has not, contributed anything to the support of his children.

The petitioner here argues that the court did not terminate the respondent's visitation rights by limiting all visitation to the home of the petitioner and that such a requirement is reasonable. The requirement of visitation in a specified place, in the company of other persons, may indeed, in a given case, be reasonable, but each such case assumes a noncustodial parent free to travel to such place. The order effectively cuts off the respondent's visitation with his children until such time as the order might be modified or the children are old enough to provide their own means of transportation.

The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may be effectively exercised only by visitation at the institution. M__L__B__v. W__R__B__ (Mo. App., 1970), 457 S. W. 2d 465; Chadwick v. Chadwick, 275 Mich. 226, 266 N. W. 331.

In the determination of custody and visitation matters, the primary concern is the best interests of the children. § 42-364, R. S. Supp., 1976; Young v. Young, 195 Neb. 163, 237 N. W. 2d 135.

The question then is, simply, is it in the best interests of the children that they be allowed to visit the respondent in the penal complex?

In support of his application, the respondent offered the evidence of the petitioner's mother, Mrs. Orville Camden. Mrs. Camden, who frequently transported the children to the penal complex and remained with them during the visitation period, testified that the children seemed anxious to see their father, talked with him, and appeared not at all disturbed by the surroundings.

Tim Shea, a psychologist at the penal complex, in response to the question as to whether "there is anything in the environment of the visiting area of the

penitentiary that would unduly disturb or upset children visiting there?", testified: "No, nothing that I can think of. I think it is always difficult for children to be away from their parents and to be able to see their parents again * * *. I think it is very good for kids really." Mr. Shea was of the opinion that the visitation was of benefit to the children and not against their best interests. Mr. Shea testified as an expert and was not personally acquainted with the Casper children.

The petitioner testified that she met continuing resistance on the part of the two eldest children as the visitations progressed. Finally she was forced to tell them that they must accompany their grandmother whether they wished to do so or not. The two elder children expressed the same view in conversations with the trial judge.

The petitioner stated that after each visitation the children's attitude would deteriorate; and that the children expressed the view that they were not required to obey her or her new husband, and that their father, the respondent, would "fix that, so they wouldn't get any punishment." She also stated that after termination of the visits, their grades and attitudes improved. The petitioner offered the opinion as to why the respondent wants visitation continued: "Because I think in a way, he still thinks he is married to me and another reason is that he never cared for the kids in the beginning. There never was anything before the divorce, before he went to prison. He never had any time for me *or the kids.*" (Emphasis supplied.)

The petitioner further testified about her alienation with her mother: "She was too attached to my ex-husband" and, at least by inference, suggests that some of the problems of the children are to be attributed to her and the respondent.

The trial court, in denying the respondent's application, placed great weight on the difficulty inherent

in the establishment of the petitioner's new marriage, the pressure placed on the petitioner and her husband by the attitudes of the children after visitation, the petitioner's belief that her mother was contributing to those attitudes, and the court's feeling that the institutional setting was against the best interests of the children.

The trial court further indicated that the best interests of the children lay in the establishment of a stable home environment, free of unsettling influences, rather than in the continued disruptions the court felt were caused by the visitations. The trial court indicated that the visitations were of benefit to the respondent but not of value or in the best interests of the children.

In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. King v. King, 196 Neb. 289, 242 N. W. 2d 632.

The trial court's findings are supported by the record. We do not find an abuse of discretion in limiting the visitation rights. We do point out that as orders relating to custody and support are open to change on a proper showing of change of circumstances, so is the trial court's order limiting visitation.

AFFIRMED.

MARY HECK, APPELLANT, V. AMERICAN COMMUNITY STORES, APPELLEE.

254 N. W. 2d 410

Filed June 8, 1977. No. 41033.

1. **Inviter and Invitee: Torts: Negligence.** 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.

2. _____: _____: _____. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence.

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

J. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellant.

John A. Rickerson of Rickerson & Welch, for appellee.

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

MCCOWN, J.

This is an action for personal injuries which plaintiff sustained as the result of a fall in a parking lot outside the defendant's store. The jury returned a verdict for the plaintiff for $36,000. Defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The District Court sustained the motion for judgment notwithstanding the verdict and plaintiff has appealed.

At about 10 a.m., on the morning of July 5, 1973, the 54-year-old plaintiff, Mary Heck, and her husband drove to the defendant's store at 72nd and Dodge Streets in Omaha, Nebraska. The store faces Dodge Street to the south and the parking lot is between Dodge Street and the store. There is a 6 to 8 foot sidewalk along the south side of defendant's store. At the south edge of the sidewalk is a concrete incline 2.65 feet wide which slopes down approximately 5 inches at a 19 percent grade to the lower elevation of the parking lot. The incline has sandpaper strips in the area in front of the doors of the store. The parking stalls in the parking area immediately south of the incline each contain a con-

crete curb or wheel stop approximately 3 feet long and 5 inches high. The curb stops are held in place by steel bars 5/8's of an inch in diameter, one at each end. The curb stops are painted yellow and yellow diagonal stripes are painted on the incline every few feet.

Plaintiff and her husband parked their car in the southeast corner of the parking lot and walked into the store through the east door. They purchased groceries which were placed in one sack. Plaintiff, carrying the sack of groceries and her purse, followed her husband out the east door of the store, turned at an angle to the southeast to go directly to the car, walked across the sidewalk, and had taken one step on the incline when she fell forward. Her left knee struck the steel bolt or bar, which protruded 3/5's of an inch from the top of the first curb stop to the east of the east entrance to the store. Plaintiff shattered her kneecap which was later surgically removed.

The day was warm and dry and there was no water or artificial substance on the sidewalk or the incline. Plaintiff had shopped at the store at least once a week for approximately 5 years and was familiar with the area. After her fall, plaintiff saw "little pebbles and twigs and sandy stuff" on the incline or slope.

The case was submitted to the jury. The jury returned a verdict for the plaintiff for $36,000. The defendant moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The District Court sustained the motion for judgment notwithstanding the verdict and entered judgment for the defendant. Plaintiff has appealed asserting that the District Court erred in sustaining the motion for judgment notwithstanding the verdict.

The only specific allegation of defendant's negligence which was submitted to the jury was that defendant failed to provide for its customers a reason-

ably safe exit and exitway as required by the Omaha municipal building code in that the ramp or incline between the sidewalk and the parking lot had a slope of 19 percent in violation of the code. Various sections of the Omaha municipal building code were received into evidence over objection by the defendant. The code sections were adaptations of the National Building Code. The latest National Building Code was 1967, and the relevant sections provide: "601.1 b Exit way means the exit doorway or doorways, * * * together with connecting hallways or stairways, either interior or exterior, or horizontal exits, by means of which occupants may proceed safely from a room or space to a street or to an open space which provides safe access to a street. * * *."

Section 608 provides: "Ramps used in place of stairways shall be constructed and enclosed as required for the stairways displaced. Ramps used in exits (sic) ways shall have a slope not to exceed 1 foot in 10 feet and shall be provided with nonslip surfaces."

Plaintiff contends that the municipal building code provisions quoted, which require a 10 percent maximum slope, applied to the incline or slope involved here. The chief building inspector for the City of Omaha testified that the slope involved in this case was not in an exitway, and that the construction of the slope or incline here was not in violation of the building code. The District Court, in granting the motion for judgment notwithstanding the verdict, specifically found that the "evidence relative to the Omaha Building Code was not applicable to the slope in question in this case." We agree.

The issue then becomes one of whether the evidence was sufficient to go to the jury. Plaintiff argues that the presence of the protruding steel bar was sufficient evidence of negligence to take the case to the jury. The problem here is that there was a failure of proof as to the cause of plaintiff's fall

and a failure of proof that the steel bar had any causal connection. The plaintiff herself did not know how or why she fell.

In this case the plaintiff was familiar with the parking lot and the approaches to the store and had been for approximately 5 years. The slope or incline was not only known to her, but was open and obvious to anyone. 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., 194 Neb. 777, 235 N. W. 2d 864; Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578.

The owner of premises has a legal duty to exercise ordinary care to keep the premises reasonably safe for the use of a business invitee but is not an insurer of the safety of invitees. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence. Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868; Whitcomb v. State Fed. Sav. & Loan Assn., 190 Neb. 26, 205 N. W. 2d 652.

The action of the District Court in sustaining the motion for judgment notwithstanding the verdict was correct and is affirmed.

AFFIRMED.

ROBERT NASH, APPELLANT, V. CITY OF NORTH PLATTE, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

255 N. W. 2d 52

Filed June 8, 1977. No. 41035.

1. **Torts: Political Subdivisions: Negligence: Police Officers and Sheriffs.** The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, specifically excludes from its provi-

sions any claim arising in respect to the detention of goods or merchandise by any law enforcement officer. Such an exception does not and was not intended to bar actions based upon the negligent destruction, injury, or loss of goods in the possession of a political subdivision.

2. **Bailments: Negligence: Burden of Proof.** In an action for the bailee's failure to exercise required care whereby bailed property becomes lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury.
3. **Bailments: Negligence: Burden of Proof: Damages.** The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

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

Donald Rowlands, II, of Baskins & Rowlands, for appellee.

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

WHITE, C. THOMAS, J.

On October 14, 1974, the plaintiff Robert Nash was the owner of a 1962 Harley-Davidson motorcycle of the stipulated value, with engine, of $2,400. On that day a friend of the plaintiff was returning the motorcycle to Nash' home when he was stopped by a police officer of the defendant City of North Platte, Nebraska. The officer discovered that the operator did not have on his person a valid driver's license and was not possessed of a registration for the motorcycle. The officer checked with the National Crime Information Center and was informed by it by teletype that the serial number on the motorcycle en-

gine matched the number of an engine reported stolen in Tulsa, Oklahoma. The motorcycle was impounded by the officer and placed in a locked, fenced area in the City of North Platte, Nebraska.

On his return to North Platte, the plaintiff, an employee of the Union Pacific Railroad, went to the North Platte police department, secured details of the impoundment, and proved to the undisputed satisfaction of the North Platte police department that the motorcycle engine was purchased from a dealer in North Platte, and then installed on a motorcycle frame which had previously belonged to the plaintiff. The parties have conceded that the plaintiff was an innocent purchaser of the motorcycle engine. The motorcycle was retained in the possession of the North Platte police department at its impoundment area until January 3, 1975, when the impoundment area was broken into and the motorcycle stolen. The plaintiff filed a claim against the defendant City of North Platte under the Political Subdivisions Tort Claims Act and the claim was not acted on within the statutory period. He then filed the action for the value of the motorcycle and engine against the City of North Platte in the county court. The defendant City of North Platte, by way of answer, alleged first that the claim against the city was barred by the operation of the Political Subdivisions Tort Claims Act, specifically section 23-2409 (3), R. R. S. 1943. The provisions of this act shall not apply to: "(3) Any claim arising in respect to the assessment or collection of any tax or fee, *or the detention of any goods or merchandise by any law enforcement officer.*" (Emphasis supplied.) The defendant, by answer, further alleged that the police had exercised due care in the impounding and protection of the plaintiff's motorcycle. The county court in its judgment found that the action was barred by the above-quoted section and dismissed the plaintiff's action. The plaintiff appealed to the

District Court and the county court judgment was affirmed. The plaintiff appeals to this court. We reverse and remand.

The Political Subdivisions Tort Claims Act of Nebraska is modeled after the Federal Tort Claims Act. Section 23-2409, R. R. S. 1943, is similar to Title 28 U. S. C. A., § 2680(c), which excludes "any claim arising in respect of the assessment or collection of any tax or customs duty, *or the detention of any goods or merchandise* by any officer of customs or excise or any other law enforcement officer." (Emphasis supplied.)

In 2 Jayson, Handling Federal Tort Claims, c. 13, § 256.03, p. 9, the author discussed Alliance Assurance Co. v. United States, 252 F. 2d 529, and concluded the court "drew a distinction between (1) a claim based upon the *detention* of goods, which is barred by the clause; and (2) a claim based upon *injury to or loss of the goods* while being detained, which it held was not barred. The suit was brought for damages for the negligent loss of a case of English woolens which, while under inspection for entry into this country, mysteriously disappeared from the possession of United States Customs at an official government warehouse. * * *

"The government argued that the detention of goods exclusion of Section 2680 (c) covers not only a refusal to deliver goods admittedly in the possession of customs authorities but also a loss of goods formerly in their possession. The court, however, rejected this view in these words:

" 'In theory, at least, in order to detain, one must possess something to detain. The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities. An examination of the cases in which the exception was asserted re-

veals that it is normally used to bar actions based upon the illegal seizure of goods. * * * the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities * * *.' " We think the reasoning of the federal court is sound.

The detention of goods is defined: "The act of keeping back or withholding, either accidentally or by design, a person or thing." Black's Law Dictionary (4th Ed.), p. 536. We believe that the definition does fairly imply that the goods, whether seized illegally, or as in this case legally, were required to be, in the normal course of their detention, ultimately returned to the person properly entitled to their possession. We hold that the City of North Platte is not immune under the terms of the Political Subdivisions Tort Claims Act from liability for failure to return those goods seized and detained by it.

The rule, however, is not one of absolute liability on behalf of the city. As in other cases, in an action for the bailee's failure to exercise required care whereby bailed property has become lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury. Sankey v. Williamsen, 180 Neb. 714, 144 N. W. 2d 429. However, "loss or injury of bailed property while in the hands of the bailee ordinarily raises a presumption of negligence * * *. * * * generally, the effect of this * * * rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial." 8 C. J. S., Bailments, § 50, pp. 518, 522. The county court received evidence concerning the degree of care and the circumstances surrounding the impoundment. Neither the county court nor the District Court made a deter-

mination thereon. In each case the courts found that the City of North Platte was immune from suit.

We reverse the judgment and remand the cause to the District Court for a determination on the issue of whether the City of North Platte exercised the appropriate degree of care in the detention of the plaintiff's motorcycle.

REVERSED AND REMANDED.

IN RE APPLICATION OF LESLIE M. HUGELMAN, DOING BUSINESS AS M & L TRUCKING. LESLIE M. HUGELMAN, DOING BUSINESS AS M & L TRUCKING, LINCOLN, NEBRASKA, APPELLEE, V. A & A TRUCKING, INC., ET AL., APPELLEES, IMPLEADED WITH ROBERT L. WENTZ, DOING BUSINESS AS B & L TRUCKING CO., LINCOLN, NEBRASKA, ET AL., APPELLANTS.

254 N. W. 2d 412

Filed June 8, 1977. No. 41039.

1. **Public Service Commissions: Statutes: Motions, Rules, and Orders.** Where the issues before the Public Service Commission are issues of fact, and the order contains a statement of the basic or underlying facts together with the ultimate facts and the findings of the commission, the requirement of section 75-134, R. R. S. 1943, that the order contain a statement of the "reasoning" of the commission is satisfied.
2. **Public Service Commissions.** The issue of public convenience and necessity is ordinarily one of fact.
3. **Public Service Commissions: Evidence: Motions, Rules, and Orders.** Where there is substantial evidence to sustain the order of the Public Service Commission this court cannot say the order was unreasonable and arbitrary.
4. **Public Service Commissions: Motor Carriers: Administrative Law.** The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it.

Appeal from the Nebraska Public Service Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Bradford & Kistler, for appellants.

James E. Ryan, for appellee Hugelman.

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

BOSLAUGH, J.

This is an appeal from an order of the Public Service Commission granting a certificate of public convenience and necessity for the following authority to Leslie M. Hugelman, doing business as M & L Trucking: "SERVICE AUTHORIZED: Transportation of feed and feed ingredients, except in special equipment. TERRITORY AUTHORIZED: (1) From the plantsites and storage facilities of Ralston-Purina Co., at or near Omaha, Nebraska and Lincoln, Nebraska, to all points in the State of Nebraska. RESTRICTION: Restricted to traffic originating at the named origin points."

The Ralston Purina Company operates feed mills in both Omaha and Lincoln, Nebraska. The plants have no storage capacity for manufactured feed so the feed is loaded in trucks as it is manufactured. Trucks are scheduled for specific times so that the manufacturing process will not be delayed by the lack of holding facilities. Most of the feed is hauled from the plants by dealers. On the average there is less than one truckload per day to be hauled by commercial trucks.

On September 19, 1975, the applicant and Robert L. Wentz, doing business as B & L Trucking Co., obtained authority from the commission similar to that granted in this case. The relationship between the applicant and Wentz was terminated on January 30, 1977. Wentz agreed to buy the applicant's interest in the equipment, but the agreement contained no provision regarding the disposition of the certificate they had obtained in 1975. Only a part of the consideration due the applicant has been paid.

The protestants are Wentz, now operating as Wentz Trucking, Lincoln, Nebraska, and Nebraska

Bulk Transports, Inc., located at Bennet, Nebraska. The traffic manager for Ralston Purina testified that Ralston Purina attempted to use Wentz to haul feed from the plants but he was unable to meet its schedule. Ralston Purina then asked the applicant to haul for it and his services have been satisfactory. The applicant has been doing all the commercial hauling for both plants.

Nebraska Bulk Transports holds authority that would permit it to serve the Ralston Purina plants. It has solicited Ralston Purina in the past but has not obtained any business from it. Approximately 65 percent of Nebraska Bulk Transport's trucking service is dedicated to Archer-Daniels-Midland at Lincoln, Nebraska.

The protestants contend the order of the commission should be reversed because it did not contain the "reasoning or other authority" relied upon by the commission as required by section 75-134, R. R. S. 1943, and the evidence does not support the finding of public convenience and necessity.

The issues in this case were essentially issues of fact. The protestants concede that the commission's order did contain both a statement of basic or underlying facts and the ultimate facts as required by section 75-134, R. R. S. 1943. After summarizing the evidence which was presented at the hearing, the order states the findings made by the commission. This amounts to a statement of the "reasoning" of the commission in granting the application and is a substantial compliance with the requirements of section 75-134, R. R. S. 1943.

The issue of public convenience and necessity is ordinarily one of fact. Neylon v. Petersen & Petersen, Inc., 183 Neb. 813, 164 N. W. 2d 452. Where there is substantial evidence to sustain the commission's order this court cannot say the order was unreasonable and arbitrary.

The purpose of the Nebraska Motor Carrier Act

was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Ruan Transport Corp. v. Herman Bros., Inc., 192 Neb. 343, 220 N. W. 2d 245. There is no evidence that the authority granted in this case will impair or endanger the stability of existing carriers. The competitive situation will not be changed, at least at this time, because the applicant has been furnishing all the commercial service required by Ralston Purina.

The authority which was granted in this case is of a very restricted nature. It is a service which must be performed according to a schedule prescribed by the shipper but it amounts to less than one truckload per day. As we view the record, the order of the commission was not unreasonable or arbitrary and must be affirmed.

AFFIRMED.

MAYME FOWLER, APPELLEE, V. ELM CREEK STATE BANK, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RONALD E. BYCROFT ET AL, APPELLANTS.
CLYDE SMYTH, APPELLEE, V. ELM CREEK STATE BANK, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RONALD E. BYCROFT ET AL., APPELLANTS.
DUANE FRAZIER, APPELLEE, V. ELM CREEK STATE BANK, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RONALD E. BYCROFT ET AL., APPELLANTS.
ADOLPH JAHN, APPELLEE, V. ELM CREEK STATE BANK, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RONALD E. BYCROFT ET AL., APPELLANTS.
WILLIAM RILEY, BY DONALD ZWINK AS NEXT FRIEND, APPELLEE, V. ELM CREEK STATE BANK, A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH RONALD E. BYCROFT ET AL., APPELLANTS.

254 N. W. 2d 415

Filed June 8, 1977. Nos. 41044, 41045, 41046, 41047, 41048.

1. **Corporations: Banks and Banking: Officers and Directors.** Cor-

porate directors may not delegate their responsibilities and are not excused from liability because they committed some of their duties to an executive committee or to other individual directors.

2. _____: _____: _____. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known.
3. _____: _____: _____. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon.
4. **Corporations: Banks and Banking: Officers and Directors: Fraud.** Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.

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

Nye, Hervert & Jorgensen, Ross, Schroeder & Fritzler, and Richard J. Hove, for appellants.

Donald Loftus of Parker & Grossart, for appellees Fowler et al.

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

MCCOWN, J.

Each of the five plaintiffs in these cases was a purchaser of debentures issued by Midstate Insurance Agency and Management, Inc. In October 1974, each of the five plaintiffs commenced a separate action in the District Court for Buffalo County against Midstate, the Elm Creek State Bank, and the five individual defendants, who had been stockholders and directors of Midstate and Elm Creek State Bank, to recover for the losses sustained on the debentures, which had become worthless. The five cases were consolidated for the purposes of trial and appeal to this court.

Plaintiffs originally alleged three causes of action, one sounding in fraud, and the other two based on violation of the Nebraska Blue Sky Law. The two causes of action based on the Nebraska Blue Sky

Law were dismissed because the statute of limitations had run. Plaintiffs were permitted to amend their petitions by adding an additional cause of action alleging negligence on the part of the individual defendants in fulfilling their corporate duties, which resulted in the dissipation of assets which constituted a trust fund for the payment of plaintiffs as creditors of Midstate.

The Elm Creek State Bank was dismissed on motion of the Federal Deposit Insurance Corporation because the bank was in receivership and time for filing claims against it had passed.

Default judgment was entered against Midstate Insurance Agency and Management, Inc., for each plaintiff on the cause of action for fraud. Levies of execution on the default judgments were returned unsatisfied.

The case was tried to the court without a jury on the two causes of action, one for fraud, and the other for negligent mismanagement and dissipation of corporate assets. The District Court found in favor of each plaintiff and against all individual defendants on both causes of action and entered judgment for each plaintiff for the amount paid for the debentures, plus interest. The individual defendants have appealed.

In 1967, Midstate Insurance Agency and Management, Inc., was organized by Ronald E. Bycroft and Henry G. Bycroft, two of the five individual defendants, as a holding company to purchase the Elm Creek State Bank. The bank was purchased in 1967. The principal asset of Midstate at all times relevent here was the Elm Creek State Bank. The bank stock represented approximately 80 percent of the assets of Midstate, and Midstate owned approximately 80 percent of all issued shares of stock of Elm Creek State Bank. Midstate's main revenue was from management fees paid to it by the Elm Creek State Bank, from which funds Midstate paid

the bank officers and directors their salaries. Other revenue was earned from insurance and real estate commissions. Midstate had an income of $5,891 in 1969, slightly less in 1970, and thereafter had losses of $8,449 in 1971, and $406 in 1972. The Midstate records show no dividend income ever received by Midstate from the Elm Creek State Bank stock.

In 1970 and thereafter the five individual defendants were the shareholders and directors, or acting directors, of both the Elm Creek State Bank and Midstate. There are no records in evidence of any directors' meetings of Midstate. The limited records and the testimony show that all business of Midstate was conducted by the shareholders, acting as a board of directors. Shareholders' meetings of Midstate and shareholders' and directors' meetings of the Elm Creek State Bank were, on occasions, held on the same day in the same place. The District Court found that there was no evidence of a board of directors of Midstate, but that the five individual defendants "held themselves forth as stockholders of a corporation and in addition assumed the responsibilities of a board of directors." The trial court also found that as early as 1968 the Elm Creek State Bank and Midstate were treated as one organization.

The Elm Creek State Bank had not been subject to criticism by the Department of Banking before its stock was acquired by Midstate in 1967. From that time on the bank was criticized on each report of examination by the department until the bank was closed by the department and F.D.I.C. in April 1973. The report of examination of the bank's condition as of April 14, 1969, showed the adjusted ratio of capital to assets substantially below average and a very limited amount of earnings. By 1970 the state examination showed that the capital account had declined to a ratio of 5.7 percent as against a minimum 9 percent guideline figure set by the department.

The Department of Banking reported to the directors of the bank that the adjusted capital account, as compared to adjusted gross assets, was substantially less than the generally accepted standard for that size bank. The 1970 report also showed that loans subject to adverse comment comprised 6.2 percent of the loan volume. Delinquent loans represented 7.9 percent of total loans, while delinquent loans in other banks of that size averaged approximately 2 percent.

In the spring of 1970 the bank had been deficient in its legal reserve requirements on five business days in violation of law. At the conclusion of the bank examination, the bank directors were made aware of the results of the examination by the examiner, and the directors assured him that they would put an additional $50,000 of new money into the capital account of the bank. On June 9, 1970, the board voted to inject $50,000 of new capital before December 31, 1970.

On July 14, 1970, approximately a month later, the same five individual defendants, acting as the shareholders of Midstate, voted to issue up to $200,000 in 5-year debentures maturing July 15, 1975, and bearing 8 percent interest payable January 15 and July 15 of each year. Although the written record of the meeting contains no additional details, the testimony was that each of the five defendant shareholders of Midstate was empowered to sell the debentures for Midstate. In 1970, $25,000 in debentures were sold to William Riley, $5,000 to Mayme Fowler, and $10,000 to Adolph Jahn. In 1971, Adolph Jahn purchased an additional $20,000, Clyde Smyth purchased $20,000, and Duane Frazier purchased $15,000. The final $5,000 in debentures involved here was purchased by Adolph Jahn in November of 1972.

Meanwhile the financial condition of the Elm Creek State Bank continued to be criticized by the banking department for inadequacies of capitaliza-

tion, loan policies, and statutory violations. The 1971 examination showed loans subject to criticism constituted 14.7 percent of total loans, more than double the 1970 percentage, and delinquent loans had increased to 9.2 percent of total loans. The Department of Banking held a meeting with the board of directors following the examination and discussed the conditions existing and the need for corrective action. By the time of the 1972 examination the situation was still worse. Statutory violations included credit extensions to the defendant Ronald E. Bycroft above maximum allowable limits. Loans subject to adverse comment had increased to 15.5 percent of total loans, and in spite of a substantial capital infusion in December 1970, the capital to assets ratio had dropped to 7 percent.

During the same time frame, funds obtained from the sale of the Midstate debentures to plaintiffs and others were being used to alter the apparent financial condition of the bank. In December 1970, Midstate bought 395 shares of the bank stock for $39,500. In February 1971, Midstate bought two notes from the bank which had been severely criticized by the Department of Banking and adversely classified in the examination reports. The two notes, which had a face value of $50,000, were bought for $35,000, and Midstate then wrote the notes off as losses. Debenture funds were also used to pay a note to U. S. National Bank of Omaha for funds initially used to purchase the Elm Creek State Bank. Funds were also used to make a direct deposit to the bank reserve for losses, to purchase other notes from the bank, and to pay the salaries of bank officers.

On April 5, 1973, the Elm Creek State Bank was closed by the Department of Banking and the Federal Deposit Insurance Corporation. Plaintiffs had received interest on their debentures through January 15, 1973, but after the bank closing they received no further payments of interest or prin-

cipal, and these actions were begun in October 1974.

The sales of debentures to the plaintiffs were made by defendants Ronald E. Bycroft or Thomas H. Neill. In the sales to all but one of the plaintiffs the defendants Bycroft and Neill represented, among other things, that the debentures were a sound investment; that both the Elm Creek State Bank and Midstate were behind the debentures; and that the bank was a good sound bank, or was making money, or was a good solid bank. In at least one sale plaintiff's check to pay for the debentures was made payable to the Elm Creek State Bank. In the case of the plaintiff William Riley, the testimony was that Riley was not competent to manage his own affairs, and that the defendant Ronald E. Bycroft was aware of that fact. There was no testimony as to the specific representations made to Riley, who appears as plaintiff in this case by his next friend.

At the conclusion of the trial the District Court found in favor of each plaintiff and against all individual defendants on both causes of action and entered judgment accordingly.

The five appealing individual defendants contend that the evidence was insufficient to sustain the judgments against them. The basic arguments are that there was insufficient evidence that fraudulent or knowing misrepresentations were made, and that representations made by defendants Ronald E. Bycroft and Thomas H. Neill were not authorized by the remaining three defendants, who did not actively participate in the sale of the debentures. The defendants also assert that the evidence was insufficient to authorize the piercing of the corporate veil and the imposition of liability on the individual defendants for actions taken by the corporation.

The evidence establishes without any serious question that all the individual defendants were, or

should have been, fully aware of the deteriorating financial condition of the Elm Creek State Bank. They knew, or should have known, that the issuance of the debentures by Midstate was for the purpose of attempting to bolster the deficient financial condition of the bank and to satisfy the direct criticisms of the Department of Banking. Each of them knew, or should have known, that facts would have to be concealed or misrepresented in order to sell the debentures. The record reflects that the five indivi-ual defendants either officially held or actively assumed the responsibilities of the board of directors of both Midstate and the bank, and that at the Midstate meeting at which the debentures were authorized each of the five individual defendants was empowered and authorized to sell the debentures. If the directors chose to delegate their responsibilities to each other as individuals they are no more excused from liability than if they committed their duties to an executive committee. The fact that only two of the individual defendants made the misrepresentations of fact and sold the debentures to the plaintiffs does not excuse the other defendants here.

We believe this case is controlled by the case of Ashby v. Peters, 128 Neb. 338, 258 N. W. 639. In that case we held that directors may not delegate their responsibility and are not excused from liability because they committed some of their duties to an executive committee or to the directors of a wholly owned subsidiary of the corporation. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon.

We specifically held in Ashby that where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities. See, also, Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479.

In the case now before us the District Court specifically found that the individual defendants held themselves forth to be stockholders of Midstate and assumed the responsibilities of a board of directors, and that the activities of the individual defendants as "stockholders" was so flagrantly fraudulent that any corporate structure must be disregarded and the defendants held responsible in their individual capacities. Those findings are supported by evidence in the record.

The defendant Calkins contends that there is insufficient evidence that he was a director of Midstate and that he cannot be held responsible for the fraud of the corporation. The record shows, however, that Calkins was named a director on the 1974 occupational tax return for Midstate. It also shows that he wrote checks on Midstate's account, and that he was in charge of preparing the shareholder minutes of Midstate. The District Court was correct in finding that Calkins, as well as the other defendants, actively participated in the sale of debentures and the management of Midstate.

Defendants finally contend that the measure of damages was not proper. They argue that the measure of damages should be the difference between the value of the debentures if they had been as represented and their actual value at the time they were purchased. Cases relied upon by the defendants involve stocks rather than debentures. Stocks represent an equity or ownership interest in a corporation while debentures are evidences of debt, such as notes or bonds which are not equity nor ownership interests. United States v. Evans, 375 F. 2d 730. Defendants' assertion is without merit.

The trial court found for the plaintiffs and against the defendants on both the first cause of action for fraud and the fourth cause of action for negligent mismanagement and dissipation of corporate assets. The defendants have not challenged the judgments on the fourth cause of action except on the ground that the trial court erred in determining that Midstate had no corporate entity. In view of the preceding discussion and the posture of this case it is unnecessary to discuss the issues arising under the fourth cause of action.

The judgment of the District Court in each of the five cases was correct and is affirmed.

AFFIRMED.

THOMAS DALE MARTIN ET AL., APPELLANTS, V. WARD F. BAXTER ET AL., APPELLEES.

254 N. W. 2d 420

Filed June 8, 1977. No. 41049.

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

Charles H. Truelsen, for appellants.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, and William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellees.

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

CLINTON, J.

The question before us in this case is whether or not the plaintiffs, sellers, are entitled, as against the defendants, purchasers, to strict foreclosure of a land contract. The trial court refused strict foreclosure. We affirm.

The essential facts are these. On March 9, 1972, the plaintiffs Martin contracted in writing to sell a

farm to the defendant Baxter for the sum of $88,000 upon the following terms: $25,520 down and the balance in 10 equal installments of $6,248, together with annual interest of 7 percent. The contract contained the following provision: ". . . and in case of failure of the said buyer(s) to make any of the aforesaid payments provided for herein or the breach of any other covenant contained herein, this contract shall at the option of the seller(s), be forfeited and determined and the buyer(s) shall forfeit all payments made hereunder, and such payments shall be retained by the seller(s) as liquidated damages in full satisfaction of all the damages sustained, and seller(s) shall have the right to re-enter and take possession of said premises aforesaid.

"That this agreement shall not be assigned by buyer(s) without the written consent of the seller(s)."

On April 11, 1975, Baxter entered into a separate contract to sell the land to the defendants Hadley for the sum of $195,600 "subject to Seller's land contract" with the Martins. At that time all payments of principal and interest on the contract between Martins and Baxter were current with $44,264 of principal having been paid. Plaintiffs elected to declare a forfeiture and refused tender of payments thereafter. They rely upon a claimed breach of the contractual provision against assignment.

This case is governed by the principles announced in Riffey v. Schulke, 193 Neb. 317, 227 N. W. 2d 4.

AFFIRMED.

DIAL REALTY, INC., A CORPORATION, APPELLEE, V. CUDAHY COMPANY, A CORPORATION, APPELLANT.

254 N. W. 2d 421

Filed June 8, 1977. No. 41055.

1. **Property: Sales: Words and Phrases.** The term "sale" ordinar-

ily means a transmutation of property from one man to another in consideration of some price or recompense in value.

2. **Trial: Judgments.** In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Property: Sales.** Generally, where there is an arm's length exchange of properties, and one of the properties lacks a readily ascertainable value, it is presumed that the properties exchanged are equal in value.

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

Michael E. Loomis of Morsman, Fike, Davis & Polack, for appellant.

Mark L. Laughlin of Zweiback & Laughlin, for appellee.

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

WHITE, C. J.

This is an action brought by plaintiff, Dial Realty, Inc., against the defendant, Cudahy Company, to recover a commission allegedly due the plaintiff under the terms of an exclusive real estate listing agreement.

Prior to trial the plaintiff filed a motion for summary judgment. A hearing was held on the plaintiff's motion, at which defendant confessed on the issue of liability. Defendant thereafter filed a motion for partial summary judgment which was overruled. A jury trial was waived and the case tried to the court. On July 20, 1976, the District Court entered its order finding for the plaintiff and against the defendant and awarding the plaintiff a judgment against the defendant in the amount of $15,750 and costs. The defendant appeals. We affirm the judgment of the District Court.

The basic facts in this case are not disputed. The defendant was the owner of an abandoned office building in Omaha, Nebraska. On May 27, 1974, the

defendant entered into an exclusive real estate listing agreement listing this property with the plaintiff. The agreement covered the period of May 27, 1974, through November 27, 1974. Under the terms of the agreement, Cudahy agreed to pay the plaintiff a commission of 7 percent of the gross sale price.

On September 30, 1974, Cudahy conveyed the subject real estate to the Goldfield Corporation. The record shows that this was done pursuant to and as part of a settlement of certain litigation involving the Goldfield Corporation, General Host Corporation, and various third parties. The defendant is the wholly owned subsidiary of General Host Corporation, and the conveyance of the property by the defendant was done at the direction of General Host's corporate counsel.

The plaintiff contends that under the terms of the listing agreement it is entitled to the stated commission, because the conveyance of the subject real estate by the defendant to the Goldfield Corporation was a "sale" within the terms of the agreement. The defendant contends in this court that this conveyance was not a "sale"; that the plaintiff is not entitled to a commission; and that the District Court erred in awarding the plaintiff damages in the sum of $15,570.

The defendant confessed plaintiff's motion for summary judgment as to the issue of liability at the hearing thereon. The defendant is thus now foreclosed from disputing its liability to the plaintiff under the listing agreement having previously admitted to it.

However, even if the defendant had not admitted its liability, under the plain and unambiguous terms of the listing agreement, the defendant was clearly liable to the plaintiff. By the following terms of the listing agreement, the defendant obligated itself to pay the plaintiff the stated commission: "If a sale is made, or a purchaser found, who is ready, willing

and able to purchase the property before the expiration of this listing, by you, myself, or any other person, at the above price and terms or for any other price and terms I may agree to accept, or if this agreement is revoked or violated by me * * *."

The term "sale" ordinarily means a transmutation of property from one man to another in consideration of some price or recompense in value. Helvering v. Nebraska Bridge Supply & Lumber, 115 F. 2d 288 (8th Cir., 1940). "A sale of land, or of an interest therein, may be defined as a transmutation of such property from one person to another in consideration of a sum of money, or in consideration of some price or recompense in value." 91 C. J. S., Vendor & Purchaser, § 1c, p. 828.

Both the essential elements of a sale were present in this transaction. There was a conveyance of the subject real estate from the defendant to the Goldfield Corporation. A consideration was received in return. The Goldfield Corporation relinquished various claims it had against the defendant's parent corporation, General Host. The District Court specifically found that for the purposes of this action the interests of the defendant Cudahy and its parent, General Host, were one and the same and that a benefit to General Host was a benefit to the defendant. "In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong." Katleman v. U. S. Communities, Inc., 197 Neb. 443, 249 N. W. 2d 898 (1977). There was sufficient evidence to support this determination by the District Court.

There being a sale of the subject real estate by the defendant during the period in which the listing agreement was in effect, plaintiff thus became entitled to its commission. The agreed commission was 7 percent of the "gross sale price." Under these circumstances, the value of what was received

in return for the building, the relinquishment by the Goldfield Corporation of various claims against General Host, would constitute the "gross sale price" from which to figure the commission.

Where there is an arm's length exchange of properties, and one of the properties lacks a readily ascertainable value, it is presumed that the properties exchanged are equal in value. This approach is exemplified in United States v. Davis, 370 U. S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335 (1962), a case which involved the conveyance of property to a wife in return for a relinquishment of her marital rights. There the court stated: "Absent a readily ascertainable value it is accepted practice where property is exchanged to hold, as did the Court of Claims in Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184, 189, 130 Ct. Cl. 166, 172, (1954), that the values 'of the two properties exchanged in an arms-length transaction are either equal in fact, or are presumed to be equal * * *.' "

The District Court found the value of the Cudahy building at the time of its transfer, and thus the value of the claims relinquished by the Goldfield Corporation, the "gross sale price," to be $225,000 and computed the plaintiff's commission to be $15,750, which is 7 percent of $225,000.

Prior to relinquishment of its claims against General Host, the Goldfield Corporation obtained an appraisal of the defendant's property. According to this appraisal, the value of the defendant's property as of September 20, 1974, was $225,000. Daniel B. Kinnamon, attorney for the Goldfield Corporation, and its agent handling the transfer of this property, testified that he prepared the real estate transfer statement listing the total consideration as $225,000 and paid the documentary stamp tax based on that amount. The Goldfield Corporation was given credit by the defendant for $247.50, the amount of the Nebraska transfer tax, based on a total considera-

tion of $225,000. Mr. Kinnamon testified that he obtained title insurance in the amount of $225,000 for the property. The defendant agreed to pay the premium for this insurance. Introduced into evidence was an owner's lien certificate signed by the defendant's vice president, the purpose of which was to induce the Fidelity National Title Insurance Company to issue title insurance to the Goldfield Corporation in the amount of $225,000. The defendant offered another appraisal of the property which gave it a value of $76,000 as of September 20, 1974. The property was carried by the defendant on its books at $50,000.

There was ample evidence to support the District Court's determination of the amount of the commission due the plaintiff.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE KIRBY, APPELLANT.

254 N. W. 2d 424

Filed June 8, 1977. No. 41056.

Constitutional Law: Criminal Law: Right to Counsel. Under both the Constitution of Nebraska and the Constitution of the United States, a defendant in a criminal trial in this state has a right to proceed without counsel and represent himself if he voluntarily and intelligently elects to do so.

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

Hal Anderson and John Stevens Berry, for appellant.

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

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

WHITE, C. J.

This is a post conviction proceeding. The defendant was charged with first degree murder, found guilty by a jury, and sentenced to life imprisonment in the Nebraska Penal and Correctional Complex. On July 27, 1976, the defendant filed a motion to vacate sentence in the District Court for Douglas County, Nebraska. The defendant's application for post conviction relief was denied and the defendant appeals. We affirm the judgment of the District Court.

The defendant's trial in the original cause was set for January 6, 1969. On December 27, 1968, a hearing was held on the defendant's motion for a speedy trial. The defendant was present at this hearing. At the hearing, the defendant expressed dissatisfaction with his counsel and made several remarks to the effect that he would just as soon represent himself in the case. The District Court refused to permit the defendant to represent himself.

Under both the Constitution of Nebraska and the Constitution of the United States, a defendant in a criminal trial in this state has a right to proceed without counsel and represent himself if he voluntarily and intelligently elects to do so. Art. I, § 11, Constitution of Nebraska; State v. McGee, 184 Neb. 352, 167 N. W. 2d 765 (1969); Amendment VI to the Constitution of the United States; Faretta v. California, 422 U. S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). On appeal, the defendant contends that he was deprived of this right.

In Faretta, *supra,* the Supreme Court, explaining its holding that a defendant in a criminal trial has a constitutional right to proceed without counsel, stated: "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable

legal fiction. *Unless the accused has acquiesced in such representation,* the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense. (First emphasis supplied.)

The record indicates that at the time of the hearing, December 27, 1968, the defendant was dissatisfied over his ability to communicate with counsel. At that time, steps were taken by the District Court to facilitate the defendant's communication with counsel.

The record also shows that prior to filing the present action, the defendant, after December 27, 1968, gave no further indication that he desired to represent himself in the case. At no time after December 27, 1968, did the defendant express any dissatisfaction with his counsel's ability or conduct of the case. In fact, every indication is that the defendant found his counsel's handling of the case to be very satisfactory. In his appeal to this court from his conviction in the original cause, the defendant alleged that he had ineffective counsel. We rejected that contention, specifically noting: "Counsel presented an adequate defense worthy of a most conscientious defense attorney. It is of more than passing interest that after 4 days of trial, when the trial judge, out of an abundance of caution, turned to defendant to explain what his attorney was doing in agreeing to a stipulation, defendant cut him short and said, 'Whatever he decides is good enough.' " State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970).

Even if there be some merit to the defendant's contention, the District Court concluded, and we concur, that the defendant was not prejudiced either by being represented by counsel or by denial of self-representation. This court will not reverse a criminal conviction in the absence of prejudice to the defendant. State v. Keith, 189 Neb. 536, 203 N. W. 2d

500 (1973); State v. McCown, 189 Neb. 495, 203 N. W. 2d 445 (1973).

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

AFFIRMED.

DOLORES J. BRANCH, ADMINISTRATRIX OF THE ESTATE OF HUBERT L. BRANCH, DECEASED, APPELLANT, V. JOHN S. WILKINSON, APPELLEE.

256 N. W. 2d 307

Filed June 15, 1977. No. 40893.

1. **Witnesses: Physician and Patient: Privileged Communications: Evidence.** The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination.
2. _____: _____: _____: _____. The party seeking to exclude evidence on the ground of privilege has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient.
3. **Physician and Patient: Privileged Communications: Evidence.** To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties. Where the information is not obtained for this purpose, it is not privileged.
4. **Physician and Patient: Privileged Communications: Evidence: Intoxicating Liquors: Statutes.** A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient.
5. **Statutes: Motor Vehicles: Criminal Law: Intoxicating Liquors.** The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor.
6. **Waiver: Words and Phrases.** A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of a known right, claim, or privilege.
7. **Trial: Evidence: Intoxicating Liquors: Juries.** Where there is no evidence presented as to the effect of intoxicants on the part of

the party involved, it is not proper to submit that issue directly to the jury.

8. **Negligence: Motor Vehicles: Words and Phrases.** Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Negligence that is purely momentary in nature generally does not constitute gross negligence.
9. **Negligence: Evidence: Juries.** 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. Negligence is never presumed.

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

Gregory J. Beal of Beal & Jensen, for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

WHITE, C. J.

This is a wrongful death action brought by the plaintiff, Dolores J. Branch, Administratrix of the Estate of Hubert L. Branch, deceased. The plaintiff's decedent was killed as a result of an automobile accident in Morrill County, Nebraska, on March 9, 1974. The plaintiff's decedent was a passenger in the motor vehicle. The defendant owned and operated the vehicle. In her petition, the plaintiff alleged negligence, including speeding and intoxication, and sought special and general damages, including damages for conscious pain and suffering by her decedent.

The defendant answered with a general denial and filed a motion to suppress evidence derived from blood samples taken from the defendant after the accident. The District Court sustained the defendant's motion to suppress evidence of the blood alco-

hol test of the defendant on the theory that the test was within the physician-patient privilege. The defendant then filed an amended answer denying that he was intoxicated at the time of the accident and alleging that the plaintiff's decedent assumed the risk, along with other specifications of negligence on the decedent's part, which, in essence, were failure to warn of approaching danger and failure to have seat belt in place and fastened.

The case was tried to a jury. At the close of the plaintiff's case, the defendant moved for a directed verdict. The District Court sustained this motion. The plaintiff filed a motion for a new trial, which was overruled, and now appeals. We affirm the judgment of the District Court.

The plaintiff's primary contention on appeal concerns the admissibility of the results of a blood alcohol test conducted on a blood sample taken from the defendant shortly after he had been brought to the hospital. The results of this test showed an alcohol content of 0.10 percent in the defendant's blood at the time the sample was withdrawn, approximately 2½ hours after the accident. The District Court held that the results of the blood alcohol test were inadmissible due to the physician-patient privilege. The plaintiff argues that the blood alcohol test results are not privileged and that, if they are, the privilege was waived by the defendant.

The record reveals the following facts relevant to the taking of a blood sample from the defendant. The accident took place at approximately 3:12 a.m. on March 9, 1974. At 4:11 a.m. Officer Harris of the State Patrol arrived at the accident scene. At 4:50 a.m. ambulances arrived at the accident scene. Officer Harris accompanied the ambulances to the Bridgeport hospital, where they arrived at approximately 5:30 a.m. Branch was taken to the emergency room and attended to by Dr. Blackstone. Wilkinson was taken to the x-ray room and attended

to by Dr. Post. Wilkinson was unconscious when brought to the hospital. At trial Dr. Post testified: "I made an order for the usual profile or battery of tests to evaluate the general blood condition." Techologist Hadden, on call at the time, stated in a deposition that she was directed by Dr. Post to draw a blood sample from both Wilkinson and Branch, and that after she drew the blood sample from Wilkinson, she placed it in the refrigerator. The blood sample of Wilkinson, which was tested for alcohol content was labeled, "John Wilkinson, Oshkosh, 5:35 a.m. 3-9-74, by B. Hadden." After Dr. Post had been with Wilkinson for 15 or 20 minutes, he was interrupted by Nurse Bateman concerning Branch. He proceeded to Branch, who died shortly thereafter at 6:07 a.m.

In her deposition, Mrs. Hadden stated that the blood alcohol sample from Wilkinson was given to the State Patrol. She stated: "This was the order from Dr. Post that if they requested it, it was to be given them. They did request it the following morning." She stated that she believed Officer Hansen of the State Patrol, who arrived at the hospital shortly after the ambulances arrived, requested the sample. She stated that she did not know whether Officer Hansen spoke previously to Dr. Post concerning the sample or not; that he asked her for the blood sample; and that she gave it to him.

Roger Lott, county attorney of Morrill County at the time, testified that he arrived at the hospital shortly after Branch had died. He stated that the possibility of drinking was discussed with Officers Harris and Hansen before the three left at 7:39 a.m. to inspect the accident scene. Lott testified that he ascertained that a blood alcohol sample had been taken from Wilkinson and that he had a conversation with one of the State Patrol officers concerning the taking of the blood alcohol sample from Wilkinson. He stated that he did not specifically request the

doctor to take the sample but knew that a sample had been taken. He testified that he had a discussion with Officers Harris and Hansen concerning the policy with respect to the blood alcohol sample and was told that it was the policy of the State Patrol to take a blood test on any state patrolman who was involved in either a personal injury or fatality accident. Lott stated that he had no personal knowledge that the blood sample had been obtained by the State Patrol, but later the State Patrol provided him with the results of the test. He stated that he was told that Officer Hansen took the test to Scottsbluff and that it was his understanding the test would be obtained from the hospital that morning and taken to Scottsbluff.

In Dr. Post's deposition, the following exchange took place:

"Q. In the course of the treatment of your patient, would you, yourself, have any reason or need or desire for a blood alcohol test of the patient?

"A. Yes. It is my custom in patients that suffer any kind of head injury, for whatever reason, I ask for a blood alcohol if there is any evidence whatsoever that it's needed. Also, we test for diabetes. * * *

"Q. Well, the question was whether or not you needed the blood alcohol test to treat the patient at that particular time?

"A. On entry and shortly thereafter?

"Q. Or thereafter.

"A. I believe the knowledge of blood alcohol would have a pertinent and important place in the treatment of this patient.

"Q. As it developed, though, whether or not Mr. Wilkinson did have some alcohol content in his blood was not a critical factor?

"A. This is true * * *."

In an affidavit filed by the defendant in support of his motion to suppress, Dr. Post stated that the blood alcohol test on Wilkinson was performed as a

normal diagnostic procedure for an unconscious patient; that no law enforcement official requested that a blood alcohol test be taken from Wilkinson; that sometime after the test was taken he had a discussion with Roger Lott, the county attorney, concerning whether such a test had been taken; that he informed Lott that such a test had been taken; that it was available to him or the State Patrol; and that Lott told him he wanted the test.

The following picture is thus presented: The blood sample was withdrawn from Wilkinson at 5:35 a.m., within minutes after the ambulances arrived at the hospital. Dr. Post testified that he ordered that the blood sample be taken from Wilkinson. Officer Hansen did not arrive at the hospital until 5:42 a.m., and the county attorney arrived after Branch had died. Thus, at the time the blood sample was taken, Officer Harris was the only law enforcement person present, having arrived with the ambulances. There is absolutely no evidence in the record that Officer Harris requested Dr. Post to withdraw the blood sample from Wilkinson. Dr. Post testified as to the medical reasons for obtaining a blood sample from Wilkinson. Later, Officers Harris and Hansen, and county attorney Lott discussed the possibility of drinking being involved in the accident. It was ascertained that a blood sample had been taken from Wilkinson and was available for a blood alcohol test. Dr. Post made the sample available to either Lott or the State Patrol, and later the State Patrol obtained the sample from Mrs. Hadden and conducted a blood alcohol test on it in Scottsbluff.

The question which we must initially decide on appeal is whether the District Court was correct in suppressing and refusing to admit into evidence the results of the blood alcohol test conducted on the blood sample taken from the defendant on the ground that said results were within the contemplation of the physician-patient privilege.

The present statute stating the physician-patient privilege is section 27-504, R. R. S. 1943, of the Nebraska Rules of Evidence. Prior to the adoption of section 27-504, R. R. S. 1943, the privilege was found in section 25-1206, R. R. S. 1943. At common law, there was no physician-patient privilege. Simonsen v. Swenson, 104 Neb. 224, 177 N. W. 831 (1920). We have held that the statute granting the privilege should be strictly construed, being in derogation of common law. Culver v. Union Pacific R.R. Co., 112 Neb. 441, 199 N. W. 794 (1924). The party seeking to exclude evidence has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient. Stapleton v. Chicago, B. & Q. R.R. Co., 101 Neb. 201, 162 N. W. 644 (1917). The object of the statute is to enable the patient to secure medical services without fear of betrayal, and not to disqualify physicians as witnesses. Falkinburg v. Prudential Ins. Co. of America, 132 Neb. 831, 273 N. W. 478 (1937). See, also, 81 Am. Jur. 2d, Witnesses, § 231, p. 262.

The essential elements which must exist before the privilege can apply are generally said to be as follows: (1) A physician-patient relationship: (2) information acquired during this relationship; and (3) the necessity and propriety of this information to enable the physician to treat the patient skillfully in his professional capacity.

In order for the privilege to apply, there must exist a physician-patient relationship. This relationship can be formed by the fact of treatment of an injured person by a physician.

In State v. Staat, 291 Minn. 394, 192 N. W. 2d 192 (1971), it was held that where hospital physicians were required to give diagnosis and treatment to the defendant who was brought in unconscious to the hospital emergency room, a confidential relationship developed between the defendant and the hospi-

tal physician. The defendant's unconscious state did not militate against the relationship. In Carlton v. Superior Court of Los Angeles County, 261 Cal. App. 2d 282, 67 Cal. Rptr. 568 (1968), it was held that the relationship of physician and patient existed between the defendant motorist, who was taken to the hospital for treatment of injuries sustained in an accident, and the physicians at the hospital who undertook to examine, diagnose, and furnish curative treatment from the time of his arrival at the hospital until his discharge. A physician-patient relationship clearly existed between Wilkinson, who was brought to the hospital unconscious, and Dr. Post who was called upon to examine and treat him.

The blood sample was withdrawn from Wilkinson by Mrs. Hadden at the direction of Dr. Post. The physician-patient privilege extends not only to physicians but to their agents as well.

As stated in Culver v. Union Pacific R.R. Co., *supra:* "A professional nurse assisting a physician to whom such confidential communications have been made by a patient is an agent of the physician. She stands in the same relation of confidence to the patient and may not be permitted to testify to such communications unless the privilege has been waived by the patient."

The next factor to be determined is whether the extraction of a blood sample comes within the contemplation of the privilege. The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination. Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621 (1910). In Stapleton v. Chicago, B. & Q. R.R. Co., *supra,* it was held that when one submits to an examination, the knowledge so acquired by the physician is privileged. In Freeburg v. State, 92 Neb. 346, 138 N. W. 143 (1912), it was held that a doctor who dressed the wound of the defendant, who

was accused of drunkenness, was incompetent under the statute then reciting the physician-patient privilege to testify as to his observations of the defendant's drunken condition during treatment.

The taking of a blood sample from a patient clearly comes within the contemplation of the physician-patient privilege. The plaintiff cites the Supreme Court case of Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), which recognizes the distinction drawn between oral communications and physical evidence, e.g., a blood sample, for purposes of the Fifth Amendment. See, also, State v. Oleson, 180 Neb. 546, 143 N. W. 2d 917 (1966); State v. Swayze, 197 Neb. 149, 247 N. W. 2d 440 (1976). The plaintiff points out that section 27-504, R. R. S. 1943, speaks of "communications" between the physician and patient and argues, based upon the above, that the blood sample is not a "communication." The above distinction is relevant only to Fifth Amendment analysis and has no application to the physician-patient privilege. Extraction and analysis of a blood sample is clearly within the contemplation of the privilege.

The plaintiff argues that the physician-patient privilege does not apply to the results of the blood alcohol test because of the provisions of the implied consent statute, section 39-669.08, R. R. S. 1943. It has been held that a blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privilege statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. See, e.g., State v. Erickson, 241 N. W. 2d 854 (N.D., 1976).

In State v. Howard, 193 Neb. 45, 225 N. W. 2d 391 (1975), we held: "The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in

the actual physical control of a motor vehicle while under the influence of alcoholic liquor." We have also held that for an implied consent to be effective the person from whom the blood sample is taken must have been arrested or else taken into custody before the test is given. State v. Baker, 184 Neb. 724, 171 N. W. 2d 798 (1969); Prigge v. Johns, 184 Neb. 103, 165 N. W. 2d 559 (1969). This case is a civil action, wrongful death, not a criminal prosecution. The defendant was never under arrest or in custody. The implied consent statute has no application here.

To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties. See, VIII Wigmore on Evidence, § 2383 (McNaughton Rev. Ed., 1961); Koskovich v. Rodestock, 107 Neb. 116, 185 N. W. 343 (1921). Where the information is not obtained for this purpose, it is not privileged. Nichols v. State, 109 Neb. 335, 191 N. W. 333 (1922).

In State v. Bedel, 193 N. W. 2d 121 (Iowa 1971), the court found that neither the certification to withdraw the defendant's blood following his arrest for driving while intoxicated, nor the blood test itself, were related to either medical diagnosis or treatment of the defendant, and held that the results were not privileged because there was no showing that they were necessary and proper to enable the physician to treat the patient. The physician did not see the defendant personally until the next morning, nor was there any showing that the nurse was ordered by the doctor to take the test.

In Hanlon v. Woodhouse, 113 Colo. 504, 160 P. 2d 998 (1945), the court, in holding in a civil action that the physician-patient privilege was not violated by the doctor's testimony to the effect that an analysis of a blood sample taken from the defendant driver while he was unconscious showed sufficient blood alcohol to cause a state of drunkenness, stated that

since the blood alcohol test was not necessary to enable the physician properly to treat the defendant after the accident, but was rather made in obedience to a request from a police officer, it was not encompassed by the physician-patient privilege.

In State v. Amaniera, 132 N. J. Super. 597, 334 A. 2d 398 (1974), the court held that the fact the police were standing by and were prevented from acting to request a blood test only by reason of the ongoing medical attention being given to the defendant after he was taken to the hospital for emergency treatment following an automobile accident did not preclude the application of the physician-patient privilege to the results of tests for alcohol performed on the defendant's blood, pursuant to the physician's order which was motivated by medical reasons.

In Ragsdale v. State, 245 Ark. 296, 432 S. W. 2d 11 (1968), the court held that the result of a blood alcohol test run on the defendant for the purpose of proscribing and treating his injury, which was sustained in an automobile accident in which one person was killed, and not at the request of a police officer or the prosecuting attorney, was privileged.

Alder v. State, 239 Ind. 68, 154 N. E. 2d 716 (1958), involved a prosecution for involuntary manslaughter. While the appellant in that case was lying unconscious in the hospital, a physician who was on call took a blood sample from the appellant in order to determine his blood type preparatory to giving him a blood transfusion. A State Police officer, who was present at the time, requested the physician to take a sample of the appellant's blood for him for the purpose of making an alcoholic test. After the physician had drawn about 15 cubic centimeters of blood, he instructed a nurse, who was present and assisting him, to give one-half of it to the State Police officer, who then forwarded the sample to the State Police laboratory in Indianapolis for analysis. The appellant contended that it was error to allow the physi-

cian to testify that he took the blood sample from the appellant because the transaction was privileged. The Supreme Court of Indiana agreed with the appellant's contention. In support of its holding, the court cited one of its previous decisions, Chicago, S. B. & L. S. Ry. Co. v. Walas, 192 Ind. 369, 135 N. E. 150 (1922), in which it had held that a physician was precluded from testifying as to his opinion of the defendant's intoxicated status based upon his observations of the defendant in the emergency room. We note that the Walas case is similar in its holding to our case, Freeburg v. State, *supra*. The Indiana court stated: "If a physician may not testify from observation whether or not in his opinion a patient on whom he was about to perform an operation was intoxicated, it would seem logically to follow that a physician may not, without the patient's consent, give a sample of his blood which he had drawn 'in the course of his professional business' to a policeman to ascertain the alcoholic content, for the purpose of determining whether or not such patient was at the time under the influence of intoxicating liquor." 239 Ind. at 75, 154 N. E. 2d at 720.

The court further stated: "In the case at bar the patient was unconscious and was completely in the trust and care of the physician. If, under such circumstances, a physician is prohibited by statute from testifying as to the intoxicated condition of the patient, it is our opinion that the statute would also prohibit testimony of a physician concerning a sample of blood which he took from the patient and caused to be delivered to the State Police officer to be used in determining the alcoholic content of the blood. This clearly was information obtained by the physician 'in the sick room' and it was error to overrule appellant's objection to testimony concerning the same" 239 Ind. at 76, 154 N. E. 2d at 720.

Dr. Post testified that he ordered the blood sample withdrawn from the defendant. He stated that it

was done for medical reasons. As stated earlier, there is no evidence that the sample was withdrawn at the request of any law enforcement officer. The fact the sample was later made available to law enforcement authorities for the purposes of blood alcohol testing did not effect its privileged status. We hold that the blood sample and the results of the blood alcohol test were privileged under the physician-patient privilege.

The plaintiff draws our attention to the rule currently stated in section 27-504 (4)(c), R. R. S. 1943, to the effect that there is no physician-patient privilege regarding communications relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient places his condition into issue, either as an element of his claim, or defense. In her petition the plaintiff alleged that the defendant was intoxicated. In his amended answer, the defendant denied that he was under the influence of alcoholic liquor to a perceptible degree. The plaintiff argues that by thus denying her allegations of intoxication, the defendant put his physical condition into issue and thus no privilege exists regarding matters relevant to that issue. We disagree with the plaintiff's contention.

In Carlton v. Superior Court of Los Angeles County, *supra,* the court stated: "So far as relevant here, section 996 of the Evidence Code reads: 'There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by: (a) the patient * * *.' Plaintiff contends that by his denial of the allegation in the complaint that defendant was intoxicated at the time of the accident, defendant 'tendered' the issue concerning his condition which must be decided by the court at the trial of the action. We cannot agree with this contention. * * *

"We hold that the case before us does not fall within the exception relied on by plaintiff, and that

defendant is entitled to the benefit of the privilege * * *." 261 Cal. App. 2d at 289, 290, 67 Cal. Rptr. at 573.

The purpose behind the patient-litigant exception to the physician-patient privilege is to prevent the patient from making his condition an element of the dispute, and then invoke the privilege to prevent the opposing party from ascertaining the true condition of the patient. We do not believe that this exception should be invoked where the patient merely denies allegations by the opposing party concerning his condition. Were we to adopt plaintiff's argument, the defendant would be placed in the position of either admitting plaintiff's allegations of intoxication, or else foregoing the privilege. We do not believe that the physician-litigant exception was intended to work such a result.

It is argued that even if the physician-patient privilege attached to the blood sample and the blood alcohol test results, it was waived by the defendant. The plaintiff finds a waiver in two instances.

In his deposition, the defendant, during examination by the plaintiff's counsel and over objections, stated that he was aware that a blood alcohol test had been conducted on him and that his mother and father told him that the blood alcohol was 0.10 percent. We do not find this to be a waiver of the privilege. In Larson v. State, 92 Neb. 24, 137 N. W. 894 (1912), it was held that where the defendant, without objection, answered questions of the prosecuting attorney upon cross-examination relating to treatment by his physician and the physician's opinion of his condition there was no waiver of the physician-patient privilege by the defendant.

The plaintiff also contends that the defendant waived the privilege when, in his presence and the presence of his counsel, Roger Lott, Morrill county attorney, read into the record during the coroner's inquest into the death of Hubert L. Branch the re-

sults of the blood alcohol test conducted on the blood sample obtained from the defendant. The plaintiff argues that defendant's failure to object constituted a waiver. After the blood alcohol test results were read into the record by the county attorney, the county attorney gave counsel the opportunity to make objections. This opportunity, however, related not to the reading of the blood alcohol test results into the record, but rather to the back half of an accident report put into the record at the same time. This was not a waiver.

"A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of a known right, claim, or privilege." 28 Am. Jur. 2d, Estoppel and Waiver, § 154, p. 836. It is apparent from the record that the blood alcohol test results of Wilkinson were known to numerous people. The record, however, is devoid of any indication that the defendant had any control over the dissemination of this information, opportunity to halt or prevent it, or that he approved it. There is no evidence in the record that the defendant ever made the results of the test known to third persons.

Finding that the blood sample taken from the defendant and the results of the blood alcohol test are within the physician-patient privilege, and failing to find any waiver of that privilege by the defendant, it follows that the District Court was correct in granting the defendant's motion to suppress and in refusing to allow the test results to come into evidence.

Next to be determined is whether or not the defendant was entitled to the directed verdict he obtained after the close of the plaintiff's case. The rules for our review of this matter were stated in Collins v. Herman Nut & Supply Co., 195 Neb. 665, 240 N. W. 2d 32 (1976): " 'In testing the sufficiency of the evidence for determining the propriety of a directed verdict, the plaintiff is entitled to have all controverted facts resolved in her favor, and she is entitled to have the

benefits of every inference that can reasonably be drawn from the evidence. * * * Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.' "

In order for the plaintiff to recover, she had to show that the defendant was either intoxicated or guilty of gross negligence.

Around 11 p.m. on March 8, 1974, the plaintiff's decedent and the defendant were observed together at the Stable Club, a restaurant and lounge in Gering, Nebraska, by Cynthia Kay Baum and several of her girl friends. One of these friends, Joan Earle, testified that the defendant was drinking a beer when she first observed him and that he ordered another beer later that evening. He was drinking "Olympia" beer. Branch, she recalled, had a mixed drink and did not order a beer. John Branch, decedent's son, testified that his father never drank beer, but preferred mixed drinks. Cynthia Kay Baum expressed her opinion that neither Branch nor the defendant appeared to be intoxicated when they all left the Stable Club at approximately 1:15 a.m. She did not see the defendant take anything out, such as packaged liquor. Joan Earle testified that, based upon her observations of the defendant, "I didn't feel he was at all intoxicated." She did not see the defendant buy any beer to take out when they left.

There is no evidence as to what happened between 1:15 a.m. and 3:12 a.m., the time of the accident. It is approximately 45 miles from Scottsbluff to Bridgeport, and approximately 25 miles from Bridgeport to the scene of the accident. Officer Harris, who first arrived at the accident scene and accompanied the ambulances to the hospital, testified that he had not smelled any odor of alcohol or seen any evidence of alcohol in the car. Officer Kling who arrived at the scene to help Officer Harris, and who remained be-

hind after the ambulances left, observed two full cans of "Olympia" beer in the car. Two or three empty "Olympia" cans were also observed in the proximity of the vehicle sometime later. Dr. Post, who was called upon to treat the defendant, stated that he did not remember detecting the odor of alcohol upon the defendant's breath while he was treating him.

The evidence adduced on the issue of intoxication was totally insufficient to warrant submission of that issue to the jury. A jury finding, based upon the above evidence, that the defendant was intoxicated at the time of the accident could only be the result of speculation and conjecture. There was no evidence, at all, concerning the effect on the defendant of the alcohol he consumed. As was stated in Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744 (1970): "Where there is no evidence presented as to the effect of intoxicants upon the part of the parties involved, it is not proper to submit that issue directly to the jury."

The accident occurred on U.S. Highway No. 26, east of Bridgeport, Nebraska. The area is fairly level and the road straight, with a slight curve just west of where the accident took place. Officer Harris observed no obstructions on the highway and observed that the paved surface of the highway was only slightly higher than the shoulder of the road. Officer Harris did not recall any moisture or dew on the road. The defendant's vehicle was proceeding in an easterly direction. Starting where the road takes a slight curve to the left, the defendant's car left the highway. It traveled completely off the paved surface, on the shoulder of the road, for about 468 feet, after which it came back onto the paved surface, crossed the centerline, crossed the westbound lane of the highway, and impacted with the north-west corner of a concrete bridge abutment. After striking the bridge abutment, the defendant's

car traveled 69 feet in the air, struck the ground, traveled 36 feet further, then rolled or was airborne another 31 feet, hit the ground a third time, and came to rest another 23 feet further on, or 159 feet from the point of impact. The car was totally demolished, the engine torn out of the car. Debris was strewn along the trajectory of the automobile.

In Luther v. Pawling, 195 Neb. 679, 240 N. W. 2d 42 (1976), we stated: "Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. * * * Negligence that is purely momentary in nature generally does not constitute gross negligence. * * * 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. * * * Negligence is never presumed."

The mere happening or occurring of a one-car accident with a bridge or culvert abutment does not, as a matter of law, justify an inference of gross negligence under our decisions.

Resolving all inferences in favor of the plaintiff, as we are required to do, we cannot infer gross negligence from the foregoing facts. There is no evidence as to what caused this accident. The inference is strong that defendant's negligence, if any, was momentary in nature. Luther v. Pawling, *supra;* Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321 (1968); Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844 (1964).

The District Court was correct in granting the defendant's motion for a directed verdict.

We have examined the other issues raised by the plaintiff and find them either to be without merit

or, in light of our above holdings, unnecessary to discuss.

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

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

The doctrine of momentary inattention is now extended to justify the direction of a verdict on the following facts:

(1) On a clear open highway with a slight curve, a host driver operates his car 468 feet on the shoulder of a highway, comes back upon and then across the right-hand lane, into the left-hand lane, and impacts with a bridge abutment on the left-hand side.

(2) After the collision, the car travels through the air 69 feet, strikes the ground, travels another 36 feet through the air, and lands and either rolls or travels through the air another 31 feet.

(3) The engine of the car is totally torn from the car, lying 3 to 4 feet from the car. The car is demolished.

A jury could *easily* find from the circumstances recited the following acts of negligence: (1) Unreasonable speed under the circumstances; (2) failure to exercise a proper lookout; and (3) failure to have the vehicle under proper control.

The defendant, called as a hostile witness by the plaintiff, admitted that in his answers to interrogatories he stated his expert witness would testify the speed of defendant's automobile could not have exceeded 64.1 miles per hour, another act which, if the cause had been submitted, would support a finding of negligence.

The several acts of negligence alleged, when considered together, would fairly support a finding of gross negligence had the cause been submitted. See Demont v. Mattson, 188 Neb. 277, 196 N. W. 2d 190.

In view of the decision of the majority opinion, the

discussion relating to the physician-patient privilege is unnecessary and dicta.

There was no adequate offer of proof in the trial court. The plaintiff merely offered to prove the percent by weight of alcohol in the blood and did not offer to prove by suitable expert testimony the effect thereof. Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744.

"If evidence would be relevant in conjunction with other facts not yet in the record, the offer should be accompanied by an offer to prove those facts at the proper time." 88 C. J. S., Trial, § 80, p. 185. See, also, McCormick on Evidence, § 51, p. 109 (2d Ed., 1972).

The issue of admissibility of the blood alcohol test results is not properly before us and should not have been considered.

McCOWN and CLINTON, JJ., join in this dissent.

COMMUNICATION WORKERS OF AMERICA, AFL-CIO, APPELLEE, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

254 N. W. 2d 695

Filed June 15, 1977. No. 41041.

1. **Statutes.** Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.
2. **Statutes: Jurisdiction: Court of Industrial Relations: Process.** Section 48-813, R. S. Supp., 1976, is the controlling statute in regard to service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked.
3. **Words and Phrases.** Words and phrases shall be construed and understood according to the common and approved usage of the language.
4. **Public Officers and Employees: Attorneys at Law: Words and Phrases: Statutes.** A city attorney is not a "principal officer" within the meaning of that phrase as used in section 48-813, R. S. Supp., 1976.

Appeal from the Nebraska Court of Industrial Relations. Reversed.

Nelson, Harding, Marchetti, Leonard & Tate, Arthur T. Carter, and William A. Harding, for appellants.

John P. Fahey, for appellee.

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

BRODKEY, J.

This is an appeal from a determination by the Court of Industrial Relations establishing a collective bargaining unit for employees of the City of Hastings, and certifying the Communications Workers of America, AFL-CIO, as exclusive bargaining agent of that unit after an election. We reverse the decision of the Court of Industrial Relations on the ground that it had no jurisdiction over the City of Hastings because of improper service of process.

The City of Hastings, respondent and appellant herein, raises numerous assignments of error in regard to the proceedings which took place in the Court of Industrial Relations. In light of our disposition of the case, however, we need only consider its contention that it was not properly served with process in this case.

In February, 1975, Communications Workers of America, AFL-CIO, petitioner and appellee herein, filed a presentation petition in the Court of Industrial Relations. In addition to members of the court, the petition and notice of filing the petition, were served only on Mr. Albert P. Madgett, the city attorney of the City of Hastings; and on Mr. William A. Harding, an attorney who had represented the City of Hastings in previous matters before the court. No service was made upon the mayor of the City of Hasings, nor upon other city officials.

Section 16-115, R. R. S. 1943, provides: "The corporate name of each city of the first class shall be the

City of _____, and all process whatever affecting any such city shall be served upon the mayor or acting mayor, or in the absence of both of said officers from the city, then upon the city clerk." Section 48-813, R. S. Supp., 1976, provides: "Whenever the jurisdiction of the Court of Industrial Relations is invoked, notice of the pendency of the proceedings shall be given in such manner as the court shall provide for serving a copy of the petition and notice of filing upon the adverse party. An employer or labor organization may be served by sending a copy of the petition filed to institute the proceedings and a notice of filing, which shall show the filing date, by any form of mail requiring a signed receipt, addressed to a principal officer at the usual place of activity of the employer or labor organization * * *. The giving of such notice in such manner shall subject the employers, the labor organizations, and the persons therein to the jurisdiction of the Court of Industrial Relations."

The City of Hastings contends that section 16-115, R. R. S. 1943, is applicable in this case because it is a city of the first class. The petitioner contends that section 48-813, R. S. Supp., 1976, controls, and that its service of process was adequate under that section. The City of Hastings objected to the service in its answer and preserved this objection for appeal. See Rule 6 of the Court of Industrial Relations. The Court of Industrial Relations found that the service was adequate under section 48-813, R. S. Supp., 1976, on the ground that service upon the city attorney of the City of Hastings met the requirement that service be made upon a principal officer of the employer.

Both parties rely on the well-established rule that where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. See, Kibbon v. School Dist. of

Omaha, 196 Neb. 293, 242 N. W. 2d 634 (1976); Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N. W. 2d 621 (1972); Duerfeldt v. State, 184 Neb. 242, 166 N. W. 2d 737 (1969). Applying the rule to this case, it is apparent that section 48-813, R. S. Supp., 1976, sets forth special and specific provisions for service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked. Section 16-115, R. R. S. 1943, although it refers specifically to persons upon whom process shall be served in cases generally, must yield to the provisions of section 48-813, R. S. Supp., 1976, in cases where the jurisdiction of the Court of Industrial Relations is invoked. Therefore we hold that section 48-813, R. S. Supp., 1976, is controlling in this case.

Although we agree with petitioner that section 48-813, R. S. Supp., 1976, controls, we disagree that the service in this case complied with that section. Section 48-813, R. S. Supp., 1976, provides that notice of the pendency of the proceedings shall be given in such manner as the court shall provide; and then further provides that an employer may be served by sending a copy of the petition to a principal officer of the employer. The record in this case does not reflect that the Court of Industrial Relations provided a manner for providing notice of the pendency of the proceedings. The court, however, found that service upon the city attorney was adequate because he is a "principal officer" of the City of Hastings. We disagree with that conclusion.

Pursuant to section 16-308, R. R. S. 1943, a city attorney is an appointive officer, and such an officer may be removed at any time by the mayor with approval of a majority of the city council. Section 16-319, R. R. S. 1943, provides that the "city attorney shall be the legal advisor of the council and city officers." Although the city attorney is an officer under the statutory scheme, he or she is not a "principal officer." "Principal," when used as an adjec-

tive, means chief, leading, primary, original; and also, highest in rank, authority, character, importance, or degree. Black's Law Dictionary, p. 1355 (4th Ed., 1951); Webster's Third New International Dictionary, p. 1802 (1968).

Our statute provides that words and phrases "shall be construed and understood according to the common and approved usage of the language * * *." § 49-802(5), R. R. S. 1943. When our Legislature used the words "principal officer" it did not mean *every* officer. It meant what it said — "principal" officer, with the word "principal" qualifying the word "officer" as an adjective. Under the statutory scheme, a city attorney is essentially the legal advisor to the city council and city officers. The city attorney serves at the pleasure of the mayor and the city council. He or she has no statutory power to make governmental decisions which affect the city. Therefore, the city attorney is not a chief, primary, or main officer, and is not a "principal" officer.

There is no dispute in this case that no city officer other than the city attorney was served with process. For the reasons given above, such service was not adequate under section 48-813, R. S. Supp., 1976; nor for that matter, under section 16-115, R. R. S. 1943; and therefore the City of Hastings was not properly subject to the jurisdiction of the Court of Industrial Relations. Having no jurisdiction over the City of Hastings, the decision of the Court of Industrial Relations is void and of no effect. Nebraska Department of Roads Employees Assn. v. Department of Roads, 189 Neb. 754, 205 N. W. 2d 110 (1973). In light of this conclusion, this court need not consider other assignments of error raised by the appellant.

REVERSED.

BOSLAUGH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JACK D. MCCURRY, APPELLANT.

254 N. W. 2d 698

Filed June 15, 1977. No. 41101.

1. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Criminal Law: Probation and Parole: Courts.** Cases in which the decision to grant or not grant probation are of delicate balance, and in those cases the judicial discretion of the trial court should be accorded great weight.

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

Herbert M. Sampson, III, for appellant.

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

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

WHITE, C. J.

The defendant was charged with assault with intent to inflict great bodily injury to which he pleaded nolo contendere. The defendant was sentenced by the District Court to a term of 1 year in the Nebraska Penal and Correctional Complex. The defendant appeals contending that his sentence is excessive and that the District Court erred in failing to place him on probation. We affirm the judgment and sentence of the District Court.

In State v. Leal, *ante* p. 233, 252 N. W. 2d 167 (1977), we stated: "This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion."

The presentence investigation report, to which there was no objection, reveals that the defendant had two prior convictions for driving while intoxicated. The defendant after a fracas or altercation involving himself and several others, went to his

automobile and deliberately drove it to the left and wrong side of the street in a deliberate effort to hit four people involved in the dispute. Moreover, the automobile, in fact, did injure two of the men. The trial court's express finding that he used the automobile as if it were a shotgun is amply sustained by the evidence. Bearing heavily on the trial court's decision was the seriousness of the offense, and it concluded that a sentence of probation would promote disrespect for the law. On the other hand, the trial court imposed the minimum sentence and such sentence appears to be appropriate in view of all the facts and circumstances.

The record also shows that the District Court reviewed the presentence investigation report several times, carefully considered and weighed the factors tested in section 29-2260, R. R. S. 1943, and concluded that incarceration was preferable to probation in this case. The defendant received the minimum sentence for the crime for which he was convicted. § 28-413, R. R. S. 1943.

" 'Inevitably there are cases in which the decision to grant or not grant probation is one of delicate balance and in those cases the judicial discretion of the trial court should be accorded great weight.' " State v. Liberator, 197 Neb. 857, 251 N. W. 2d 709 (1977).

The sentence imposed was within statutory limits and as such will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). We find no abuse of discretion.

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

AFFIRMED.

ARLYCE HANSON, APPELLANT, V. LELAND HANSON, APPELLEE.

254 N. W. 2d 699

Filed June 15, 1977. No. 41196.

1. **Appeal and Error: Evidence.** A bill of exceptions is the only vehicle for bringing evidence before this court.
2. _____: _____. Evidence which does not appear in the record cannot be considered by this court on appeal.
3. **Appeal and Error: Evidence: Pleadings.** In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court.

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

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

Patrick A. Brock of Winkle & Brock, for appellee.

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

WHITE, C. J.

This is an appeal from an order of the District Court for Nance County, Nebraska, raising the child support payments to the appellant from $140 per month to $240 per month. We affirm the judgment of the District Court.

The appellant and appellee were granted a divorce on September 1, 1970, in the District Court for Nance County, Nebraska. The divorce decree gave custody of the minor children to the appellant and appellee was ordered to pay $140 a month child support. On August 6, 1975, the appellant filed an application for increase in child support with the District Court. On September 9, 1975, the District Court increased the child support payments from $140 to $225. That decision was appealed to this court by the appellant. We reversed on procedural grounds and remanded the cause to the District Court for fur-

ther proceedings. See Hanson v. Hanson, 195 Neb. 836, 241 N. W. 2d 131 (1976).

Subsequently, appellant filed an application for increase in child support with the District Court. The District Court entered an order increasing child support payments from $140 to $240 per month. The appellant again appeals to this court.

Actions to increase child support payments, being a continuation of and incident to a divorce action, are equitable in nature and are triable de novo in this court on the record made in the trial court. Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262 (1964).

Appellant argues, on appeal, that the increase in child support payments was inadequate. Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions. Brown v. Shamberg, 190 Neb. 171, 206 N. W. 2d 846 (1973). A bill of exceptions is the only vehicle for bringing evidence before this court. Dilsaver v. Pollard, 191 Neb. 241, 214 N. W. 2d 478 (1974). Evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan, 193 Neb. 841, 229 N. W. 2d 550 (1975).

No record was made in this case subsequent to the appellant's last appeal. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50 (1976).

The judgment of the District Court is affirmed.

AFFIRMED.

THE BEREN CORPORATION, APPELLEE, V. WILLIAM E. SPADER ET AL., APPELLANTS, IMPLEADED WITH OBED U. WALKER ET AL., APPELLEES.

255 N. W. 2d 247

Filed June 22, 1977. No. 40854.

1. **Courts: Pleadings: Judgments.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
2. **Pleadings: Judgments.** A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense. Such party is not required to show that he will ultimately prevail in the action, but only that he has a defense which is recognized by the law and is not frivolous.
3. **Pleadings: Judgments: Evidence.** The meritorious defense which must be shown in support of an application to open or vacate a default judgment is one worthy of judicial inquiry because it either raises a question of law deserving some investigation and discussion, or a real controversy as to the essential facts.
4. **Lessors and Lessees: Mines and Minerals: Quiet Title: Property.** A lessee of real estate or of gas, oil, and mineral rights in land may maintain an action to quiet title to his leasehold, but a lessee takes his leasehold subject to all claims of title which are enforceable against his lessor; and in a quiet title action he is required to recover on the strength of his own title, and not upon the weakness of his adversary's title.
5. **Vendor and Purchaser: Property: Contracts: Time: Security Interest: Trusts.** Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate.
6. **Vendor and Purchaser: Property: Contracts.** The vendee under a land contract may assign the interest he acquires under the contract in whole or part, and the effect of such an assignment is to convey the vendee's equitable interest in the land to the assignee. The vendee may properly reserve or except rights in the land in such conveyance.
7. **Property: Deeds: Vendor and Purchaser.** Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed

merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same.

Appeal from the District Court for Hitchcock County: NORRIS CHADDERDON, Judge. Reversed and remanded.

Pierson, Pierson & Fitchett, for appellants.

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

Obed U. Walker, pro se.

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

BRODKEY, J.

This is an appeal from a District Court decision overruling a motion to vacate a default judgment which quieted title to certain real estate in Hitchcock County. We reverse and remand for further proceedings.

This case involves a somewhat complicated factual situation involving several transactions for the sale of real estate. In summary, the pertinent facts, on which the parties agree, are as follows. On December 4, 1968, William E. and Koila R. Spader, the defendants and appellants herein, executed an agreement for the purchase and sale of real estate with Paul and Louise Miller. The Millers agreed to sell to the Spaders real estate in Hitchcock County described as the "North Half (N½), the Southeast Quarter (SE¼), and the East Half of the Southwest Quarter (E½SW¼), all in Section Fourteen (14), and the North Half of the Northeast Quarter (N½ NE¼) of Section Twenty-three (23), all in Township Three (3) North, Range Thirty-four (34), West of the 6th P.M. in Hitchcock County, Nebraska." The con-

tract for sale was an installment contract, with a total purchase price of $64,000, and specifically included the oil, gas, and mineral rights. The following escrow provision was included in the contract: "The Sellers will deposit in escrow at the First National Bank of McCook, Nebraska a good and sufficient Warranty Deed to the premises being purchased by the Buyers, the grantee's names to be left blank and inserted by the Bank upon delivery, together with a good and sufficient abstract of title showing merchantable title of record in the premises being bought by the Buyers. The deposit shall be made on or before December 31, 1968. The said First National Bank, as escrow agent, shall retain the warranty deed and the said abstract until the full amount of the purchase price is fully paid at which time the said escrow agent will deliver the deed and abstract to the Buyers or their assigns. The escrow costs shall be shared one-half by the Sellers and one-half by the Buyers."

On October 5, 1970, the Spaders executed an assignment of the real estate in question, agreeing to "sell, assign, set over and transfer absolutely" to Obed and Lola Walker "all of our right, title and interest" in the real estate, subject to the provisions of the land contract between the Millers and the Spaders. The assignment, however, provided that the Spaders "shall retain an (sic) one-half interest in and to the oil, gas and minerals (sic) rights to the above described property for a period of ten years after which period all oil, gas and mineral rights shall revert back to the land."

On October 14, 1970, 9 days subsequent to the assignment by the Spaders to the Walkers, the Millers and the Walkers executed an agreement for the sale and purchase of the real estate. This contract, like the original contract between the Millers and the Spaders, provided for installment payments to be made to an escrow agent, a bank. The Millers

agreed that they would furnish to the Walkers "an abstract of title showing said premises to be free and clear of all encumbrance whatsoever, and shall deliver to the First National Bank of McCook, McCook, Nebraska, to be held in escrow, a warranty deed running to" the Walkers. The bank, as escrow agent, was authorized to deliver a warranty deed to the Walkers upon their payment of the full contract price, which was $47,700. The contract between the Millers and the Walkers did not refer to any retention of a one-half interest of gas, oil, and mineral rights in the land by the Spaders. In 1971, the Millers and the Walkers deeded a small portion of the land in question to the Johnny Walker Boys' Ranch, Inc.

A survivorship warranty deed, dated October 17, 1973, in which the Millers conveyed the land in question to the Walkers, without encumbrance and with no reservations, was filed with the register of deeds in Hitchcock County on October 19, 1973. On May 25, 1974, the Walkers granted an oil and gas lease to the Beren Corporation (Beren), the plaintiff and appellee herein. The lease was granted to Beren for the purpose of mining for oil and gas, and for activities relating thereto. The lease was for a 5-year period, and included portions of Section 14, 23, 24, 25, and 26, Township 3 North, Range 34 West of the 6th P.M., Hitchcock County. Included in the land leased to Beren were the portions of Sections 14 and 23 which the Spaders had contracted to buy from the Millers, and to which the Walkers had taken title under the deed from the Millers after the Spaders assigned their interest in that land to the Walkers. The lease made no reference to any gas, oil, and mineral rights which may have been retained by the Spaders under their assignment to the Walkers. On July 10, 1974, the Johnny Walker Boys' Ranch, Inc., ratified the oil and gas lease between the Walkers and Beren in order to grant Beren rights as a lessee in regard

to the land which had been deeded to the ranch in 1971.

On December 1, 1975, Beren brought a quiet title action against the Spaders, the Walkers, and the Johnny Walker Boys' Ranch, Inc. Beren's petition alleged the facts already described above, and attached thereto were the relevant contract documents and the oil and gas lease. It alleged, however, in reference to the original agreement of sale between the Millers and Spaders, that no deed was prepared or deposited in escrow in accordance with that contract. The petition acknowledged that the Spaders had attempted to retain a one-half interest in the oil, gas, and mineral rights in the real estate under their assignment to the Walkers, but alleged "that said provision was made notwithstanding that the title to the oil, gas and minerals under said land had not vested in the defendants, William E. Spader and Koila R. Spader, and by reason of said assignment never would so vest; that such provision was void as an attempt to create an interest in real estate by means of a reservation in favor of persons without title thereto." The petition further alleged that the Spader/Walker assignment became merged into the agreement of sale of the real estate between the Millers and the Walkers and the deed issued as a result of that agreement; and that the assignment therefore became void and of no effect. Beren alleged that the "pretended reservation" of rights in the Spader/Walker assignment cast a cloud upon the title Beren had in the land; and prayed that title be quieted against the pretended reservation, and that any claim of the Spaders be declared to be junior and inferior to the rights of Beren under its lease.

A summons was served on the Spaders on December 6, 1975, which provided that unless the Spaders answered the petition on or before January 5, 1976, the allegations of the petition would be taken as true and judgment rendered accordingly. The Walkers

and Johnny Walker Boys' Ranch, Inc., both entered a voluntary appearance, but did not contest the allegations of the petition. The Spaders failed to answer within the prescribed time. The record is silent as to the reason for such failure, but in their brief they state that it was due to oversight in that they did not notify their attorney of the pending action. On January 7, 1976, 2 days after answer day, the District Court entered a default judgment in favor of Beren. The record is barren of any evidence that Beren gave the Spaders or their attorneys notice of its intention to take the default judgment.

The decree entered by the District Court provided that the purported reservation of gas, oil, and mineral rights by the Spaders was void and of no effect; and that title to the oil and gas lease should be quieted in Beren against all claims of the Spaders to the oil, gas, and minerals in and under the land. The court specifically found that the Walkers were the owners of all oil, gas and mineral rights in the land in question, except those rights which went with the land which had been deeded to the Johnny Walker Boys' Ranch, Inc.; and that the Spaders were not the owners of any part of the oil, gas, and mineral rights in the land, as no interest therein of any kind was vested in them, and therefore the purported reservation of such rights in the Spader/Walker assignment was void and of no effect.

When the Spaders discovered that a default judgment had been entered against them, they notified their attorney, who, on January 27, 1976, filed a motion to vacate the decree. On March 18, 1976, the Spaders offered copies of a proposed demurrer and answer to the petition in support of their motion. In their general demurrer they state that the Spaders "demur to the petition of the Plaintiff for the reason that it fails to state a cause of action." In their proposed answer the Spaders acknowledge the existence of all the contracts and deeds described above,

but deny the allegation in the petition that no deed was prepared or deposited in escrow as provided for in the 1968 agreement of sale between the Millers and Spaders. The proposed answer alleges that the Spaders had a vested interest in the real estate from which a reservation of a one-half interest in the oil, gas, and mineral rights could be made; and that the Spaders were owners of a one-half interest in such rights for a period of 10 years, commencing October 5, 1970, under the Spader/Walker assignment.

After submission of briefs and a hearing on the motion to vacate, the motion was overruled by the District Court on March 18, 1976. The Spaders moved for a new trial on March 25, 1976, which motion was overruled on April 28, 1976. The Spaders have now appealed to this court, contending that the District Court erred in overruling their motion to vacate the default judgment entered against them.

The appellants' assignment of error is that the "trial court erred in overruling appellant's motion to set aside the default judgment." The Spaders contend that in order to set aside a default judgment by motion in the same term in which it was entered, a defendant need only show by answer or other proof that a meritorious defense to the petition exists and that their proposed demurrer and proposed answer to the petition presented meritorious defenses. Beren contends that in order to set aside a default judgment it is incumbent on the defendant to show affirmatively by answer or other means that he can present a good defense on the merits; and that the Spaders have not done so in this case because the allegations in the petition and answer show that the Spaders never acquired legal title to the land in question, and any equitable interest held by the Spaders was lost by them due to merger when the deed running from the Millers to the Walkers was delivered to the Walkers. The Spaders argue that the doctrine of merger is not applicable in the case,

and that their retention of rights in the land by reservation in the assignment of their interest to the Walkers was lawful and binding, and not destroyed by subsequent deeds, contracts for sale, or leases involving the land.

The law in this jurisdiction in regard to vacation of a default judgment during the same term in which it is rendered is well settled. It has long been held that a District Court has the inherent power to vacate its own judgment any time during the term in which it is rendered, and it is the policy of the law to give a litigant full opportunity to present his contention in court. It is also the duty of the courts, however, to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings. Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877 (1970). The matter of vacation of a default judgment rests in the sound discretion of the trial court, but this discretion is not an arbitrary one, and it must be exercised reasonably. Our cases have "universally held that where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard upon the merits." Beliveau v. Goodrich, *supra*. See, also, Jones v. Nebraska Blue Cross Hospital Service Assn., 175 Neb. 101, 120 N. W. 2d 557 (1963); Urwin v. Dickerson, 185 Neb. 86, 173 N. W. 2d 874 (1970); Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378 (1933). We have also stated that the courtesy which should prevail between opposing counsel ordinarily requires that counsel for one party should, before taking a default, give notice to counsel for the other side, or to the defendant if defendant has no counsel, of his intention so to do. Urwin v. Dickerson, *supra;* Lacey v. Citizens Lumber and Supply Co., *supra;* Barney v. Platte Valley Public

Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335 (1946).

In this case the default judgment was taken 2 days after answer day. Beren does not contest the fact that the Spaders promptly moved to vacate the default judgment once they discovered it had been entered, and that the Spaders were not given notice of Beren's intention to take a default judgment. There is no contention that the Spaders were using dilatory tactics, intentionally causing unnecessary delays, or abusing process. The primary issue remaining, therefore, and the one disputed by the parties, is whether the Spaders set forth a meritorious defense in their proposed answer.

It is clear that a party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense. Beliveau v. Goodrich, *supra.* Where a proposed answer does not state a valid and recognized defense to the petition, or where the allegations of the answer show that there is no defense, the motion to vacate the default judgment should be overruled. Frazier, Inc. v. Alexander, 183 Neb. 451, 161 N. W. 2d 505 (1968). The requirement that the proposed answer set forth a meritorious defense, however, does not require that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous. See, Beliveau v. Goodrich, *supra;* Jones v. Nebraska Blue Cross Hospital Service Assn., *supra;* Urwin v. Dickerson, *supra.*

In the proposed answer submitted by the Spaders in this case, they admit the allegations in the petition in regard to the existence of the contracts, assignment, and deeds previously described in this opinion. They deny the allegations that the Walkers or the Johnny Walker Boys' Ranch, Inc., acquired all the oil, gas, and mineral rights in the land in question by virtue of the deeds referred to in the pe-

tition. They deny the allegation that their contract with the Millers contemplated that title to the real estate might not at any time vest in them and that title to the property did not at any time so vest. The Spaders also deny that they have relinquished by contract or operation of law their interest in and to oil, gas, and mineral rights in the land. They allege in their proposed answer that the escrow deed referred to in their contract with the Millers was executed and delivered into escrow, and allege that they were vested with an interest in the real estate from which a reservation of one-half of the oil, gas, and mineral rights could be made. Finally, the Spaders allege that they are the present owners of a one-half interest in the oil, gas, and mineral rights to the property for a period of 10 years, which commenced on October 5, 1970, the date of their assignment to the Walkers.

Beren contends that the proposed answer alleges no facts which demonstrate a meritorious defense, and contains only allegations which are conclusions of law, and which are not sufficient to meet the requirement that a meritorious defense be shown before a default judgment is vacated. It is true that the allegations set forth in the proposed answer include conclusions of law in the sense that the Spaders allege that they are owners of a one-half interest in the gas, oil, and mineral rights in the land. It must be noted, however, that the Spaders are not contesting the existence of the contracts, assignment, and deeds on which Beren relies in asserting its claim. Instead, the Spaders' primary contention is that the relevant documents show that they are the owners of an interest in the land. The issue the Spaders raise in their proposed answer is primarily one of law. The Spaders are not in the position to allege facts establishing a defense because they claim that under the facts Beren alleged in its petition they are owners of an interest in the land.

A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts. 46 Am. Jur. 2d, Judgments, § 741, p. 903; 49 C. J. S., Judgments, § 336(c), pp. 646 to 648; Naughton v. First Nat. Bank of Boston, 356 N. E. 2d 1224 (Mass. App., 1976); Lovell v. Lovell, 276 Mass. 10, 176 N. E. 210 (1931). Thus, where a proposed answer raises a question of law deserving argument and investigation, and one which is not frivolous, it sets forth the meritorious defense which must be shown in support of an application to open or vacate a default judgment. Spaders' allegation that they own an interest in the land under the relevant documents attached to the pleadings clearly raises a question of law. To counter this, Beren argues that it is not a question of law sufficient to support vacation of the default judgment because reference to the proposed answer and the relevant documents shows that Spaders' claim is unfounded. In examining these contentions, it is necessary that we refer to applicable law on conveyancing, vested property rights, and retention of interests by a grantor or assignor. Our inquiry, however, is limited to the question of whether the proposed answer sets forth a meritorious defense, and we do not determine the merits of the case, as the only question presented on appeal is whether the trial court erred in overruling the motion to vacate the default judgment.

We first note that a lessee of real estate or of gas, oil, and mineral rights may maintain an action to quiet title to his leasehold. Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, modified on rehearing, 160 Neb. 708, 71 N. W. 2d 186 (1955); 38 Am. Jur. 2d, Gas and Oil, § 289, p. 752; Annotation, 51 A. L. R. 2d 1227, § 3, at p. 1229. A lessee, however, takes his leasehold subject to all claims of title which are enforce-

able against his lessor, as a lessor cannot create any greater interest in the lessee than he himself has. 49 Am. Jur. 2d, Landlord and Tenant, § 13, p. 56. See, also, Gregory v. Pribbeno, 143 Neb. 379, 9 N. W. 2d 485 (1943); Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734 (1897). It is also the rule that a plaintiff in a quiet title action is required to recover on the strength of his own title, and not upon the weakness of his adversary's title. Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294 (1967). Therefore in this case Beren's claim, as lessee of the Walkers, is only as good as the Walkers' claim to ownership of the gas, oil, and mineral rights in the land. Beren must rely on the strength of the Walkers' title to the land, and not upon the weakness of the Spaders' title. Beren does not contest this fact on appeal, as it relies on its claim that the Walkers took full title to the land in question under the contract and deed executed with the Millers.

With these principles in mind, we turn to Beren's contentions that no serious question of law is raised by the proposed answer. First, it is contended that an interest in the land never vested in the Spaders. A review of pertinent provisions of the Uniform Property Act, sections 76-101 to 76-123, R. R. S. 1943, is relevant at this point. Section 76-101, R. R. S. 1943, provides that the "term property means one or more interests either legal or equitable, possessory or nonpossessory, present or future, in land, or in things other than land, * * *." That section also provides that "the term conveyance means an act by which it is intended to create one or more property interests, * * *." Section 76-106, R. R. S. 1943, provides that an "otherwise effective reservation of property by the conveyor reserves the interest the conveyor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested." Section 76-203, R. R. S. 1943, defines "deed" to "embrace every instrument in writing by

which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity * * *." Under the Uniform Property Act, a person holding an equitable interest in property may convey his interest, and also make a reservation therein; and an instrument in writing by which the interest is assigned is considered to be a deed.

We next note that upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price. In Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252 (1954), this court stated: "It has been frequently and consistently decided by this court, as it is quite unanimously agreed by courts generally, that if the owner of real estate enters into a contract of sale whereby the purchaser agrees to buy and the owner agrees to sell it and the vendor retains the legal title until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and that from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser." Under a land contract, the vendee is the equitable owner of the real estate. Graf v. State, 118 Neb. 485, 225 N. W. 466 (1929). The fact that the equitable ownership of property can be in one person and the legal title in another is beyond question. DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733 (1956). The law in Nebraska on these issues is in accordance with that in other jurisdictions. See, Burroughs v. State, 21 Md. App. 648, 320 A. 2d 587 (1974); General Electric Co. v. Levine, 50 Mich. App. 733, 213 N. W. 2d 811 (1973); Eager v. Berke, 11 Ill. 2d 50, 142 N. E. 2d 36 (1957). It is also the rule that where a land contract has an escrow provision providing that the deed will be held in escrow until payment of the pur-

chase price, the grantor of an instrument held in escrow loses control over it so long as the grantee does not default, even though he retains bare legal title in the land as security for payment of the purchase price. Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311 (1957).

The vendee under a land contract, having obtained a vested equitable interest in the real estate upon executing the contract, may generally assign his interest to a third party. 77 Am. Jur. 2d, Vendor and Purchaser, § 387, p. 533. The effect of such an assignment is to convey the vendee's equitable interest to the assignee. 77 Am. Jur. 2d, Vendor and Purchaser, § 390, p. 534; Burroughs v. State, *supra*. The assignment creates a privity of estate between the assignee and original vendor, but not a privity of contract between them, as the assignee's only contract is with the vendee. General Electric Co. v. Levine, *supra;* 92 C. J. S., Vendor & Purchaser, § 311 (b), p. 194. The vendee may make a partial assignment of his interest rather than assign his entire interest. III American Law of Property, § 11.39, p. 109.

The authorities cited above indicate that the vendee under a land contract has a vested equitable interest in the real estate, one which he may assign in whole or part. Therefore, contrary to Beren's contention, the allegation in the proposed answer that the Spaders had a vested interest in the land which they could assign, reserving a part thereof, raised a question of law deserving investigation, and therefore one which establishes a meritorious defense under the principles previously set forth in this opinion.

Beren's next claim is that the Spaders lost whatever interest they had in the land because they never obtained a deed from the Millers, and that without holding such deed the Spaders could not effectively retain an interest in the land. Beren con-

tends that in order to retain an interest in the land, the Spaders had to obtain a deed from the Millers, and then grant a deed to the Walkers, reserving the desired one-half interest in the gas, oil, and mineral rights. Although there is no prior Nebraska case deciding the question, a recent Colorado case is on point and persuasive.

In Brian v. Valley View Cattle Ranch, Inc., 35 Colo. App. 428, 535 P. 2d 237 (1975), facts similar to those in this case were present. The Wrockloffs were the fee simple owners of two tracts of land. In 1947 they entered into a purchase contract with one Brian for sale of the land. The Wrockloffs reserved a one-half interest in the mineral rights in the land under the contract. In 1952, Brian contracted to sell the land to Sullivan, and reserved a three-fourths interest in the mineral rights. Brian was reserving a one-half interest for the benefit of the Wrockloffs, and a one-fourth interest for himself. At this point in time, the Wrockloffs had not yet delivered a deed to Brian. In a subsequent quiet title action, it was established that the Wrockloffs still retained legal title to the land subject to the Brian/Sullivan contract.

In 1960, Sullivan contracted to sell part of the land to Valley View, including all mineral rights belonging to Sullivan. In 1960, Sullivan, upon payment in full by him to the Wrockloffs, received a deed from the Wrockloffs. The deed from the Wrockloffs reserved an undivided one-half interest in the mineral rights to the land, but was silent as to the one-fourth interest retained by Brian under the Brian/Sullivan contract. Sullivan then conveyed part of the land to Valley View, subject to all prior reservations of mineral rights. The successors in interest to Brian subsequently commenced a quiet title action against Valley View, asserting that they owned a one-quarter interest in the mineral rights in the land held by Valley View.

The court held that upon payment in full by Sullivan to the Wrockloffs pursuant to the terms of the 1947 contract, equitable fee title to the one-quarter mineral interest vested in Brian. The court found that the Wrockloffs held the legal title to the land in trust solely for the purpose of conveying the same to Brian. Thus it was held that Brian effectively retained an interest in mineral rights in the land under his contract with Sullivan, even though Brian himself never received a deed from the Wrockloffs, and even though the Wrockloffs gave the deed directly to Sullivan, reserving only a one-half interest in mineral rights for themselves.

The facts in Brian, although differing in some respects, are very analogous to those in the present case. Brian supports the Spaders' claim that they effectively reserved an equitable interest in the gas, oil, and mineral rights in the land pursuant to their assignment to the Walkers. Therefore a question of law has been raised by the proposed answer, and Beren's contention that the answer and the relevant documents attached to the pleadings show that the Spaders unquestionably have no interest in the land is without merit. Whether the Spaders in fact have an interest in the gas, oil, and mineral rights in the land must be determined after all relevant facts are ascertained.

The final legal argument Beren raises is that the petition and proposed answer show that the Spaders lost their interest in the land when the deed from the Millers was delivered to the Walkers. Beren contends that all agreements made prior to the deed became merged therein, and that since the deed contained no reservation in favor of Spaders, the Spaders lost their interest in the land. It is true that "for most purposes when a deed is made in execution of a contract of sale, the provisions of the contract are merged in the deed." Weiner v. Hroch, 188 Neb. 389, 196 N. W. 2d 907 (1972). In Ingraham v. Hunt,

159 Neb. 725, 68 N. W. 2d 344 (1955), it is stated: "Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties." See, also, Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659 (1956). The doctrine of merger, however, was applied in those cases only in situations where the parties to the land contract and the parties to the deed were the same. It does not apply in regard to persons who have no privity of contract. See Nebraska Wesleyan University v. Smith, 113 Neb. 208, 202 N. W. 2d 625 (1925). Whether or not the doctrine of merger is applicable in this case can only be determined on remand after all pertinent facts are adduced.

In the present case, the deed ran from the Millers to the Walkers, and the assignment ran from the Spaders to the Walkers. There is no allegation or indication in the record that the Spaders were a party to the Miller/Walker contract, or took part in the execution of the deed running from the Millers to the Walkers. We reject the contention that the proposed answer shows that the doctrine of merger applies in this case, and that the defense of the Spaders is not meritorious.

As stated previously, the allegation in the proposed answer that the Spaders own an interest in the land in question raises a question of law worthy of investigation, and is therefore one which sets forth a meritorious defense. We have thoroughly examined Beren's contentions that the proposed answer itself shows that the Spaders could not have the interest they claim. We find these contentions unpersuasive,

and believe that the Spaders should be given a full opportunity to present their arguments in the District Court. We note that in this equity case, were the default judgment allowed to stand, the Spaders would not only have rights inferior to those of Beren, but would also be precluded from pursuing any claim they may have against the Walkers, who obtained the land via the assignment from the Spaders, and who agreed that the Spaders should retain a one-half interest in the gas, oil, and mineral rights. This is so because the default decree entered by the trial court not only granted Beren relief, but also provided that the Spaders had never acquired the interest they claim, and that the Walkers and the Johnny Walker Boys' Ranch, Inc., had full title to the land. The Spaders were not charged with dilatory tactics in this case. They promptly moved to set aside the default decree, and have tendered a meritorious defense in their proposed answer, the same being a question of law worthy of investigation. Under such circumstances, the default judgment should have been vacated. See Beliveau v. Goodrich, *supra*.

We emphasize that the discussion of law herein does not decide the merits of the case. On remand, disputed questions of fact, as well as questions of law, may need to be resolved. The trial court will have to reach conclusions as to the ownership of the oil, gas, and mineral rights in question in light of the facts presented by the parties. We reverse the judgment and remand the cause for further proceedings, conditioned upon defendants Spaders paying all costs of this appeal.

REVERSED AND REMANDED.

CLINTON, J., concurring in the result only.

I concur in the result only. I cannot join in the opinion as a whole because of what appears to me to be undue speculation as to the ultimate outcome and the legal principles applicable. The only question in

this case is whether the default judgment should be set aside so as to give the defendants Spaders an opportunity to present their case on the merits. There are factual issues to be resolved and it would appear that the legal principles to be applied will be of first impression in this state. The pleadings on which the trial judge acted in denying the application to set aside the default judgment raise disputed questions of fact, and the outcome of the case depends upon the resolution of the fact issues and the determination of what principles of law are to be applied. Only a *possibly* meritorious defense is pleaded.

It is undisputed in the pleadings that when the plaintiff Beren Corporation took the oil and gas lease from the Walkers, it did so from persons who were then holders of 100 percent of the record legal title to the oil and gas interests underlying the land in question. At that time, however, there was of record the contract from Millers to Spaders for sale of the land which contained no exceptions or reservations of oil and gas interests. A deed from the Millers containing no exceptions of a one-half interest in the oil and gas underlying the land was in escrow. In that deed the grantee was undesignated. Spaders assigned the contract to Walkers and in the assignment there was a provision that Spaders would retain "one-half interest in and to the oil and gas," et cetera. When the transaction was completed the deed in escrow went directly from Millers to Walkers. We do not know exactly why the transaction was completed in this fashion rather than by the insertion of Spaders' name in the deed in escrow and then having the Spaders make a deed to Walkers containing an appropriate exception of one-half of the oil and gas rights. The pleadings raise a factual question as to whether or not it was ever intended that Spaders ever become the owner of any interest in the premises, including oil and gas.

The questions which seem to be raised and which

need resolutions, both factual and legal, are these: (1) What factual reason existed for completing the transaction directly from Millers to Walkers — was this done with the knowledge and acquiescence of Spaders? (2) Was the Beren Corporation entitled to rely on the doctrine of merger when it took the oil and gas lease from the persons who were then the record holders of the legal title to all the oil and gas interests underlying the land in question? The doctrine of merger, of course, is applicable in Nebraska. Ingraham v. Hunt, 159 Neb. 725, 68 N. W. 2d 344; Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659; Weiner v. Hroch, 188 Neb. 389, 196 N. W. 2d 907. (3) Ought Spaders, so far as the Beren Corporation is concerned, be treated as a stranger to the title for the purpose of the application of the doctrine of merger? An exception in a conveyance cannot under the general rule be made in favor of a stranger to the conveyance. Bauer v. Bauer, 180 Neb. 177, 141 N. W. 2d 837; 6 Thompson on Real Property, § 3091, note 84, p. 787. (4) If the purported reservation in the assignment is to be given effect, ought it only to be as between Spaders and Walkers, but subject to the Beren Corporation's oil and gas lease?

So far as my researches have disclosed, the questions here presented have never been answered in this state. The Colorado case which is heavily stressed in the majority opinion may not be applicable because in that case there was no intervening oil and gas lease taken from the record title holder.

HOUSE OFFICERS ASSOCIATION FOR THE UNIVERSITY OF NEBRASKA MEDICAL CENTER AND AFFILIATED HOSPITALS, APPELLEE, V. UNIVERSITY OF NEBRASKA MEDICAL CENTER ET AL., APPELLEES, IMPLEADED WITH BOARD OF REGENTS, UNIVERSITY OF NEBRASKA, APPELLANT.

255 N. W. 2d 258

Filed June 22, 1977. Nos. 40912, 41040.

1. **Court of Industrial Relations: Employer and Employee; Labor and Labor Relations.** House Officers of the University of Nebraska Medical Center are employees of the State of Nebraska as defined under section 48-801, R. R. S. 1943, and are entitled to participate in an appropriate bargaining unit.
2. **Legislature: Labor and Labor Relations.** It is the intent of the Legislature and the policy of this court to avoid undue fragmentation of bargaining units.
3. **Court of Industrial Relations: Labor and Labor Relations: Appeal and Error.** Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
4. **Court of Industrial Relations: Labor and Labor Relations: Employer and Employee: Evidence.** The decision of the Court of Industrial Relations separating House Officers of the University of Nebraska Medical Center from other "A" line employees at the Medical Center, except graduate students, is not supported by substantial evidence.
5. _____: _____: _____: _____. The evidence supports the decision of the Court of Industrial Relations that House Officers at the University of Nebraska Medical Center have a community of interest separate from graduate students and assistants at the Medical Center to warrant the separation of the House Officers from the graduate students and assistants for the purposes of collective bargaining.

Appeals from the Nebraska Court of Industrial Relations. Affirmed in part, and in part reversed and remanded.

David R. Buntain and Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Maynard H. Weinberg of Weinberg & Weinberg, for appellee House Officers Assn.

Bernard D. Hirsh and Betty Jane Anderson, for amicus curiae.

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

WHITE, C. THOMAS, J.

These are appeals by the Board of Regents of the University of Nebraska from a determination of the Court of Industrial Relations that the interns and residents of the University of Nebraska Medical Center, known as House Officers, are employees of the State of Nebraska under the provisions of Chapter 48, article 8, R. R. S. 1943, and from a further determination of the Court of Industrial Relations that a unit composed solely of House Officers employed by the University of Nebraska Medical Center is an appropriate "unit" within the meaning of section 48-838, R. S. Supp., 1976. The Board of Regents appeals.

The errors assigned are the Court of Industrial Relations erred in holding: (1) That the House Officers were employees and not students as contended by the Board of Regents; and (2) that a unit consisting solely of House Officers is an appropriate unit under section 48-838, R. S. Supp., 1976. We shall consider these assignments of error in order.

The term "House Officer" is used in postgraduate medical programs associated with the University of Nebraska College of Medicine and is used to cover the former terms "intern" and "resident." House Officers are essentially physicians who are engaged in postgraduate medical education. While formerly one who had obtained the degree of Doctor of Medi-

cine was required to serve a 1-year period called "internship" before being licensed to practice his profession in this state, this is no longer the case. Now a graduate medical doctor, upon passing the tests administered by the state licensing agency, acquires a license which authorizes him or her to practice the profession of medicine and surgery in any location in the state. Under the former practice, a first-year postgraduate medical doctor was called an "intern" and those postgraduate medical doctors engaged in various specialty programs after that internship were known as "residents." Now all postgraduate medical doctors are designated "House Officers" or "H.O." The positions as House Officers in various teaching facilities throughout the United States are determined by a national computer-matching program where the candidates for medical degrees indicate their preferences and the hospitals or teaching facilities grade the applicants according to their needs and openings. The results are announced simultaneously nationwide. At the start of postgraduate training, each House Officer is offered a contract. A salary is established which increases from year-to-year during the course of the House Officer's service. The normal stay for a House Officer ranges from 3 years to as long as 5 years. The House Officer program is not aimed at any postgraduate degree. It is either first, as found by the Court of Industrial Relations, "the desire of the individual to acquire additional or more refined skills in order to engage in a limited area of practice demanding those skills, and secondly, the demand by national certification bodies in the medical profession that a program of this kind be completed as a condition precedent to eligibility to take that body's certification examination with a view toward becoming a recognized specialist in a limited field of medical practice." All graduate medical programs at the University of Nebraska Medical Center are

governed by the "Essentials of Approved Internship" and the "Essentials of an Approved Residency" adopted by the House of Delegates of the American Medical Association. Each of the 17 House Officer programs of the Medical Center is evaluated approximately every 3 years by residency review committees and the Liaison Committee on Graduate Medical Education, a group representing the American Board of Medical Specialties, the American Hospital Association, the American Medical Association, the Association of Medical Colleges, and the Council of Medical Specialty Societies. Thus, the essentials of the graduate medical training program are only indirectly governed by the Medical Center itself but are also governed in conjunction with the specialty bodies. The programs are required to meet the requirements of outside accrediting agencies so that the persons completing the program will be deemed qualified to take the examination leading to certification in their particular specialty. The House Officer training is taken either at the University Hospital, a part of the Medical Center, or at various other affiliated hospitals. All paychecks are made through the Medical Center except for service at the Veterans' Hospitals, federal institutions, in which case the House Officer is paid directly from federal funds.

The evidence indicates that the House Officers regularly work extremely long hours. Weekly workloads of 80 to 100 hours are not unusual. The evidence indicates that the House Officers perform 50 percent or more of their functions in primary medical care and in some cases as high as 80 to 90 percent in primary medical care. Depending on the length of time in the program, the House Officers perform operations without staff men being present, write prescriptions without supervision, run out-patient clinics with minimum supervision, and write in-patient orders that are not subject to review be-

fore being carried out. The full-time staff men who are running the specialty department have their own patient load but are available, if asked, to provide support in difficult cases. While the University Hospital is a teaching hospital and generally is a referral hospital handling the highest level of cases, the House Officers are the sole in-house physicians at night and in the emergency room. The full-time staff is on call when needed but for the most part do not perform night or emergency functions.

In its Bylaws, the University of Nebraska Board of Regents defines six classifications of employees.

The employees in these categories are further designated as either "A" line, "B" line, or "C" line individuals. "A" line employees are those individuals holding the position as Professional Staff, Academic-Administrative Staff, or Other Academic Staff; "B" line personnel are individuals who hold Managerial-Professional Staff positions; and "C" line personnel are individuals who are Office and Service Staff. The House Officers are considered "Other Academic Staff" by the University Administration and are thus "A" line employees. The purpose of the House Officer program is obviously twofold, the advance training in the specialty of the medical graduate and, in return, the providing to the University Medical Center a considerable degree of service for which the House Officer is compensated. The House Officers pay federal and state income tax on their salaries. There is no exclusion under the Internal Revenue Code for stipends to students. They pay Social Security. Workmen's compensation is provided as is a free basic family health plan, a retirement plan, and 20 days of vacation. House Officers receive an employee booklet and an employee I.D. card, and are referred to as "Other Academic Staff" in their contracts which they are required to sign individually. The obvious conclusion from the recitation of facts is that the House Officers

are both students and employees of the University of Nebraska. The appellant urges us to accept the rationale of Cedars-Sinai Medical Center, 223 N.L.R.B. No. 57, 91 L.R.R.M. 1398 (1976). That case held that for the purpose of the National Labor Relations Act, specifically Title 29 U.S.C. 152, the House Officers of a private nonprofit hospital were not employees entitled to form a bargaining unit. In that case the Board stated: "(The house staff participates) in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing and residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties. While the house staff spends a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. * * * These programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the students to develop in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice."

In City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860 (1971), we said that the decisions under the National Labor Relations Act were helpful but not controlling upon this court or the Court of Industrial Relations.

The great weight of authority in state courts has come to a contrary decision to the Cedars-Sinai case. See, Regents of the University of Michigan v. Employment Relations Commission, 389 Mich. 96, 204 N. W. 2d 218 (1973); Albert Einstein College of

Medicine of Yeshiva University & Committee of Interns & Residents of New York City, 33 S.L.R.B. No. 86 (N.Y., 1970); Bronx Eye Infirmary, Inc. & House Staff Assn. of the Bronx Eye Infirmary, Inc., 33 S.L.R.B. 245 (N.Y., 1970); Brooklyn Eye & Ear Hospital & House Staff Assn. of Brooklyn Eye & Ear Hospital, 32 S.L.R.B. 65 (N.Y., 1968); The Long Island College Hospital & House Staff Assn. of the Long Island College Hospital, 33 S.L.R.B. 161 (N.Y., 1970); Matter of Wycoff Heights Hospital & House Staff Assn. of Wycoff Heights Hospital, New York State Labor Relations Board Case No. SE 45100 (1971); Worcester City Hospital & Worcester City Hospital Physicians House Staff Assn., Case No. M.C.R.-2349 (Mass., 1976); City of Cambridge & Cambridge Hospital House Officers Assn., 2 M.L.C. 1450 (Mass., 1976). In Regents of the University of Michigan v. Employment Relations Commission, *supra,* it was said: "Interns, residents and post-doctoral fellows are both students and employees. The fact that they are continually acquiring new skills does not detract from the findings of the MERC that they may organize as employees under the provisions of PERA. Members of all professions continue their learning throughout their careers. For example, fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not employees of the law firm."

Section 48-801, R. R. S. 1943, states: "Employee shall include any person employed by any employer as defined in sections 48-801 to 48-823." The section provides the employer shall mean "the State of Nebraska or any political or governmental subdivision of the State of Nebraska, except the Nebraska National Guard or state militia, any municipal corporation, or any public power district or public power and irrigation district." We find nothing in the stated purpose of the act that would indicate that the

Legislature intended that persons who are students but also employees of the University of Nebraska should be exempted from the provisions of the act. We hold that the House Officers are employees within the meaning of the act and are entitled to participate in an appropriate bargaining unit.

The appellant next contends that the Court of Industrial Relations erred in its determination of a correct bargaining unit. In its memorandum opinion, the CIR rejected a claim that the appropriate unit would include all "A" line and "B" line personnel. The CIR concluded: "That group would include a vast number of professors, lower level administrators, professional staff, managerial staff, extension agents, graduate assistants, etc. Such an all-encompassing unit was rejected by us in A.A.U.P. v. Board of Regents, 3 C.I.R. 71. In that case we held appropriate a unit consisting of all 'A line' employees at UNL, except the faculties of the colleges of dentistry and law. Each of those latter faculties was held to be an appropriate unit. In the present case, the record even more strongly supports a finding of a complete lack of a community of interest between the House Officers and other University employees. The closest to them would be graduate students who are serving as teaching assistants, research assistants, etc. * * * The record indicates that there is little, if any, contact between the House Officers and those graduate students."

Any determination of an appropriate bargaining unit must be made in light of our decision in American Assn. of University Professors v. Board of Regents, *ante* p. 243, 253 N. W. 2d 1 (1977). We there affirmed the ruling of the CIR that the "A" line employees of UN-L, except those at the Colleges of Law and Dentistry, were an appropriate bargaining unit. Central to that holding were three decisions: First, the UN-L faculty could form a separate bargaining unit from the UN-O faculty; second, the faculty of

the College of Law and of the College of Dentistry could each have their own bargaining unit; and third, the "A" line employees should be separate from the "B" and "C" line employees of the University.

The structure of the University system must again be reviewed. The University of Nebraska is a constitutionally created state-wide University with its general government vested in The Board of Regents of the University of Nebraska. The Board, pursuant to legislative authority, has established a separate central branch for the administration of the University as a whole. This central branch, entitled Central Administration, is headed by the President of the University. The Central Administration has and exercises direction and control over the entire University system subject only to the control and direction of the Board.

The University is divided into three major administrative units, each of which has its own administrative staff headed by a Chancellor. These units are the University of Nebraska at Omaha, the University of Nebraska at Lincoln, and the University of Nebraska Medical School. Each of the three units is further divided into colleges, schools, and departments.

The Medical Center consists of seven major components: College of Medicine; College of Nursing; College of Pharmacy; Nebraska Psychiatric Institute; C. Louis Meyer Children's Rehabilitation Institute; Eugene C. Eppley Institute for Research in Cancer and Allied Diseases; and the University Hospital and Clinics.

The Medical Center, through the College of Medicine and the University Hospital and Clinics, offers 17 internship and residence programs. The responsibility for these programs rests with the Dean of the College of Medicine, who also serves as the Medical Director of the University Hospital and Clinics. The

physicians who are appointed to these programs are the "House Officers" of whom we are concerned.

We have noted that House Officers are classified as "Other Academic Staff" by the University and are "A" line employees. Teaching assistants, research assistants, graduate assistants, and teaching fellows are also considered to be "Other Academic Staff" and are "A" line employees.

In American Assn. of University Professors v. Board of Regents, *supra,* we concluded that "a separate bargaining unit for UN-L faculty is appropriate." The Board there argued that UN-O faculty should be included with the UN-L faculty in a bargaining unit. As a necessary corollary of that case then the UN-L faculty should not be included in a bargaining unit with the "A" line employees at the Medical Center. We now hold that the "A" line employees at the Medical Center have a sufficient community of interest separate from the faculty of UN-O which warrants a separate unit.

Section 48-838 (1), R. S. Supp., 1976, reads, in part, as follows: "The court shall determine questions of representation for purposes of collective bargaining for and on behalf of employees * * *." In subsection (2) of that section, it is provided: "It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate."

In American Assn. of University Professors v. Board of Regents, *supra,* we stated: "It is clear that in enacting subsection (2) of section 48-838, the Legislature properly sought to avoid *undue* fragmentation of bargaining units." Although rejecting the argument that separate bargaining units for each major administrative unit would result in overfragmentation, the majority opinion did note that there is a danger of "whipsaw" tactics and unneces-

sary bureaucracy when too many units are allowed. The dissent noted that "fragmentation leads directly to development of expensive and administratively unmanageable bargaining structures and to increased administrative costs once an agreement is reached. It fosters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions such as the University to develop, administer, and maintain any semblance of uniformity or coordination in their employment policies and practices." Clearly, it is the intent of the Legislature and the policy of this court that fragmentation of bargaining units within the public sector is to be avoided.

The review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order is supported by substantial evidence justifying the order or decision made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents, *supra.*

In American Assn. of University Professors v. Board of Regents, *supra,* we considered appropriate a bargaining unit of "A" line employees of an individual professional college within one of the three major administrative units of the University. In the current case, the Court of Industrial Relations has allowed the fragmentation of "A" line employees into separate bargaining units within an individual professional college. This is a step further than what was allowed in American Assn. of University Professors v. Board of Regents, *supra.*

The Court of Industrial Relations found that there was "a complete lack of a community of interest between the House Officers and other University employees." An examination of the record reveals little, if any, evidence concerning the relationship be-

tween the House Officers and other "A" line employees of the Medical Center, other than graduate students. We, therefore, hold that the decision of the CIR in separating House Officers from "A" line employees of the Medical Center, other than graduate students, is not supported by substantial evidence. We further find the order of the CIR to be in possible contradiction of the statutory dictate to avoid undue fragmentation.

The Court of Industrial Relations found that the House Officers should have a separate bargaining unit from graduate students. In reviewing this determination, we find substantial evidence to support the order. Dr. Sparks, Chancellor of the University of Nebraska Medical Center, testified at length as to the duties and positions of the graduate students employed at the Medical Center. He stated that a graduate assistant is selected from a group of students enrolled in formal educational programs leading towards a Master's or Doctorate degree. The graduate assistant may be offered the opportunity to supervise in a laboratory or teach a part of a course, duties for which the student receives a stipend on a partial-pay basis. Although graduate assistants use the same library and laboratory facilities as do the House Officers, they only participate in seminars with the House Officers to a limited degree. Dr. Sparks further testified that the graduate students are paid a lower salary for the services than House Officers and usually work only part-time. In fact, Dr. Sparks admitted that the graduate students at the Medical Center generally performed duties and functions similar to graduate students within the University system in general. It is clear that the House Officers have a community of interest separate from the graduate students and assistants to warrant the separation of the graduate students and assistants from the House Officers for purposes of collective bargaining.

The ruling of the Court of Industrial Relations is affirmed in part, and in part reversed and remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SPENCER, J., dissenting in part and concurring in part.

I respectfully dissent from the majority opinion because I believe the House Officers of the University of Nebraska Medical Center and Affiliated Hospitals are not employees entitled to form a bargaining unit. I am in full agreement with the rationale of Cedars-Sinai Medical Center, 223 N.L.R.B. No. 57, 91 L.R.R.M. 1398 (1976).

I further dissent for the reasons set out in my dissent in American Assn. of University Professors v. Board of Regents, *ante* p. 243, 253 N. W. 2d 1. I have particular reference to my discussion relative to the fragmentation of bargaining units among public employees of the State of Nebraska as being contrary to the public policy of our state labor law as set forth in the provisions of section 48-802, R. R. S. 1943.

I concur with the portion of the majority opinion reversing the portion of the order by the Court of Industrial Relations separating House Officers from "A" line employees of the Medical Center other than graduate students. For reasons expressed in my other dissent, I cannot agree that the House Officers should have a separate bargaining unit from other employees.

SPANHEIMER ROOFING & SUPPLY COMPANY, A CORPORATION, APPELLEE, V. MRS. VERNER L. THOMPSON, ALSO KNOWN AS LOIS C. THOMPSON, APPELLANT, IMPLEADED WITH METROPLITAN LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

255 N. W. 2d 265

Filed June 22, 1977. No. 41021.

1. **New Trial: Time.** An application for new trial must be made within 10 days after the verdict, report, or decision was rendered.
2. **Judgments: Motions, Rules, and Orders.** No judgment is rendered until the pronouncement thereof is entered on the trial docket.
3. **New Trial: Judgments: Time.** A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity.

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

Wilbur C. Smith of Smith & Hansen and Ivory Griggs, for appellant.

Ben F. Shrier, for appellee Spanheimer Roofing & Supply Co.

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

WHITE, C. THOMAS, J.

This is an appeal from the judgment of the District Court finding that the plaintiff was entitled to a mechanic's lien on property of the defendant Thompson as a materialman and from the order of the court dismissing the defendant's counterclaim. The defendant appeals and assigns numerous errors but we have concluded that this court lacks jurisdiction to determine those issues and they will not be discussed. After trial to the court, the judge, by letter dated June 23, 1976, to all counsel, stated that the plaintiff was entitled to foreclosure of its mechanic's

lien and to an order dismissing defendant's counterclaim and requesting that counsel for the plaintiff submit a decree consistent with findings made by the court.

On June 30, 1976, the defendant filed a motion for new trial. On July 2, 1976, the court signed the decree submitted by plaintiff and on the same day entry of the decree was noted on the trial docket. On July 28, 1976, counsel for both parties appeared before the court for a hearing on plaintiff's motion to quash the defendant's motion for a new trial. The hearing on the motion was continued until August 6, 1976, at defendant's request. On August 6, 1976, a hearing was held on the plaintiff's motion to quash. The motion for new trial was quashed as having been filed prematurely. On August 6, 1976, the defendant gave notice of appeal.

Section 25-1143, R. R. S. 1943, provides: "The application for a new trial must be made, within ten days, * * * after the verdict, report or decision was rendered * * *." In Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541, the trial court, on September 24, 1975, signed a memorandum finding that the plaintiff's motion for summary judgment should be granted. Formal judgment was signed by the trial judge and filed October 1, 1975. In that case the plaintiff contended that the motion for new trial was required to be filed within 10 days of September 24, 1975. This court disagreed citing section 25-1301, R. R. S. 1943: " 'A judgment is the *final determination* of the rights of the parties in an action. (2) *Rendition* of a judgment is the act of the court, or a judge thereof, in *pronouncing judgment,* accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the *relief granted or denied* in an action.' " The court cited Fritch v. Fritch, 191 Neb. 29, 213 N. W. 2d 445, to the effect that: "No judgment is rendered until the pro-

nouncement thereof is noted on the trial docket." The effect of Valentine Production Credit Assn. v. Spencer Foods, Inc., *supra,* is clearly that until the judgment is pronounced, accompanied by an appropriate docket entry, a motion for new trial is premature. A memorandum or letter as in this case is not a report or decision within the meaning of section 25-1143, R. R. S. 1943.

"It is said that a motion for a new trial if made before all of the material issues have been disposed of is premature. A motion for a new trial if prematurely made is ineffectual." 58 Am. Jur. 2d, New Trial, § 187, p. 403. We have previously held that a motion for new trial not filed within 10 days after verdict, report, or decision is rendered is a nullity, Pallas v. Dailey, 169 Neb. 277, 99 N. W. 2d 6, so a motion for new trial filed prior to the rendition of a judgment must equally be said to constitute a nullity.

Section 25-1912, R. R. S. 1943, states: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court * * * shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, * * * or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal * * *." An appeal must be dismissed where notice is not filed within the time prescribed by section 25-1912, R. R. S. 1943. Giangrasso v. Eagle Distributing Co., 185 Neb. 406, 176 N. W. 2d 16.

No effective motion for new trial having been filed, the District Court was correct in quashing the premature filing, and no notice of appeal having been filed within 1 month of the date of the rendition of the judgment, this court acquired no jurisdiction. The cause is dismissed for want of jurisdiction.

APPEAL DISMISSED.

CLINTON, J., concurring.

The majority opinion says: "We have previously held that a motion for new trial not filed within 10 days after verdict, report, or decision is rendered is a nullity, Pallas v. Dailey, 169 Neb. 277, 99 N. W. 2d 6, so a motion for new trial filed prior to the rendition of a judgment must equally be said to constitute a nullity."

We have said numerous times that the motion for new trial serves two functions: (1) To inform the trial judge of the complained-of errors as a necessary condition precedent to our ruling on trial errors. (2) Its timely filing is necessary if the party wishes to use the date of the overruling of the motion as the beginning of the 1 month within which notice of appeal must be filed — otherwise time for appeal begins to run from "rendition of such judgment."

Heretofore we have always applied the "nullity" application to the filed-too-late cases. I suggest that the application of the so-called "nullity" principle to the so-called "premature" filings has nothing whatsoever to do with the accomplishment of either of the two purposes which we have said the motion for new trial is supposed to accomplish and that as applied here is hypertechnical and not required by the language of our statutes.

I wish to call attention to three statutes insofar as they pertain to the matter of appealing from the "rendition of such judgment."

Section 25-1143, R. R. S. 1943, says the "application for a new trial must be made, within ten days . . . after the verdict, report or *decision was rendered,* except . . . ." (Emphasis supplied.)

Section 25-1301, R. R. S. 1943, defines a judgment as the final determination of the rights of the parties and then defines two other terms: "(2) *Rendition of a judgment* is the act of the court, or a judge thereof, in *pronouncing judgment, accompanied* by the

making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action. . . . (3) *Entry of a judgment* is the act of the clerk of the court in *spreading the proceedings* had and the relief granted or denied *on the journal* of the court." (Emphasis supplied.)

Section 25-1912, R. R. S. 1943, provides for appeal to this court by filing a notice of appeal in the office of the clerk of the District Court "within one month after *the rendition of such judgment or decree,* or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause. . . ." (Emphasis supplied.)

The language of the statutes in the respect we are talking about is not congruent. Section 25-1143, R. R. S. 1943, refers to "decision was rendered," section 25-1301, R. R. S. 1943, refers to "rendition of a judgment" and "entry of a judgment," and section 25-1912, R. R. S. 1943, refers to "rendition of such judgment or decree" and to "overruling of a motion for a new trial."

Presumably when section 25-1301, R. R. S. 1943, was amended in 1961 it was intended to define clearly when certain acts were accomplished so that lawyers would know when they had to accomplish the next step. The truth is that no one looked at the other statutes with which there must be congruence.

First, in section 25-1143, R. R. S. 1943, the term "decision was rendered" must be interpreted to mean either "rendition of judgment" or "entry of judgment" whichever occurs first — because there will be occasions when there will be an "entry of judgment" without any "rendition of judgment." This would occur when the judge makes no "notation on the trial docket" but at some time signs a journal entry and it is filed.

Under section 25-1912, R. R. S. 1943, the notice of appeal must be filed within 1 month after "rendition

of judgment." It does not speak of "entry of judgment" as does section 25-1301, R. R. S. 1943. So, for purposes of section 25-1912, R. R. S. 1943, we have thus necessarily read "rendition of judgment" to include both "rendition" and "entry" under section 25-1301, R. R. S. 1943, and, of course, we do so because, as noted in the preceding paragraph there can be an "entry" of judgment, without a "rendition," if we take everything in the statutes literally. In short there is plenty of room for construction in our application of the statutes. I don't see any point in the circumstances of the case before us for equating "prematurity" with "late filing," as in Pallas v. Dailey, 169 Neb. 277, 99 N. W. 2d 6, cited in the majority opinion. Part of the problem is that we have in the past and still do use the term "nullity" when what we mean is "filed too late," that is, the deadline principle has been violated. Under the facts in this case this principle isn't violated and neither is the principle of letting the trial judge know what was being complained about.

Now let us consider three cases, including the one before us, and let us do it in light of the practical knowlege of how a District Judge must necessarily sometimes operate in a multi-county district and perhaps sometimes even in a single-county district. When, e.g., he has a case under advisement and makes up his mind when in his home county and away from the county where the case is, he writes a letter to counsel informing them of what he has decided. There is at that time no "rendition of judgment" because he can't make a notation on the trial docket. Neither is there an "entry of judgment" because no journal entry has as yet been signed and filed.

Now to consideration of the three cases.

Spanheimer

Letter memo — June 23rd — No entry on trial docket.

Motion for new trial — June 30th.
Decree signed — July 2d — therefore judgment has both been rendered and entered.

Counsel in this case knew what the "decree" was going to be because he was told in a letter — he jumps the gun — so he is out in the cold and so is his client.

> Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541.

Letter memo — September 24th — No evidence of entry on trial docket.
October 1 — "Entry of judgment," that is, journal signed and filed.
Motion for new trial — October 9th.

We overruled the contention in that case that the motion was too late and we did so properly, but I do not think that case necessarily demands the proposed outcome in the case of "prematurity."

Brandt v. Mayer, 196 Neb. 751, 246 N. W. 2d 203. The sequence of events was as follows, although dates are not shown.
Entry of judgment.
Motion for new trial filed (timely).
Judgment modified (this was the judgment appealed from).

No motion for new trial was filed as to the modified judgment. We there summarily dismissed the contention that because no motion for new trial had been filed as to the judgment appealed from that we could not consider trial errors. We did not in that case consider the motion filed before the modified judgment as a "nullity" even though certainly it was premature as to the judgment from which appeal was taken. In that case we said: "Defendants contend it was necessary for the plaintiff to file a motion for a new trial before processing this appeal. We determined it was not. The purpose of a new trial motion is to give the trial court an opportunity after

judgment to review and correct alleged errors in the previous proceeding." (Citing authority.) I cannot in principle distinguish the above case which we decided just a few months ago from the one at hand.

I am willing to grant that the majority opinion will create certainty. I am also willing to concede that the term "within ten days" in section 25-1143, R. R. S. 1943, literally read closes both ends. The motion must not only be not "too late," it also must be not "too early." Note, however, that statute speaks of the decision rendered.

I think that we propose being too hypertechnical in this case. However, I concur for the sake of laying down an absolutely certain rule because the majority wish to do so. I accompany it with this explanation so that all can see the state of confusion of these statutes.

McCOWN, J., dissenting.

I agree with Justice Clinton's conclusion that a "premature" filing of a motion for a new trial does not and should not be equated with a belated out-of-time filing. I believe that such an approach is hypertechnical and unjustified. The fact that a rule may be definite and certain does not necessarily mean that it is fair and just. Justice is often lost in a maze of technicalities.

BOSLAUGH, J., dissenting.

I agree with Judge Clinton that the problem in these cases is the rule that a motion for new trial filed prematurely is a nullity. The rule is a trap for litigants who try to comply promptly with section 25-1143, R. R. S. 1943.

I think the proper solution to the problem is to make the rule inapplicable where the trial court has notified the parties of its decision by letter or otherwise.

COUNTY OF MADISON, APPELLEE, V. CITY OF NORFOLK ET AL., APPELLEES, IMPLEADED WITH WRIGHT-WAY WASH, INC., APPELLANT, DONALD H. REES ET AL., INTERVENERS-APPELLEES.

255 N. W. 2d 54

Filed June 22, 1977. No. 41058.

Foreclosure: Service: Collateral Attack: Demurrer. In a tax foreclosure action where jurisdiction was obtained for service by publication, a petition by a dissolved corporation to vacate the decree and allow it to redeem after confirmation on the ground the affidavit regarding a diligent investigation and inquiry was fraudulent is subject to demurrer in the absence of an allegation that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other person having charge of the assets.

Appeal from the District Court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Kirby, Duggan & McConnell, for appellant.

W. G. Whitford, for appellee County of Madison.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for interveners-appellees.

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

BOSLAUGH, J.

This case originated as a suit by the County of Madison, Nebraska, to foreclose tax sale certificates. The first cause of action involved a half-acre tract of land owned of record by the defendant, Wright-Way Wash, Inc., which was alleged to be a dissolved corporation. Service upon the defendant was obtained by publication. The defendant made no appearance and a decree of foreclosure was entered on October 8, 1974. An order of sale was issued and the property was sold to Donald H. Rees and Joan M. Rees, the interveners. The sale was confirmed on December 6, 1974, and a sheriff's deed was executed and delivered to the interveners.

On April 2, 1976, the defendant, Wright-Way Wash,

Inc., filed a petition seeking to vacate the judgment under section 25-2001, R. R. S. 1943, on the theory the judgment had been obtained by fraud. Demurrers were sustained to this petition and an amended petition. The trial court dismissed the action and refused leave to file a second amended petition. The defendant has appealed and contends the trial court erred in sustaining the demurrer to the amended petition and in refusing leave to file a second amended petition.

Section 25-515, R. R. S. 1943, provides that service upon a dissolved corporation may be had by publication if the action is one in which service by publication is proper and if, after diligent investigation and inquiry, no assignee, trustee, receiver, or person having charge of the assets of the dissolved corporation can be found. The statute requires that before the publication of notice it be alleged in the petition or affidavit for service by publication that, after diligent investigation and inquiry, the assignee, trustee, receiver, or person having charge of the assets of the dissolved corporation cannot be found in the State of Nebraska, and that an order for service by publication be made in the action. An affidavit conforming to the requirements of the statute was filed and an order for service by publication was made before the notice was published. The defendant's contention, in substance, is that a diligent investigation and inquiry was not made and the allegations made in the affidavit were fradulent.

The defendant's amended petition to vacate the decree of foreclosure alleged the defendant was a domestic corporation; its registered agent was Gloria Luebbe who resided at 341 South Beemer Street in West Point, Nebraska; its articles of incorporation, together with its business address, were filed of record and with the Secretary of State; that no attempt was made to serve the corporation by service upon its registered agent or by leaving a

copy of a summons at the last usual place of business of the defendant; "that said plaintiff did in no way make an attempt to determine the whereabouts of the registered agent of the corporation or its receivers or trustees"; that the affidavit upon which service for publication was obtained was false and fraudulent; and the order for service by publication and the judgment were procured by fraud. The defendant prayed that the decree be vacated and the defendant be allowed to redeem.

The second amended petition tendered by the defendant further alleged that the defendant had a meritorious defense to the petition and that the property had been sold for less than its market value.

The defendant did not allege that it was not a dissolved corporation and did not allege that there was an assignee, trustee, receiver, or person having charge of the assets of the dissolved corporation, or where such a person could be found. This was important because section 25-515, R. R. S. 1943, is a special statute relating to dissolved corporations and provides that service shall be made by delivering a copy of the process to the assignee, trustee, receiver, or person having charge of the assets, or by leaving a copy at the residence of such person. If no assignee, trustee, receiver, or person having charge of the assets can be found, service can be made by leaving a copy at the last usual place of business or office of the corporation or service can be made by publication if the action is one in which service by publication is proper.

If no assignee, trustee, receiver, or other person having charge of the assets can be found, service may be made by publication without first attempting to make service by leaving a copy at the last usual place of business or office of the corporation. There is no requirement in the statute that service be attempted at the last usual place of business or office of the corporation before making service by publication.

Because the defendant did not deny that it was a dissolved corporation or allege that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other person having charge of the assets of the defendant, the amended petition was subject to demurrer.

The second amended petition added nothing of importance to the allegations of the amended petition. The defendant was asking to redeem and the bare assertion that a meritorious defense existed was of no consequence here. The fact that the property may have been sold for less than its value would not afford any ground for redemption after confirmation if the proceedings were otherwise valid.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BERNARD L. STONE, APPELLANT.

255 N. W. 2d 57

Filed June 22, 1977. No. 41065.

1. **Criminal Law: Courts: Misdemeanors: Appeal and Error.** Misdemeanor appeals from the county or municipal court are triable de novo in the District Court on the record made in the lower court.
2. **Criminal Law: Due Process: Right to Counsel.** It is inherent in the right to a trial de novo that there be an adequate notice of the time and place of the hearing, an opportunity to be heard, and the right to an effective representation by counsel.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

Walter J. Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, Richard M. Jones, and James Schaefer, for appellee.

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

McCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

The defendant was charged with operating or being in actual physical control of a motor vehicle upon a public street or highway while under the influence of intoxicating liquor or drug or while having ten hundredths of one percent or more by weight of alcohol in his blood, breath, or urine. The case was tried in the municipal court of the City of Omaha, Nebraska, on July 1, 1976. The defendant was found guilty, fined $100, assessed costs, and his driver's license suspended for a period of 6 months. An appeal was taken to the District Court. On August 10, 1976, the District Court affirmed the judgment and sentence of the municipal court and remanded the case for execution of sentence. The defendant filed a motion to vacate this order, which was overruled, and has appealed. For the reasons stated below, we reverse the judgment of the District Court and remand the case for further proceedings in accordance with this opinion.

The defendant appeared at the arraignment on appeal but received no notice of the date set for the hearing and was thus precluded from arguing the case to the District Court. Under these circumstances, the defendant contends, the District Court erred in not vacating its judgment and granting the defendant a rehearing.

Section 29-611, R. R. S. 1943, in relevant part, provides: "The defendant shall have the right of appeal from any judgment of a county or municipal court, imposing fine or imprisonment, or both, to the district court of the county * * *." Section 29-613, R. R. S. 1943, states: "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 re-

mand the case to the county or municipal court for a new trial."

Misdemeanor appeals from the county or municipal court are thus triable de novo in the District Court on the record made in the lower court. State v. Clark, 194 Neb. 487, 233 N. W. 2d 898 (1975). The proposition needs no citation that this trial must be a formal trial. It must comport with the fundamentals of due process, which are adequate notice and an opportunity to be heard.

Defendant received no notice of the hearing in this case, and was thus unable to argue to the District Court. While the defendant could not contradict or dispute the record made in the lower court (Anderson v. State, 163 Neb. 826, 81 N. W. 2d 219 (1957)), he was entitled to have effective assistance of counsel and to bring to the court's attention any questions of law and any inferences and analyses of the facts and inconsistencies in the testimony which he perceived in the State's case against him.

For the foregoing reasons, the judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STAN VRBA, APPELLANT, V. RONNY KELLY, APPELLEE.

255 N. W. 2d 269

Filed June 29, 1977. No. 40950.

1. **Motor Vehicles: Negligence.** A driver who operates his vehicle at such a rate of speed that he is unable to stop or turn aside in time to avoid a collision after a danger becomes apparent is negligent as a matter of law.
2. _____: _____. When range of vision is reduced by blowing snow, a driver is required to take such condition into consideration and to be more alert and vigilant for dangers.
3. **Motor Vehicles: Negligence: Statutes.** The requirements of sec-

tion 39-670 (1), R. R. S. 1943, do not apply to disabled vehicles, if the driver thereof observes such requirement so far as he is able and so far as weather conditions permit.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Affirmed in part, and in part reversed and remanded with directions.

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

Neil R. McCluhan and Michael W. Ellwanger of Kindig, Beebe, McCluhan, Rawlings & Nieland, for appellee.

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

KUNS, Retired District Judge.

This action was brought in the county court of Thurston County, Nebraska, by Stan Vrba, appellant, against Ronny Kelly, the appellee, for the recovery of damage received in a motor vehicle collision. Appellee counterclaimed for his damage. The county court dismissed appellant's action and entered judgment for the amount of appellee's damage. On appeal to the District Court, both the petition and the counterclaim were dismissed. Appellant brings a further appeal to this court. Appellee does not cross-appeal. We reverse the judgment of dismissal against the appellant and affirm the judgment of dismissal of the counterclaim.

The situation reflected by the pleadings and the evidence is that on the evening of February 4, 1975, during a severe snowstorm, the appellant's vehicle became stuck in a snowdrift about 90 feet below the crest of a hill. After unsuccessful attempts to dig the vehicle free, appellant left it on his right side of the highway and proceeded to his home on foot; he did not place flares, leave his lights on, or give other warning of the location of the vehicle. Later that night a county road maintainer cleared a path ap-

proximately 10 feet wide in the center of the road. The following morning, the appellee while driving down said hill collided with appellant's vehicle, causing damage to the left front corner of each vehicle, that being the area of impact.

Appellant contends that appellee was negligent in failing to exercise proper control, driving at an excessive rate of speed, failing to maintain a proper lookout, and in driving on the wrong side of the highway. He argues that the evidence of such negligence was so clear that the trial court should have entered judgment for the amount of his damage. The only evidence concerning the manner in which appellee was driving comes from the appellee himself. He stated that as he proceeded over the crest of the hill, his range of vision was reduced to approximately 50 feet by the blowing snow; his rate of speed was then 25 to 30 miles per hour; and when he saw appellant's vehicle, he was unable to stop or turn aside in time to avoid the collision.

This testimony shows upon its face that the appellee was driving at a rate of speed which, under the conditions shown, rendered him unable to keep a proper lookout or to maintain proper control over the operation of his vehicle. When a driver cannot stop or turn aside in time to avoid collision after a danger becomes apparent to him, he is negligent as a matter of law. The existence of adverse weather conditions affecting the range of visibility or the ability to maneuver a vehicle does not excuse his conduct but rather emphasizes the lack of care displayed by him. This has long been the rule in Nebraska, subject to some exceptions not found in the evidence in this case. Most v. Cedar County, 126 Neb. 54, 252 N. W. 465; Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584; Rief v. Foy, *ante* p. 572, 254 N. W. 2d 86. Appellee's own evidence, therefore, requires a finding that he was negligent as a matter of law at the time of the collision and that the degree of

such negligence was more than slight. Appellee cannot recover upon his counterclaim and is liable to the appellant for his damage unless the defense of contributory negligence is established.

Appellee contends that the appellant was negligent in leaving his vehicle stopped on a public highway without lights or flares in a place where it was not in clear view for a distance of 200 feet in each direction. Appellant testified that when he was unable to extricate the vehicle from the snowdrift by shoveling he moved it as far to his right side as he could and proceeded on foot to his home. The collision occurred before he returned. Appellee relies upon the language of section 39-670 (1), R. R. S. 1943, that: "No person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon a roadway outside of a business or residential district, when it is practicable to stop, park, or leave such vehicle off such part of such highway, but in any event an unobstructed width of the roadway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of two hundred feet in each direction upon such highway."

We have previously held in Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, that such statutory requirements do not apply to disabled vehicles. Appellant's vehicle was disabled within the meaning of this precedent. It could not be moved further from its position and it is immaterial whether the cause of such immobility was a mechanical malfunction or the presence of drifted snow. The appellant did comply with the requirements of the statute so far as possible; the vehicle was stopped as far to the right as possible; there was an unobstructed space, the width of a maintainer blade opposite; and weather conditions rendered it impossible for the appellant or anyone else to provide a clear view of the vehicle for 200 feet in either direction. The evidence was not

sufficient to support a finding of any negligence on the part of the appellant, but shows rather that the location of the appellant's vehicle was only a condition and could not operate as a concurrent cause of the collision. Appellee's defense of contributory negligence must therefore fail.

The trial court should have entered judgment for the appellant for the amount of his stipulated damage. The counterclaim by appellee was properly dismissed. The judgment is reversed and the cause remanded for the entry of judgment in favor of appellant and is affirmed as to the dismissal of appellee's counterclaim.

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

BRODKEY, J., concurring.

I concur with the majority opinion in this case, but believe that additional remarks are appropriate in light of the case of C. C. Natvig's Sons, Inc. v. Summers, *post,* p. 741, 255 N. W. 2d 272 (1977), which involved a factual situation similar in many respects to that in the present case, but where this court reversed a summary judgment entered against a party which had been found negligent under the range of vision rule.

In C. C. Natvig's Sons, Inc. v. Summers, *supra,* the trial court found that the plaintiff's driver was guilty of negligence as a matter of law and granted summary judgment to the defendants because plaintiff's driver was unable to stop his vehicle within his range of vision, and collided with defendants' vehicle. This court reversed the judgment of the trial court on the grounds that the record showed the defendant driver may have been negligent, and that a factual question existed as to whether the negligence of plaintiff's driver was slight and the negligence of the defendant driver, if any, was gross in comparison. See section 25-1151, R. R. S. 1943, the comparative negligence statute in Nebraska. This court stated:

"The range of vision rule was never intended to be arbitrary. * * * Although in some circumstances it may be proper for the trial court to determine as a matter of law that a person violating the range of vision rule is guilty of negligence more than slight, so as to prevent recovery, such as where the other party was not negligent in any respect, yet we have never held that a driver violating that rule is guilty of negligence more than slight in every circumstance, regardless of the actions or negligence of the person with whom he collides."

In the present case, as the majority opinion indicates, the plaintiff could not be found negligent. Since defendant was guilty of negligence under the range of vision rule, plaintiff is entitled to judgment in his favor. In C. C. Natvig's Sons, Inc. v. Summers, *supra,* the record showed that the defendant driver may well have been guilty of active negligence. Defendants' vehicle in that case was not disabled at the time of the collision, but was being pulled from the side of the road and was blocking the entire road. Defendant driver took no precautions and gave no warning to oncoming drivers, although he knew that the location was dangerous due to the geography and weather conditions. In such a situation, a factual question was raised as to comparative negligence of the parties, and summary judgment was inappropriate.

Therefore, although the two cases may appear to be inconsistent at first glance there is a fundamental difference which distinguishes them. The present case should not be construed as holding that a party found to be negligent under the range of vision rule is guilty of negligence more than slight as a matter of law in every situation, regardless of the negligence of the person with whom he collides.

STATE OF NEBRASKA, APPELLEE, V. JAMES ADAMS, APPELLANT.

255 N. W. 2d 280

Filed June 29, 1977. No. 40955.

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

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

A. Loy Todd, Jr., of Davis, Bailey, Polsky, Huff & Denney, for appellant.

No appearance for appellee.

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

MCCOWN, J.

Defendant pleaded guilty in the municipal court of Lincoln, Nebraska, to a charge of driving on a suspended license. He was sentenced to 30 days in jail and his operator's license was suspended for a period of 1 year thereafter. On appeal the District Court affirmed the conviction and sentence, and defendant has appealed to this court.

On February 8, 1976, defendant was arrested for speeding. The arresting officer then discovered that defendant's license to operate a motor vehicle had been suspended for a period of 6 months on September 3, 1975. The basis for the license suspension was a point system violation arising out of five speeding convictions and one failure to yield the right-of-way violation occurring in the period between October 14, 1973, and June 17, 1975. A collision was involved in the failure to yield violation.

The defendant was 32 years old at the time of the offense here and had no adult record other than extensive traffic offenses. In the District Court defendant complained that the original presentence in-

vestigation report in the municipal court was negative because of a clash of personalities between the investigating officer and the defendant. The District Court therefore asked for a new presentence investigation report, gave the defendant and his counsel opportunity to review the report, and explain any portions of the report which counsel felt needed explanation. Both reports showed a juvenile record ending in 1960 when defendant was age 16. Military and family information was, of course, included but was of no particular significance.

The sentence of 30 days in jail and revocation of driver's license for a period of 1 year thereafter is the mandatory sentence for a first offense conviction under section 60-430.01, R. R. S. 1943. The District Court stated that the offense involved demonstrated a lack of respect for the law. Defendant's extended record of traffic violations was also an indication of a lack of regard for the safety of society.

Where the term of a sentence is mandatory, the only issue is whether or not the sentencing court abused its discretion in failing to grant probation. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head, *ante* p. 58, 251 N. W. 2d 668. There was no abuse of discretion here.

AFFIRMED.

WIEBE CONSTRUCTION COMPANY, A NEBRASKA, CORPORATION, APPELLEE AND CROSS-APPELLANT, V. THE SCHOOL DISTRICT OF MILLARD, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, A PUBLIC CORPORATION, APPELLANT AND CROSS-APPELLEE.

255 N. W. 2d 413

Filed June 29, 1977. No. 41034.

1. **Contracts: Waiver: Damages.** A contractual provision provid-

ing for an award of liquidated damages for delay in performance of a contract may be waived.

2. **Courts: Evidence: Judgments.** This court will not overturn factual findings in a case tried by the judge with jury waived unless the findings are clearly wrong.
3. **Contracts: Damages: Interest.** In an action for a liquidated sum which is the balance owing on a contract, the amount claimed does not become unliquidated merely because of the assertion of an offset, and if the trier of fact finds against the defendant on the offset, prejudgment interest should be awarded on the claim.
4. **Contracts.** In a contract action, if the plaintiff has fully performed his contract he is entitled to the contract price.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Malcolm D. Young of Malcolm D. Young Law Offices, for appellant.

Lyle E. Strom and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

CLINTON, J.

This is an action by Wiebe Construction Company against the School District of Millard, arising out of a contract entered into by the parties on July 22, 1969, under the terms of which Wiebe agreed to construct for the district a project identified as the Millard high school stadium at a cost price of $556,365. In accordance with provisions for changes in the contract contained therein, the contract was modified by the parties by change orders Nos. 1, 2, 3, and 4, calling for additional work and payments in the amount of $2,172.18, $2,067, and $8,553. The original contract required completion of the work within "350 consecutive calendar days" after " 'Notice to Proceed.' " The contract also provided that the contractor pay liquidated damages in the sum of $100 per day for each day of delay in performance.

Wiebe's petition contained three causes of action as follows: (1) $56,915.72 for balance unpaid on the contract price; (2) $42,042 for increased costs by reason of delay caused when problems not anticipated by the parties arose and the district and its engineers delayed in making decisions as to necessary specification changes; and (3) $1,361.21 for extra work performed in reconstruction of a sidewalk.

The district filed an answer and a counterclaim. In its answer the district alleged that Wiebe failed to complete the work properly. It denied that unanticipated conditions were encountered and alleged that in any event they should have been anticipated by the contractor. In its counterclaim the district made factual allegations, and prayed for liquidated damages at $100 per day for 224 days delay in completion of the project and for damages for certain defects in performance, including, among others, the claim that planks for certain stadium seats were not in accordance with contract specifications. Its total prayer for damages was in the sum of $62,112.65. In its reply Wiebe alleged, among other things, that the delay in construction was caused by indecision of the district's engineers and agent as to whether specification changes were required and what these changes would be.

The trial of the case began before a jury and after 5 days before the jury the parties waived a jury trial, presenting the remainder of the evidence and submitting the case to the trial judge.

The trial court entered a judgment in part as follows: ". . . the court finds generally in favor of the plaintiff and that there is due to the plaintiff from the defendant on the causes of action set forth in plaintiff's petition the sum of $44,880.68." The court also allowed interest at 6 percent from October 1, 1971, until April 30, 1976, the date of judgment, in the amount of $12,342.18. The court dismissed with prejudice the counterclaim of the district.

The district appealed to this court, here making two assignments of error: (1) The trial court erred in awarding prejudgment interest. (2) The trial court erred in not awarding liquidated damages for delay in performance. In a cross-appeal Wiebe asserted that it was entitled to the full amount of the balance on the contract, to wit, $56,915.72, instead of the $44,880.68 awarded by the court, as well as prejudgment interest on the full balance.

We will first discuss the claim of the district that it was entitled to liquidated damages for delay in performance. The entire project consisted of a football field, stadium, appurtenances, and a running track. The delay in performance arose only in connection with the running track portion of the contract. The evidence would permit the trial court to find the following. After construction was commenced a part of the site was found to be underlain with ground water and to be in a very spongy condition. When this matter was called to the attention of the engineers in November of 1969, it appeared that the condition would require a change in contract specifications and not merely more difficult work on the part of the contractor. As a consequence of this situation the engineers, in a letter dated December 18, 1969, in response to a letter from Wiebe, stated: "It would seem to us that a more reasonable approach to resolving this matter would be to wait until spring of 1970 to determine the change in the work." In a letter dated June 1, 1970, the engineers wrote to Wiebe: "We will provide you with additional details on the extra work to be performed for stabilization of the running track subgrade in the very near future." A letter from the engineers to Wiebe dated June 15, 1970, contained the following item: "6. The track stabilization detail will be made available, for construction purposes, upon the completion of all items listed above and no work should be performed on the track curb, subgrade base, etc. until these items

have been corrected." As one consequence of the water condition, change order No. 4, dated September 1, 1970, and executed by the parties a few days later, was entered into. It called for an extra in the form of a drainage system which was in fact constructed. The system was not, however, completely effective. After that there were extended discussions between the parties as to what, if any, further specification changes were required. The engineers hired a soil expert who made recommendations. Under date of September 3, 1970, a fifth change order, which was a revision of several previously proposed change orders, was offered by the district's engineers. This change order made some additional specification changes in the preparation of the subgrade of the track and also provided for an 120-day additional time extension on the contract period in addition to a 28-day extension which had been granted by one of the earlier change orders. The proposed changes in change order No. 5 were not agreed to by Wiebe because of, among other things, a claim that it could not, on the basis of the proposed specification changes, make any reasonable estimate of quantities of certain materials involved.

It is now necessary to note portions of the four change orders which were in fact adopted as these portions pertain to the "contract period." In change order No. 1 the contract period was designated as August 18, 1969, to August 3, 1970 (350 days). The second change order provided for the same contract period. The third change order stated the contract period as 378 days and contained no substantive contract changes otherwise. Change order No. 4, dated September 1, 1970, in addition to the drainage system change, provided: "Contract Period To be determined." Following change order No. 4 there were no further determinations as to what would be the contract period, but on September 15 or 16, 1970, Wiebe was instructed to proceed under the

original track specifications. On October 28, 1970, the engineers performed a test of soil conditions and it was found the ground was too wet to proceed at that time. Wiebe, however, indicated that he would proceed nonetheless if the district would accept the risk of frost damage to the track. No agreement was reached at that point. The track was completed on October 25, 1971.

The foregoing evidence would be sufficient to support a finding that the district had waived the provision for time of performance, or that the parties had modified the time for performance of the contract. A contractual provision providing for an award of liquidated damages for delay in performance may be waived. See, Hansen v. Covell, 218 Cal. 622, 24 P. 2d 772; United States v. John Kerns Constr. Co., 140 F. 2d 792; Traut-Ditmar Constr. Co. v. Hartman, 112 N. Y. S. 919, 61 Misc. 173; Edward Edinger Co. v. Willis, 260 Ill. App. 106; Rockwell v. Mountain View Electric Assn., Inc. (Colo App.), 521 P. 2d 1272. Thus dismissal of the part of the counterclaim concerning liquidated damages for delay in performance was supported by the evidence and cannot be said to be clearly wrong.

The evidence as to whether some of the work done was not in accordance with contractual specifications is to some limited extent in conflict. It presented simply a factual issue for the trial judge to determine. The court's dismissal of the counterclaim for defective work is therefore also supported by the evidence.

We now turn to the issue of the propriety of the award of prejudgment interest. The district argues that a reasonable controversy existed as to Wiebe's right to recover the contract balance and that the amount was a matter of dispute, therefore the claim was unliquidated and under the previous holdings of this court no prejudgment interest could be allowed. It cites Frank McGill, Inc. v. Nucor Corp., 195 Neb.

448, 238 N. W. 2d 894, and other opinions of this court. In the cited case, although the contract price was a fixed amount, we upheld the trial court's denial of prejudgment interest because the contract was ambiguous as to the amount of work to be done for the stated contract price and there was a factual question as to whether all the required work had been done. This, we said, made the plaintiff's right of recovery, as well as the amount, a subject of dispute, therefore the claim was unliquidated even though the jury awarded the plaintiff the exact amount of his claim.

In none of the Nebraska cases cited by the district do we have the situation which confronts us here. Wiebe, in its first cause of action, sought a sum certain fixed by the terms of the contract. The district sought to offset the amount owed by a claim for liquidated damages for delay in performance as well as by amounts for claimed defects in the performance of the work. Wiebe relies upon the proposition that where the plaintiff's claim is liquidated, the existence of an unliquidated setoff does not prevent the recovery of prejudgment interest. It cites the following authorities, among others, Raymond International, Inc. v. Bookcliff Constr., Inc., 347 F. Supp. 208, affirmed 489 F. 2d 732 (8th Cir.); Hansen v. Covell, *supra*; Fluor Corp., Ltd. v. United States ex rel. Mosher Steel Co., 405 F. 2d 823; Macri v. United States, 353 F. 2d 804; Annotation, 3 A. L. R. 809; Annotation, 89 A. L. R. 678. It seeks to distinguish Wilson Concrete Co. v. A. S. Battiato Constr. Co., 196 Neb. 185, 241 N. W. 2d 819, which cited Hays v. County of Douglas, 192 Neb. 580, 223 N. W. 2d 143, which latter case did not involve an offsetting counterclaim.

It is apparent that Wiebe's claim on its first cause of action for the balance owed on the contract is, by itself, a liquidated claim. It is the amount owed, computed in accordance with the terms of the con-

tract. The amount was disputed only because of the claims the district made in its counterclaim. Because of the limited assignments of error, the only part of the counterclaim before us on this appeal is the claim for the contractually stipulated daily damages for delay in performance. The trial judge found against the district on that part, as well as on those for defective performance.

The situation in Wilson Concrete Co. v. A. S. Battiato Constr. Co., *supra*, was similar to that before us here, that is, there was a claim by the plaintiff for a contract balance and the defendant asserted an offset by reason of defective performance. However, in that case the jury had found that certain of the materials furnished in the performance of the contract did not meet the specifications and allowed an offset. The trial court then allowed prejudgment interest on the contract balance, less the amount of the offset. A division of this court reversed that portion of the judgment, placing reliance upon Hays v. County of Douglas, *supra*. In the case here before us, the trier of fact found against the district on its counterclaim. The Hays case, on which the Wilson opinion rested, did not involve a plaintiff's liquidated claim and an offsetting counterclaim, but an ambiguous contract, and contested factual details relating to claimed nonperformance which clearly rendered the amount of recovery uncertain. In our judgment, the opinion in the Wilson case is not controlling here because (1) in the case before us the trier of fact found against the defendant on the counterclaim, and (2) it may be that the Wilson opinion's reliance upon Hays is misplaced, but we need not decide that at this time.

We hold that in an action for a liquidated sum which represents a balance owing on a contract, the amount claimed does not become an unliquidated claim merely because of the assertion of an offset, and that if the trier of fact finds against the defend-

ant on the offset, prejudgment interest should be awarded on the plaintiff's claim. In accord is Raymond International, Inc. v. Bookcliff Constr., Inc., *supra,* a diversity case in which the trier of fact was the judge, a jury being waived, and where the court was required to apply Nebraska law. There the trier of fact found against the party asserting the offset and, after pointing out that where the contract is clear and unambiguous and the defense untenable, the Nebraska Supreme Court held that prejudgment interest is to be awarded. The federal court then went on to say: "The existence of an unliquidated set-off or counterclaim does not in this case bar interest prior to the entry of judgment. Eastmount Const. Co. v. Transport Mfg. & Equip. Co., 301 F. 2d 34 [8th Cir. 1962]." In Hansen v. Covell, *supra,* cited by Wiebe, the California court has gone a bit further. It treats the offset, if allowed, as a payment and awards interest on the contract balance after deducting the offset. Whether we wish to go that far can be decided when a pertinent case reaches us. The trial court did not err in awarding prejudgment interest.

We now turn to Wiebe's cross-appeal in which it asserts that it should be awarded the full balance of the contract price in the amount of $56,915.72 instead of the $44,880.68 awarded by the court, a difference of $12,035.04. The only basis for reducing the contract balance would have been by allowing some portion of the counterclaim. This the trier of fact expressly disallowed. The general finding for the plaintiff and the disallowance and dismissal of the counterclaim cannot be reconciled with the award to the plaintiff of an amount less than the contract balance. "In a contract action, if the plaintiff has fully performed his contract he is entitled to the contract price." Rickertsen v. Carskadon, 172 Neb. 46, 108 N. W. 2d 392. Wiebe has not assigned as error disallow-

ance of the counterclaim except that part on liquidated damages. This we have already treated.

The judgment is reversed and the cause remanded for further proceedings consonant with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL FREDERICK, APPELLANT.

255 N. W. 2d 417

Filed June 29, 1977. No. 41042.

1. **Criminal Law: Sentences.** A sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
2. _____: _____. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.

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

T. Clement Gaughan and Paul M. Conley, for appellant.

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

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

SPENCER, J.

Defendant, Michael Frederick, prosecutes this appeal from a sentence of not less than 18 months nor more than 3 years in the Nebraska Penal and Correctional Complex. The sentence runs consecutive to a sentence rendered July 30, 1976. Defendant's only assignment of error is that the sentence is excessive. The offense was fraudulently passing an insufficient fund check in the amount of $930.78. We affirm.

Section 28-1213, R. R. S. 1943, under which defend-

ant was charged, provides for imprisonment in the Nebraska Penal and Correctional Complex not exceeding 10 years. The sentence imposed is well within the statutory limits. This court has repeatedly said that a sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Childress, *ante* p. 577, 254 N. W. 2d 89 (1977).

On March 17, 1976, defendant was placed on 3 years probation on an insufficient fund check charge. On April 30, 1976, defendant was arraigned on an information seeking the revocation of that probation. After hearing, defendant was found guilty of its violation. On July 30, 1976, he was sentenced to a term of imprisonment in the Nebraska Penal and Correctional Complex for a period of 1 year. He was serving that sentence when the present sentence was imposed on August 13, 1976. The presentence report indicates the checks written on this occasion total $3,805.83.

The court did not abuse its discretion herein. Defendant had a juvenile record of shoplifting, burglary, auto theft, and petit larceny. The juvenile court records reflect probation did not deter defendant from further transgressions. He was discharged from probation for juvenile offenses June 14, 1974. A month later he was convicted of petit larceny. In May 1975, he was charged with shoplifting, pled guilty, and on March 10, 1976, was sentenced to 15 days in jail. This charge was pending on appeal in the District Court at the time of the trial herein.

The present offense occurred within a month of the time defendant was placed on probation for a similar charge. On April 18 or 19, 1976, defendant opened a bank account with a $10 deposit. On April 19, 1976, he issued the check in the amount of $930.78 on that account. As of April 30, 1976, the bank had returned approximately $2,000 in insufficient fund checks drawn against this $10 deposit. It is apparent

probation not only failed to rehabilitate defendant but made it possible for him to prey on society.

Defendant argues that incarceration for a term consecutive to the term he is currently serving will be of no real benefit to the state, to society, and certainly of no benefit to him. We agree with the Attorney General that to have made this sentence concurrent with the prior sentence would have in effect imposed a lesser sentence on the second offense than on the first. Under the circumstances, defendant has received a minimal sentence. We have repeatedly said that it is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Rodman, 192 Neb. 403, 222 N. W. 2d 109 (1974).

The judgment of the District Court is affirmed.

AFFIRMED.

C. C. NATVIG'S SONS, INC., A CORPORATION, APPELLANT, V. LARRY SUMMERS ET AL., APPELLEES.

255 N. W. 2d 272

Filed June 29, 1977. No. 41052.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence.
2. **Motor Vehicles: Negligence.** It is generally negligence as a matter of law for a motorist to drive his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision.
3. **Negligence: Statutes: Words and Phrases.** The words "slight" and "gross" as used in section 25-1151, R. R. S. 1943, are comparative terms, and the intent of the statute is that the negligence of the

parties shall be compared one with the other in determining questions of slight and gross negligence.

4. **Negligence: Statutes: Juries.** In making the comparisons required by section 25-1151, R. R. S. 1943, the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff. The determination of questions of negligence and contributory negligence, and the comparative measuring of them, are basically factual issues which are generally for determination by the jury.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellant.

J. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellee.

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

BRODKEY, J.

C. C. Natvig's Sons, Inc., plaintiff and appellant herein, appeals from a summary judgment entered by the District Court for Holt County in favor of defendants Larry Summers and George Van Conet in a motor vehicle negligence action. The District Court found that the contributory negligence of plaintiff's driver, LaVerne Overweg, was more than slight as a matter of law, and dismissed plaintiff's petition. Plaintiff has appealed from that finding, contending it was error to dismiss its petition. We reverse and remand for further proceedings.

The evidence offered and received in this case in support of defendants' motion for summary judgment consisted of the depositions of defendant Van Conet, who was operating a vehicle owned by defendant Summers; and of Overweg, plaintiff's driver. We first summarize the testimony of Overweg.

On February 22, 1971, Overweg was transporting eggs from Kimball, South Dakota, to Ravenna, Nebraska, in a truck-tractor and trailer. As Overweg

was traveling south from Spencer, Nebraska, toward St. Paul, Nebraska, on U. S. Highway No. 281, weather conditions were unfavorable due to blowing snow. Although the wind was blowing snow across the road, the road surface was in good condition, and Overweg was not concerned with being able to see or operate his truck and trailer. He was driving at a speed of approximately 30 to 35 miles per hour.

The accident in this case occurred 9 miles north of St. Paul, at approximately 10 o'clock a.m. As one approaches the accident site from the north, there is a bend in the road and a small knoll or hill. Beyond the knoll is a slope to the south, and the accident in this case occurred about halfway down the slope. As Overweg came over the knoll his visibility was reduced to about 60 feet for several seconds due to blowing snow. Overweg immediately let up on the accelerator and began to gently apply his brakes. The road ahead was snowpacked, but Overweg was having no difficulty controlling his truck. He then observed Van Conet and his truck-tractor about 200 to 300 feet away, blocking the entire highway. Overweg stated that he had no time to downshift, and could not go around Van Conet's vehicle because there were ditches or banks on both sides of the road. Overweg continued to apply his brakes, but collided with defendant's vehicle, traveling about 10 to 15 miles per hour at the time of impact. Overweg stated it was difficult to see defendants' vehicle because it was "silhouetted" too much with the white background. He did not see any lights on defendants' vehicle, nor did he see any warning signals indicating that defendants' vehicle would be blocking the road.

Van Conet testified that he became stuck in a snowdrift at the accident site at approximately 6:30 a.m. He was driving a truck-tractor without a trailer; and while it was stuck, it was blocking only part of the south-bound lane. Van Conet went to the

nearest farm residence, owned by Lyle Tomsen. Van Conet had breakfast, helped Tomsen take care of his chores, put chains on his farm tractor, and charge the battery of the tractor. At approximately 10 a.m. Tomsen and Van Conet went to the truck-tractor to pull it out of the snowdrift. It had stopped snowing at that time, although the wind continued to blow snow across the highway.

When they arrived at the snowdrift, they found a north-bound car stuck in the drift, and Tomsen pulled the car free. A truck pulling a grain trailer then passed through the accident site, coming from the north, and avoiding Van Conet's truck by using the passing lane. Tomsen then pulled Van Conet from the drift, moving the truck-tractor in an easterly direction. When Van Conet's truck came out of the drift, it stopped about 5 feet from the east edge of the highway, resting crossways on the highway. It was at that point that Overweg collided with Van Conet. Van Conet stated that he did not see Overweg's vehicle before the collision, although he did state that he could see to the top of the knoll when he looked to the north. Van Conet testified that the lights to his vehicle were on at the time of the collision, but the evidence was unclear as to whether the lights could be seen by one approaching from the north since the truck-tractor was facing to the east. Van Conet acknowledged that he was unfamiliar with safety laws applicable to truck drivers, and that he set no flares or warning signals at any time, athough his vehicle was equipped with flares. After considering the above testimony, the trial court found that the "contributory negligence of LaVerne Overweg as shown by his testimony in the depositions is more than slight as a matter of law"; and dismissed plaintiff's petition. Plaintiff contends that this finding and the dismissal of its petition were erroneous.

The issue in this case is whether summary judg-

ment was properly granted in favor of defendants because Overweg was guilty of contributory negligence more than slight as a matter of law because he could not stop his vehicle within his range of vision. The rules with regard to summary judgment are well-established in this jurisdiction. "The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law." Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N. W. 2d 434 (1976). Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. It is an extreme remedy which should be awarded only when the issue is clear beyond all doubt. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976). We have pointed out that summary judgment is difficult to use in many tort cases. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976).

In the present case defendants contend that the deposition testimony received by the trial court on their motion for summary judgment shows that Overweg was guilty of contributory negligence more than slight as a matter of law because he was unable to stop his vehicle within his range of vision. They rely on the long-standing general principle that it is negligence as a matter of law for a motorist to drive

his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. See, Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584 (1975); Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975); Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571 (1965); Pool v. Romatzke, 177 Neb. 870, 131 N. W. 2d 593 (1964). This rule has been applied to driving where vision is impaired by storms or weather conditions such as snow, ice, or fog. Such factors are held to be conditions and not intervening causes, and require drivers to exercise a degree of care commensurate with the circumstances. See, Duling v. Berryman, *supra*; Newkirk v. Kovanda, 184 Neb. 127, 165 N. W. 2d 576 (1969); Pool v. Romatzke, *supra*. Although there are exceptions to the general rule, they generally embrace factual situations involving various factors which might reasonably be considered to relieve a driver of the duty to see the object or vehicle in time to avoid it. Guynan v. Olson, *supra*; McClellen v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559 (1973).

We cannot say after reviewing the record that the trial court was incorrect in finding that the general rule was applicable in the present case, and that none of the exceptions embraced the factual situation presented. Under the cases cited above, it was possible to conclude that Overweg was guilty of negligence as a matter of law because he was unable to stop his vehicle within his range of vision. Our inquiry, however, does not end there. Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross *in comparison,* but the contributory negligence of the

plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." (Emphasis supplied).

In Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799 (1949), this court interpreted section 25-1151, R. R. S. 1943, as follows: "The statute by the use of the words 'when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison' clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence." See, also, Andelt v. County of Seward, 157 Neb. 527, 60 N. W. 2d 604 (1953). In Niemeyer v. Tichota, 190 Neb. 775, 212 N. W. 2d 557 (1973), we stated: "In making the comparisons required by the statute between the negligence of a plaintiff and of a defendant, there is no flat formula which is applicable. Neither is the comparison limited to an item by item comparison of the kind and degree of negligence involved in specific acts. It seems clear that the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff.

"It should be noted here that the final provision of the comparative negligence statute requires that 'all questions of negligence and contributory negligence shall be for the jury.' While that language obviously does not affect the court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence *and the comparative measuring of them are basically factual issues which are generally*

for determination by the jury." (Emphasis supplied.)

In the present case, even assuming Overweg was guilty of negligence as a matter of law under the range of vision rule, the degree of his negligence as compared to possible negligence on the part of the defendants remains in dispute. At the time of the accident Van Conet was removing his vehicle from a snowdrift and blocking the entire highway at a place he knew to be unusually dangerous due to adverse weather conditions and a location just beyond a hill. No flares were set, nor was any warning of any kind given to oncoming drivers. Van Conet did not even see Overweg approaching, which might indicate that he was not keeping a lookout for oncoming traffic at a time when he knew he was blocking the entire highway.

The range of vision rule was never intended to be arbitrary. Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732 (1949); Pool v. Romatzke, *supra*. Although in some circumstances it may be proper for the trial court to determine as a matter of law that a person violating the range of vision rule is guilty of negligence more than slight, so as to prevent recovery, such as where the other party was not negligent in any respect, yet we have never held that a driver violating that rule is guilty of negligence more than slight in every circumstance, regardless of the actions or negligence of the person with whom he collides. In the present case the deposition testimony, viewed most favorably to the plaintiff, indicates possible active negligence on the part of Van Conet, and raises a factual question as to the comparative negligence of both parties. Summary judgment is not appropriate where there is an issue of fact to be resolved or where the inferences to be drawn from the facts are not clear. Reeves v. Associates Financial Services Co., Inc., *supra*. In this case there is a factual dispute as to whether Van Conet was negligent;

and as to whether Overweg's negligence was slight and the negligence of Van Conet, if any, was gross in comparison. We determine that the record at this time does not show conclusively that there is no genuine issue of fact, and therefore summary judgment was inappropriate in this case.

We reverse the judgment and remand the cause to the District Court for further proceedings not inconsistent with this opinion. Since a trial on the merits will be necessary on remand, the trial court should consider all issues raised by the parties in light of the evidence adduced at trial.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I dissent. I am unable to reconcile the holding in this case with that in Vrba v. Kelly, *ante* p. 723, 255 N. W. 2d 269, filed today.

STATE OF NEBRASKA, APPELLEE, V. FREDDIE M. SCHONEWEIS, APPELLANT.

255 N. W. 2d 281

Filed June 29, 1977. No. 41068.

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

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

Miles W. Johnston, Jr., for appellant.

No appearance for appellee.

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

SPENCER, J.

Defendant, Freddie M. Schoneweis, pled guilty in municipal court to the offense of operating a motor

vehicle with more than 0.10 percent alcohol in his body fluid. He was fined $100 and his operator's license was suspended for a period of 6 months. He prosecuted an appeal to the District Court which affirmed the lower court. Defendant appeals to this court, alleging the lower court abused its discretion by not granting him probation. We affirm.

This is defendant's second offense for driving while under the influence of intoxicating liquor. He was placed on probation in 1970 for the first offense. We have repeatedly held this court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head, *ante* p. 58, 251 N. W. 2d 668 (1977).

To grant probation a second time on a conviction of operating a motor vehicle while under the influence of intoxicating liquor is to ignore the rights of society and the purpose of probation. The trial court did not abuse its discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR J. ALEGRIA, APPELLANT.

255 N. W. 2d 419

Filed June 29, 1977. No. 41080.

1. **Criminal Law: Plea Bargains: Guilty Plea: Judges.** 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: Plea Bargains: Guilty Plea: Judges: Sentences.** In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement.

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

Padley & Dudden, for appellant.

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

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

BOSLAUGH, J.

Upon a plea of guilty to forcibly assaulting or resisting a law enforcement officer while engaged in or on account of the performance of his official duties, the defendant was sentenced to 5 months imprisonment in the Nebraska Penal and Correctional Complex. He has appealed and contends the trial court erred in receiving the guilty plea and not honoring the plea bargain, and in refusing to place the defendant on probation.

At the arraignment it was disclosed to the court that the defendant had entered into a plea bargain with the county attorney, in which the county attorney agreed to recommend probation in return for the defendant's agreement to enter a plea of guilty. After the terms of the plea bargain had been stated in the record the following occurred: "THE COURT: Mr. Alegria, as we have been careful to explain to you, the only — this is not binding upon the court. Now, I am free to tell you that I will take it into consideration. But there is no guarantee to you that I will not sentence you to the maximum of one year in the penitentiary. MR. ALEGRIA: Yes. THE COURT: And that my only responsibility is to consider the recommendations of the parties as I will consider all other factors in this case. Do you understand? MR. ALEGRIA: Yes. THE COURT: And you know that you are not guaranteed anything, right? MR. ALEGRIA: Yes."

At the sentencing hearing the defendant testified

as follows: "Q. Now, in connection with this matter at the time we were in the county court and you waived your preliminary hearing and entered your plea here, you were told, of course, that any arrangements we made with the County Attorney would not bind the court with regard to what would happen, you knew that, didn't you? A. Yes. Q. And it is a fact, however, that we did in dealing with the County Attorney enter a plea on the basis of the fact that the State would not stand in the way of probation for you. You understood that? A. Yes. Q. But you realize, of course, that that agreement between the County Attorney and myself and yourself does not bind his honor here with regard to the sentencing? A. Yes." After the defendant's testimony had been completed, the county attorney made the following statement: "MR. KEITH SINOR: Your Honor, as the Journal Entry of April 13 shows in this matter, a plea agreement was entered into whereby I would recommend probation. I would so recommend to the Court. And I might say to the Court that although I was dismayed by the previous offenses that were evident in the Pre-sentence investigation, it would still be my recommendation with or without the plea agreement for probation." The defendant's counsel then made a statement to the court which included the following: "I would like for the court to give him a chance. Now, I am not harping on the fact that the County Attorney and I made a plea bargain. I know about plea bargains just as well as the defendant does. And this court is not bound by that plea bargain."

The plea bargain which was made in this case was fully performed. The county attorney recommended the defendant be placed on probation but the trial court was of the opinion that the nature of the offense and the defendant's previous record required that a sentence of imprisonment for 5 months be imposed.

Although the defendant did not ask leave to withdraw his plea, he suggests that after the trial court had decided the defendant could not be placed on probation, the defendant should have been informed of that fact and have been given an opportunity to withdraw his plea. A similar contention was considered and rejected in State v. Evans, 194 Neb. 559, 234 N. W. 2d 199. In that case we said: "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.

"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 defendant is approximately 24 years of age and single. He has completed 2 years of instruction at the Mid Plains Community College, Vocational-Technical campus. He has a satisfactory employment record. He was earning $800 per month at the time of the offense and was planning to be married.

He was stopped at about midnight in McCook, Nebraska, on February 23, 1976, for driving in a reckless manner. He produced an operator's license issued to his brother, his license having been suspended at that time. He had been drinking and was unable to pass any of the sobriety tests administered by the officers. He was then arrested for driving while under the influence of intoxicating liquor and taken to the police station.

When the officers tried to explain the implied consent law to the defendant and obtain a breath test he became violent and struck one of the officers. The

defendant continued to resist the officers after he had been placed in handcuffs by spitting at them and attempting to kick them. After he had been placed in a cell and the handcuffs removed he attempted to strike the officers.

The defendant was arrested for bicycle theft when he was 11 years of age. He was committed to the Boy's Training School in 1965, 1967, 1969, and 1970, for theft, breaking and entering, and assault. Since 1972 the defendant has been arrested for 11 traffic offenses including a charge of driving while intoxicated in 1975.

Although the defendant behaved well while institutionalized, he has exhibited a disrespect for authority and the rights of others at other times. In view of the defendant's record and the violent nature of the offense we can not say that the trial court abused its discretion in refusing to place the defendant on probation.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurring in result only.

My views with respect to permitting the withdrawal of a guilty plea if the trial court is unwilling to accept the sentence concessions contemplated by a plea bargain are set out in State v. Evans, 194 Neb. 559, 234 N. W. 2d 199. The opinion in the case at bar cites only State v. Evans in support of its holding. The last paragraph of the dissent in Evans is therefore still appropriate. "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."

I strongly reaffirm the principles set out in my dissent in State v. Evans, *supra*.

STATE OF NEBRASKA, APPELLEE, V. PAUL B. ALLEN, APPELLANT.

255 N. W. 2d 278

Filed June 29, 1977. Nos. 41097, 41098.

1. **Rules of Supreme Court: Appeal and Error: Records: Pleadings.** 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.
2. **Appeal and Error: Records: Evidence: Judgments: Courts.** It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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.
3. **Criminal Law: Courts: Evidence: Judgments.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
4. **Criminal Law: Evidence: Verdicts.** In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt.
5. _____: _____: _____. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.

Appeals from the District Court for Douglas County: JOHN T. MURPHY, Judge. Affirmed.

David L. Herzog and William T. Weisbecker, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard L. Dunning, for appellee.

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

McCOWN, J.

Defendant was charged in the municipal court of Omaha with illegal possession of liquor; giving or selling liquor to evade the law; and providing gambling facilities in violation of ordinance. Defendant's motions to suppress the evidence and dismiss the complaints were overruled. On trial in municipal court, defendant was found guilty of illegal possession of liquor and of providing gambling facilities in violation of ordinance, and was fined $50 on each count. Defendant was acquitted on the charge of giving or selling liquor to evade the law. Defendant appealed to the District Court and that court affirmed the municipal court determinations.

At about 2:30 a.m., on May 30, 1976, five Omaha police officers in plain clothes went to a building in North Omaha in the course of an investigation of illegal possession of liquor and gambling violations. Substantial numbers of people had previously been observed entering and leaving the building. The officers had no warrant for a search. Through the window, between the curtains, the plainclothes officers could see people milling around and considerable activity of some kind going on but could not determine exactly what the activity was. They tried the door but found it locked. They knocked on the door. The door was opened and a man let them in. The officers testified that the defendant let them in while the defendant testified that he had not opened the door but was standing some 12 or 14 feet away. The room inside the door contained approximately a dozen persons. There was a bar extending along one wall with partially empty liquor bottles with pour spouts sitting on and behind the bar. There was also a cash register behind the bar. There were open cans of beer and paper cups containing alcoholic beverages sitting on the bar and on tables around the room. There was also a juke box and a pool table. Further examination also disclosed

large quantities of beer in that room and another room. In the other room, six or seven people were shooting dice at a large table covered with green felt.

A woman standing behind the bar pointed out the defendant as the person in charge. She testified that she was the owner of the premises, and that defendant had an agreement with her for the use of the building as a private club in exchange for some repair work he was to do on the building. The premises had no liquor license. The defendant's testimony was that it was a private club and that he was the only officer of the club present. He testified that he was not in charge of the premises and that the gathering in the building was simply a social one in which everyone had chipped in for the liquor. The water bill for the premises was in defendant's name. The defendant and several other persons present were arrested and taken to the police station. Before he left the building, defendant unplugged the juke box and locked the front door.

Defendant's first assignment of error is that the court erred in overruling defendant's motion to suppress the evidence obtained by the police on entering the premises without a search warrant. The bill of exceptions does not contain the testimony at the hearing on the motion to suppress. 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. Boosalis v. Horace Mann Ins. Co., *ante* p. 148, 251 N. W. 2d 885. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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 sus-

tained the findings of the court. State v. Clark, 194 Neb. 487, 233 N. W. 2d 898.

Defendant's remaining assignment of error asserts that the evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. Although the evidence was circumstantial and there was some direct conflict in the testimony, the evidence was sufficient to sustain the verdict. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. State v. Thompson, *ante* p. 48, 251 N. W. 2d 387. In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650.

The evidence in this case was sufficient to support the verdict. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLYDE RICE, APPELLANT.

255 N. W. 2d 282

Filed June 29, 1977. No. 41116.

1. **Criminal Law: Sentences: Probation and Parole.** A sentence

which denies probation and is within the statutory limits will not be disturbed on appeal, absent an abuse of discretion.

2. _____: _____: _____. If the proposed disposition of a case would depreciate the seriousness of the crime, then a sentence of probation is not appropriate.

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

Toney J. Redman and Thomas L. Hagel, for appellant.

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

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

WHITE, C. THOMAS, J.

On April 10, 1976, the defendant and the deceased met by agreement at the parking lot at the V. F. W. Club in Lincoln, Nebraska. The purpose was to settle longstanding grievances between the two over the alleged use or misuse of C. B. radios, the defendant contending that the deceased was addicted to foul language in breach of established C. B. courtesy patterns. At least on one other occasion the defendant and the deceased had agreed to meet to settle their differences but by misadventure, the arrangement was not completed.

In preparation for the confrontation, the defendant brought with him in his pickup truck a broken pool cue and a pistol which the defendant contends was unloaded. At the parking lot each of the parties emerged from their respective vehicles, the defendant armed with his pool cue. The parties were seen to argue and the defendant swung the pool cue twice at the decedent but apparently missed. He then retreated to the pickup, the decedent following. The decedent thereupon apparently bent the outside mirror of the pickup truck and was kicking the door of the pickup. The defendant produced the pistol and

waved it at the decedent, who backed away and stood near the front and slightly to the side of the pickup truck. According to witnesses for the State, the defendant then backed his pickup and drove it at the decedent a series of seven or eight times, finally striking the decedent with the front wheels of the pickup and possibly passing the back wheels over the decedent's body. The defendant then left the scene and notified the Lincoln police department and surrendered himself. The decedent died several days after the incident as a result of the injuries.

The defendant was first charged with assault with intent to do great bodily injury and upon the death of the deceased, the charge was amended to first degree murder, for which charge the defendant stood trial. The jury returned a verdict for the lesser included offense of manslaughter. On consideration of the presentence investigation, the court sentenced the defendant to a term of 2 years in the Nebraska Penal and Correctional Complex. The penalty for manslaughter, as provided in section 28-403, R. R. S. 1943, is imprisonment for not more than 10 years nor less than 1 year. The sentence is, in effect, for 1 to 2 years.

In this court the defendant urges that under the provision of section 29-2308, R. R. S. 1943, this court reduce the sentence of the trial court on the ground that the sentence is excessive. The presentence investigation discloses that the defendant has an I. Q. range which is classified in the various psychiatric reports as borderline mentally retarded. It indicates that the defendant has a fairly successful marital relationship and although found to change jobs frequently, he has had an excellent work record and no criminal record.

We have previously said on numerous occasions that this court will not overturn a sentence which denies probation unless there has been an abuse of discretion and that a sentence imposed within statu-

tory limits will not be disturbed on appeal absent an abuse of discretion. See State v. Leal, *ante* p. 233, 252 N. W. 2d 167. The evidence is overwhelming that the defendant is guilty of a violent crime which caused the death of another. Acknowledging the prior good record of the defendant, the court, in passing judgment of either probation or sentence to a penal institution, must determine whether the proposed disposition of the case would depreciate the seriousness of the crime, and if so, then a sentence of probation is not appropriate. See ABA Standards Relating to Probation, Part I, § 1.3 (iii), p. 10 (1970).

We find that the trial court sentence was well within the discretion allowed the judge and the judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT BEVINS, APPELLANT.

255 N. W. 2d 284

Filed June 29, 1977. No. 41118.

1. **Criminal Law: Courts: Evidence.** A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. A sentencing judge is not denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable in a criminal trial.
2. **Criminal Law: Courts: Evidence: Due Process: Sentences.** Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the due process rights of a defendant may be violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability.
3. **Criminal Law: Evidence: Sentences: Waiver.** Where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld.
4. **Criminal Law: Sentences.** A sentence imposed within the statu-

torily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Gary L. Giese, for appellant.

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

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

BRODKEY, J.

In an information filed in the District Court for Buffalo County on June 25, 1976, Robert Bevins, the defendant and appellant herein, was charged with feloniously, unlawfully, and knowingly delivering (1) the controlled substance of marijuana; and (2) the controlled substance of peyote, under section 28-4,125, R. R. S. 1943. Defendant had originally been charged with five, rather than two, counts of delivering a controlled substance, but three of the counts were dismissed pursuant to a plea bargain. The defendant pled guilty to both counts, and the District Court accepted the pleas and adjudged the defendant guilty as charged. Defendant was sentenced to a term of imprisonment of 2 years. Defendant has appealed from the sentence, contending that it is excessive, and that the trial court relied on erroneous information contained in the presentence report in imposing the sentence. We affirm the sentence of the District Court.

The record shows that the defendant delivered marijuana and peyote, both controlled substances, to an individual employed as a "cooperating individual" by law enforcement officials, and defendant admitted he had done so. After defendant's plea of guilty was accepted by the trial court, sentencing was deferred pending the completion of a presentence

investigation and report. The defendant and his counsel were aware that such a report was being prepared.

On the date of sentencing, the trial court announced that it had received the presentence report, and asked the defendant whether he wanted to say anything before it reviewed the report and pronounced sentence. The defendant declined to make a statement. The trial court then specifically referred to information contained in the report. At the conclusion of these statements, the trial court stated: "From the presentence investigation and from other matters that have been before this Court, the Court has taken knowledge of the fact that this defendant has been involved in some drug traffic over the past several months, not limited to the charges which are filed here; that in the course of selling drugs he has made use of younger persons, including Rene Saldivar and others of the age of sixteen to eighteen years of age, both for customers and as for runners, and that he has been selling drugs in the Kearney area in addition to the drugs which are the charge of this particular complaint." The defendant or his counsel did not object to the accuracy of this statement, or contend that it was untrue. The record does not show that defendant or his counsel ever demanded to see the presentence report, or ever objected to it on the ground that it contained inaccurate, unreliable, or false information. At oral argument in this case, defendant's attorney acknowledged that he had seen the presentence report prior to sentencing, but stated that the portions of the report to which he objects were not included in the report at that time. The record, however, does not show whether or not this statement is true, and this court is unable to review matters not in the record. In any event, no objection was made to the statements of the trial court at the time of sentencing, when it

referred to the portions of the report to which the defendant now objects.

In his assignments of error, defendant contends that the sentence was excessive; and that the District Court erred in relying on hearsay statements contained in the presentence report because they were unreliable or materially untrue, and because the defendant was not given the opportunity to rebut the statements.

The statement made by the trial court at the time of sentencing, quoted above, is a summary of information contained in the presentence report and objected to by the defendant. The information was provided to the probation officer by an identified law enforcement officer and an acquaintance of the defendant. The latter had been arrested for shoplifting, and told police he was shoplifting in order to raise money to pay the defendant for hashish he had purchased from the defendant. Defendant contends the acquaintance was an unreliable source of information because he was facing a possible charge of violation of parole at the time he made statements to the police in regard to the defendant.

We first note that the fact that information contained in a presentence report is based on hearsay statements does not render the report defective. A sentencing judge had broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information. A sentencing judge is not denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable in a criminal trial. State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974).

Although the sentencing judge may use all perti-

nent evidence or information in regard to sentencing, the due process rights of a defendant are violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. Townsend v. Burke, 334 U. S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); United States v. Weston, 448 F. 2d 626 (9th Cir., 1971), cert. den. 404 U. S. 1061, 92 S. Ct. 748, 30 L. Ed. 2d 749 (1972). A court may consider relevant information, however, when the accuracy of the information is not disputed or objected to by the defendant at the proper time. See, United States v. Bass, 535 F. 2d 110 (D. D. C., 1976); United States v. Cardi, 519 F. 2d 309 (7th Cir., 1975).

In the present case, the defendant did not object to the report as being inaccurate or unreliable at the time of sentencing, even though the trial court specifically referred to the statements to which defendant objects. It is fundamental that error may not be predicated on a ground not preserved by a proper objection. State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421 (1964). Where the defendant is advised by the court of information on which the court is relying in imposing the sentence, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld. United States v. Bass, *supra*. The defendant was not denied the opportunity to see the complete report, or object to and rebut its contents, and therefore his contention that it was inaccurate and unreliable will not be entertained on appeal.

Defendant also contends that his sentence was excessive. He is 21 years of age, and has completed 3 years of college education. He was previously convicted of possession of marijuana in 1975. He was committed to the Youth Development Center in 1970 after a burglary.

This court has repeatedly stated that a sentence imposed within the statutorily prescribed limits will

not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Tweedy, 196 Neb. 252, 242 N. W. 2d 641 (1976). The possible penalty for each of the crimes to which defendant pled guilty was imprisonment of not less than 1 nor more than 10 years. § 28-4,125 (2), R. R. S. 1943. He received a consolidated sentence of 2 years imprisonment, which in effect was an indefinite term of 1 to 2 years under section 83-1,105 (2), R. R. S. 1943. The sentence was obviously within the statutorily prescribed limits, and was a minimum sentence. There was no abuse of discretion, and therefore the sentence of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD EUGENE BRINER, APPELLANT.

255 N. W. 2d 422

Filed June 29, 1977. No. 41169.

1. **Criminal Law: Statutes: Due Process.** The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden.
2. **Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
3. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

McCarthy, McCarthy & Vyhnalek, for appellant.

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

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

SPENCER, J.

Defendant, Donald Eugene Briner, was convicted by a jury of possession of burglary tools with the intent to use them to break and enter. He received a term of 1 to 1½ years in the Nebraska Penal and Correctional Complex. He appeals, alleging three assignments of error. First, the statute is unconstitutional. Second, the testimony of one of the State's witnesses was unduly prejudicial. Third, the sentence imposed is excessive. We affirm.

Defendant was apprehended at approximately 3:30 a.m. on January 8, 1975, inside the stockade area of the Fort Cody Trading Post, a souvenir store located at the intersection of Interstate 80 and U. S. Highway No. 83 in Lincoln County. He had a crowbar in his hand and a walkie-talkie. He also had in his possession a revolver, a pair of gloves, a flashlight, a wire with alligator clips on each end, and a pocket knife.

Two officers testified to the use of each of these items in the commission of a burglary. In addition, the State was allowed over defendant's objections to call a self-styled retired burglar to testify as to the utility of the items found on the defendant for burglarious purposes.

Section 28-534, R. R. S. 1943, provides: "Whoever shall be found having upon him or her, or having in his or her possession, custody or control, any picklock, crow, key, bit or other instrument or tool with intent feloniously to break and enter into any dwelling house, store, warehouse, shop or other building containing valuable property, shall be deemed guilty of a felony, and punished by confinement in the Nebraska Penal and Correctional Complex not less than one year nor more than five years."

Defendant's first contention is that section 28-534,

R. R. S. 1943, is unconstitutionally vague and indefinite. He claims it does not properly apprise individuals as to the nature of the offense charged; sets up no reasonable criteria of guilt; and makes ordinary acts a crime.

Defendant ignores the plain language of the statute. As we held in Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698 (1951): "The essential elements of an offense under section 28-534, R. R. S. 1943, required to be charged and proved by the State, are the possession of instruments or tools suitable for breaking and entering with the intent to use them for a burglarious purpose."

Section 28-534, R. R. S. 1943, has been a part of our law since 1907. So far as we are able to determine, this is the first instance of an attack on its constitutionality, although convictions under it have been reviewed and sustained on numerous occasions. Similar statutes have been consistently upheld against constitutional attack in other jurisdictions. See the note at 33 A. L. R. 3d 798, 809.

We do not find the statute to be vague or indefinite. Even if there was some question about it, what we said in State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359 (1977), would be appropriate: "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden."

It tests credulity to believe the items he had in his possession would not have been understood by defendant to be within the ambit of the statute. The possession of such tools at 3:30 in the morning in the stockade area of the Fort Cody Trading Post would be considered by any reasonable person as tools suitable for breaking and entering. We find the statute definite enough to warn individuals to permit

them to conform their conduct so as to avoid that which is forbidden.

Defendant strenuously objected to the testimony of an admitted burglar called on behalf of the State. This witness testified as to the use to which the items found in the defendant's possession might be put in perpetrating a burglary. The witness, who testified he was a retired burglar, had been convicted on at least five occasions. Defendant argues the testimony of this witness interfered with the decision-making process of the jury and was prejudicial to him. While two police officers testified as to the probable use of the items, it would be hard to find a person more qualified as an expert witness on the subject at hand than the witness to whom defendant objects.

Section 27-702, R. R. S. 1943, provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The sentence pronounced was clearly within statutory limits. It was in effect a minimal one. Our rule is well established that a sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976).

We infer defendant feels he should have been considered for probation. There is no basis for such consideration. In any event, we have often held that an order or sentence of the trial court which denies probation will not be overturned unless there has been an abuse of discretion. State v. Swails, 195 Neb. 406, 238 N. W. 2d 246 (1976). There has been no abuse of discretion herein.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY HUFFMAN, APPELLANT.

255 N. W. 2d 287

Filed June 29, 1977. No. 41183.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Gary L. Giese, for appellant.

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

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

WHITE, C. THOMAS, J.

Defendant plead guilty to burglary in the District Court and was sentenced by the court to a term of 1 to 3 years in the Nebraska Penal and Correctional Complex with credit for time spent in the county jail awaiting sentence. He contends that the sentence was excessive. We disagree and affirm.

Section 28-532, R. R. S. 1943, provides that on conviction for the crime of burglary the defendant may be sentenced for a term of 1 year to 10 years in the Nebraska Penal and Correctional Complex or up to 6 months in the county jail or a $500 fine.

The presentence report indicates the defendant was previously convicted of burglary, contributing to the delinquency of a minor, insufficient fund checks, and obtaining money by false pretenses. The sentence imposed by the District Court was well within statutory limits and will not be disturbed absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NARCISCO TORRES, APPELLANT.

255 N. W. 2d 424

Filed June 29, 1977. No. 41204.

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

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

Keith N. Bystrom and Scott P. Helvie, for appellant.

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

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

MCCOWN, J.

Defendant was charged in the county court of Lincoln County, Nebraska, with driving while intoxicated, third offense, and driving while his license was suspended. He was bound over to the District Court for trial. In the District Court, under a plea bargain, defendant pleaded guilty to the charge of driving while intoxicated, third offense, and the charge of driving while his license was suspended and an additional charge for failure to appear in the county court were dismissed. After presentence investigation and report, the District Court sentenced the defendant to 1 to 2 years imprisonment.

The defendant contends on appeal that the District Court abused its discretion in refusing to place defendant on probation. The defendant has a 7th grade education, was 36 years old at time of trial, was twice divorced, and was a self-employed tree trimmer. His record included four prior convictions

for driving while intoxicated. The last two of these convictions, one in 1974 and one in 1975, were used as the basis for the third offense charge here. His record also shows conviction for intoxication extending back to 1968, and one or two misdemeanors, obviously alcohol related. Defendant argues that the sentencing court relied upon prior convictions for driving while intoxicated where the record fails to show that such convictions were constitutionally valid. The defendant, however, does not allege any specific facts to contradict the constitutional validity of any of the charges. The offenses complained of were not used as the basis for the third offense conviction here, nor is there any evidence that any of such offenses were constitutionally defective. Defendant's argument on this point is untenable.

The penalty for driving while intoxicated, third offense, is 1 to 3 years imprisonment, plus license suspension. The defendant's sentence was 1 to 2 years and clearly within sentence limits. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Childress, *ante* p. 576, 254 N. W. 2d 89. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head, *ante* p. 58, 251 N. W. 2d 668.

Defendant's remaining assignments of error are without merit. The evidence fails to establish an abuse of discretion by the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES R. RANDOLPH, APPELLANT.

255 N. W. 2d 288

Filed June 29, 1977. No. 41253.

1. **Criminal Law: Sentences.** A sentence imposed within the statu-

torily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the trial court.

2. **Criminal Law: Sentences: Probation and Parole.** An order by the trial court which denies probation will not be overturned absent an abuse of discretion.

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

Richard H. Hoch of Hoch & Steinheider, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

BRODKEY, J.

James R. Randolph, defendant and appellant herein, was charged in the District Court for Otoe County with embezzlement under section 28-538, R. R. S. 1943. On December 3, 1976, defendant pled guilty to the charge, and was subsequently sentenced to confinement in the penal complex for a period of not less than 2 nor more than 5 years. Defendant has appealed to this court, contending that the sentence imposed is excessive. We affirm.

The record shows that defendant embezzled approximately $3,000 from a restaurant, where he was employed as a cook and manager trainee. Defendant was apprehended shortly after he took the money when he became involved in an automobile accident after leaving the state, and investigating officers discovered the embezzled money.

Defendant is 34 years old, married, and has two infant children. He contends that a sentence of probation is warranted because he has committed no felonies during the 15 years preceding this crime, and because his criminal activity is the result of a drinking problem.

Although it is true that previous to this case the

defendant has not been convicted of a felony for a substantial period of time, he has a serious criminal record. In 1960 a charge of automobile theft was reduced to joy riding, and defendant was sentenced to 4 months imprisonment in a Colorado county jail. In 1960 the defendant was convicted of grand larceny in Minnesota, and given a sentence of probation for 3 years. In 1962, defendant pled guilty to robbery in Iowa, received a 5 year sentence, and was subsequently paroled. In conjunction with the present case, defendant was charged with unlawful use of an automobile, which he borrowed on a pretense, and then used it to leave the state after the embezzlement.

Although defendant has a wife and two children, he has previously deserted them, once for a 20-month period in 1974 to 1976. Defendant acknowledged that at the time of his crime he had no concern for his wife and children, and simply decided to "take off." He has been unable to control his drinking problem, despite one attempt at counseling.

We have repeatedly held that a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the trial court. State v. Tweedy, 196 Neb. 251, 242 N. W. 2d 629 (1976). Similarly, an order by the trial court which denies probation will not be overturned absent an abuse of discretion. State v. Frans, 192 Neb. 641, 223 N. W. 2d 490 (1974). The sentence imposed in this case was within the statutorily prescribed limits of 1 to 7 years imprisonment. The trial court in this case fully considered the defendant's past record, his family and social situation, and his problem with alcohol. It found that probation would not be an effective or appropriate sentence. Such a finding was not an abuse of discretion on the record presented, and therefore the sentence imposed by the trial court is affirmed.

AFFIRMED.

ASSOCIATED BEAN GROWERS, APPELLEE AND CROSS-APPELLANT, V. CHESTER B. BROWN COMPANY, APPELLANT AND CROSS-APPELLEE.

255 N. W. 2d 425

Filed July 6, 1977. No. 41053.

1. **Contracts: Evidence: Words and Phrases.** Words technical or ambiguous or their face, or peculiar to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage.
2. **Warehousemen: Liens.** A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.
3. **Warehousemen: Damages: Liens.** A warehouseman's right to compensation, generally secured by a warehouseman's lien on the property, survives a loss of the lien.
4. **Property: Damages: Conversion.** The measure of damages for conversion is the market value of the converted property on the date of conversion.

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

Monen, Seidler & Festersen, for appellant.

James R. Hancock of Hancock & Shaver, for appellee.

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

WHITE, C. J.

This is an action by the plaintiff for a declaratory judgment concerning the defendant's refusal as a public warehouseman to redeliver stored beans. The plaintiff's petition contained two causes of action each relating to a warehouse receipt for 8,419 pounds of Great Northern beans.

The case was tried to the court. On July 19, 1976, the court entered its judgment, finding for the plaintiff. The court found that the plaintiff had delivered to the defendant 8,149 pounds of grade 96 dry, edible Great Northern beans as evidenced by each receipt

and that the plaintiff tendered the receipts to the defendant in exchange for delivery of the beans together with charges for storage, insurance, and receiving in and loading out as noted on the receipts; that the defendant failed to specify any other charges it may lawfully have been permitted to make upon the warehouse receipts which would include processing charges and that the defendant was without lawful authority to impose a processing charge of $8 per cwt., at the time the plaintiff presented the receipts. The court further found that at the time the receipts were presented the defendant had no lawful excuse for nondelivery of the beans and thus converted the property of the plaintiff. The defendant was found liable to the plaintiff for the sum of $6,071.21, which included costs and interest at 6 percent on the value of the beans from February 19, 1974, to July 15, 1976. The defendant filed a motion for a new trial which was overruled, and now appeals. We affirm the judgment of the District Court, as modified, and remand the cause for further proceedings in accordance with this opinion.

The plaintiff is a nonstock cooperative association of bean growers originally formed in 1970 with about 10 members. By 1973 it had approximately 45 members. The defendant, in addition to warehousing dry edible beans, is in the business of buying and selling beans. In the North Platte Valley, in the Panhandle of the state, a variety of white beans, known as Great Northern beans, is grown. About 75 percent of the Great Northern beans produced in the United States are grown in this area where both the plaintiff and the defendant are located.

The plaintiff association markets the beans of its grower members. At the time the events took place which led to this litigation, the plaintiff association had no storage facilities of its own and thus had to store its beans with the existing elevators and public warehouses, such as the defendant. The record

shows that except for the plaintiff association and the NFO to a small extent, the only existing marketing agency for the beans produced in this area were the existing elevators, such as the defendant. Wayne Snyder, sales manager for the defendant, estimated that the defendant company had 40 to 50 percent of the bean business. As can be readily perceived from the above facts, the defendant, while providing services to the plaintiff association in its capacity as a public warehouseman, is also in competition with the plaintiff for the marketing of beans grown in the area.

On October 17, 1973, the plaintiff delivered to the defendant 8,419 pounds of dry, edible Great Northern beans. In return, the defendant issued its warehouse receipt No. 7912 to the plaintiff. On the same day, Ted Daggett, an officer and member of the plaintiff association, delivered an identical amount of beans and was given in return warehouse receipt No. 7911 by the defendant which was subsequently assigned to the plaintiff.

On February 19, 1974, Larry Birdsall, Ted Daggett, and Warren Brashear, all members and agents of the plaintiff association went to the defendant's office in Morrill, Nebraska, and tendered warehouse receipts Nos. 7911 and 7912, along with the specified charges for storage, insurance, and receiving in and loading out shown on the receipts. Wayne Snyder then informed the plaintiff's agents that there was a processing charge due of $8 per cwt. which had to be paid before they would get their beans out. The plaintiff's agents refused to pay this charge, taking the position that since no dollar amount was specified on the receipts for processing they did not owe such a charge. This litigation followed.

Both receipts contained the following notation: "Charges due warehouseman including processing." Thereafter, *specific* authorized charges for storage and insurance, and receiving in and loading out were listed.

The plaintiff contends that, because no specific amount due for processing was shown on the face of the receipts, it did not have to pay a processing charge to the defendant, but only the charges listed on the receipts. The District Court found that the defendant failed to specify a processing charge upon the warehouse receipts and that the defendant was without lawful authority to impose a processing charge of $8 per cwt. at the time the plaintiff presented the receipts.

The first issue is whether, under the circumstances of this case, the plaintiff was liable to the defendant for a processing charge. It is not disputed by the plaintiff that a public warehouseman is entitled to assess a reasonable charge for processing dry, edible beans.

Section 88-511, R. R. S. 1943, provides that prior to July 1 of each year, the Public Service Commission shall set for the ensuing year reasonable storage rates for public warehousemen, which rates "shall be full compensation for receiving, handling, storing, delivering and insuring." Pursuant to this authorization, the Public Service Commission, in its Schedule E applying to 1973 crops, provided for the following charges for edible dry beans:

(1) storage and insurance	$ .00131 cwt. per day
(2) receiving charge	$ .06 per cwt.
(3) load out charge	$ .06 per cwt.

These charges were listed on the face of the receipts in addition to the notation: "charges due warehouseman including processing."

It is clear from the record that the plaintiff could not reasonably have concluded that the processing charge was included in the Schedule E charges. It is clear that the plaintiff understood the processing charge to be a charge separate from and in addition to the Schedule E charges shown on the receipts.

Wayne Snyder, associated with the defendant for 34 years, testified that it was generally known in this

particular industry that previously the Attorney General had ruled that the Public Service Commission, then the State Railway Commission, had no jurisdiction over processing charges. Larry Birdsall testified that he understood there was a separate charge for processing, distinct from Schedule E charges. Ted Daggett acknowledged that in years prior to 1973, both he and the plaintiff had paid a processing charge separate from other warehousing charges such as storage, insurance, and receiving in and delivering out, and testified as to his understanding that the charge for processing was distinct from charges authorized by the Public Service Commission.

It is also clear from the record that the plaintiff could not reasonably have interpreted the notation: "charges due warehouseman including processing," on the face of the receipts, as an indication that the processing charge had already been paid or was included in the other listed charges. Parol evidence may be used to show the surrounding circumstances of the issuance of a warehouse receipt to throw light on the interpretation of the contract, where the receipt is ambiguous or uncertain. 78 Am. Jur. 2d, Warehouses, § 288, pp. 369, 370. "Words technical or ambiguous on their face, * * * or peculiar * * * to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage." 25 C. J. S., Customs and Usages, § 25, p. 151.

Larry Birdsall, member of the plaintiff's board of directors, testified that when the beans were delivered to the defendant's warehouse, there was a posted charge of $1.35 per cwt. for processing. He testified that prior to the harvest in 1973, the plaintiff tried to negotiate the processing charge with the defendant, to no avail, and was told that there would be an increase in the processing charge. Birdsall acknowledged that by February 1973, he knew that

the defendant was claiming a processing charge on beans.

In December 1973, the plaintiff ordered some beans out of the defendant's warehouse. Several of the warehouse receipts did not specify the amount of processing charge on their face. The plaintiff, at that time, was assessed a processing charge of $2.70 per cwt. and paid this charge without protest.

Wayne Snyder testified that when the plaintiff's agents came on February 19, 1974, to claim the plaintiff's beans, the following conversation took place:

"Q. Now, what did they say after you informed them that the processing charge was $8.00?

"A. They said it was entirely too high.

"Q. Was that the end of that conversation?

"A. No. We visited a while there and I can't quote verbatim, but I think I said, 'What is a reasonable charge?' And they said, 'Well, $2.70 ought to be a reasonable charge.' "

Birdsall testified that he did not recall whether or not the plaintiff offered to pay a processing charge of $2.70 on February 19, 1974.

Based upon the record it is apparent that a reasonable processing charge was contemplated by the parties. The defendant is thus entitled to a reasonable charge for processing the plaintiff's beans. Under the facts of this case, the plaintiff's contention that it did not have to pay any processing charge to the defendant, because the exact amount of such charge was not specifically indicated upon the face of the receipt, is without merit.

When the plaintiff tried to obtain its beans from the defendant, the defendant demanded a processing charge of $8 per cwt. As previously indicated the defendant was entitled to exact a reasonable processing charge from the plaintiff. The question to be decided next is whether or not a processing charge of $8 per cwt. was reasonable under the circum-

stances. We have reviewed the record and find no evidence in support of this charge as a reasonable one.

The record reveals that 1973 was a difficult harvest year. Erratic weather conditions lowered the quality of the beans harvested. Ordinarily the beans are harvested in September, but in 1973, October was the predominant harvesting month. During the course of the season the price of Great Northern beans started at $15 to $20 per cwt., and advanced rapidly. There was speculation by some growers that the price of beans would reach $100 per cwt.

In December 1973, with the price of beans rapidly advancing, the defendant decided that it would no longer place a stated processing charge on the warehouse receipts, but would simply note that a processing charge was due and then negotiate the price when the beans were processed. Instructions to this effect were given to the defendant's employees. According to Ted Daggett, in past years the processing charge shown on the warehouse receipts was the actual amount charged for processing; and processing charges were paid as indicated on the receipt.

During the 1973 season, the record shows, the defendant's processing charge generally rose. In October 1973, at the beginning of the season, there was a posted processing charge at the defendant's warehouse of $1.35 per cwt. In December 1973, the defendant charged $2.70 per cwt. on $24 per cwt. beans. On February 2, 1974, the charge was $5 per cwt. On February 19, 1974, the plaintiff was charged $8 per cwt. On February 20, 1974, the defendant offered to do processing for $4.50 per cwt. On March 13, 1974, the charge was $7 per cwt.

Processing involves cleaning and bagging beans after they are brought to the warehouse. Wayne Snyder testified that there was a relationship between the cost of processing beans and the value of beans. During the course of processing, some beans

are lost. Also, there is a shrinkage factor as the beans lose moisture during storage. When a warehouse receipt is issued for a certain weight of beans, that same weight of beans must be delivered when the receipt is presented and the beans called for. As the value of beans increases, so does the cost of replacing the beans lost during processing. Larry Birdsall agreed that it would be fair and reasonable for a warehouse to make a processing charge that is tied to the value of the product at the time of processing.

When the beans are first delivered to the warehouse the tare is determined. The grower's truck is driven on the weight scales and the gross weight of the beans determined. A sample of the beans is taken from which the percentage of tare, foreign material such as dirt, rocks, sticks, pods, and small, shriveled, cracked and broken beans, is determined. A percentage of weight is eliminated from the gross weight to represent the tare in the load. A moisture test is also run. A sample of beans is taken and run over a moisture tester which ascertains the percentage of moisture in the beans. An adjustment is then made to account for excess moisture in the beans. During the 1973 season, the defendant deducted down to 15 percent moisture. The beans can also be upgraded from a lower to a higher grade. The charge for upgrading is separate and distinct from the processing charge. Wayne Snyder also testified that the defendant stores its beans in bulk, and is continually processing beans. Snyder also testified that during the 1973 season, the defendant had no new or expensive or different processing equipment.

Other than for Snyder's general assertion that the cost of processing is linked to the price of beans, there is no evidence of any rational basis upon which the defendant's processing charges might be based. Although Snyder stated that the cost of processing was tied to the price of beans, and the plaintiff's wit-

ness Birdsall agreed that a system linking processing to the value of the product when processed would be logical, there is no evidence that the defendant, in fact, employed such a system. There is no indication or evidence of a predetermined schedule of processing charges which escalate as a determinable function of the market price of beans. The record shows that on February 19, 1974, the defendant demanded a processing charge of $8 per cwt. from the plaintiff. The next day the defendant's sales manager, Snyder, called the plaintiff and offered to do the processing for $4.50 per cwt.

As noted earlier, in addition to being a public warehouseman, the defendant, like the plaintiff association, also purchases beans from local growers and markets them. On the date the plaintiff called for its beans, the record shows the grower price for beans was between $32 and $35 per cwt. The market price that day was $42 per cwt. As can readily be seen, were the plaintiff required to pay a processing charge of $8 per cwt. it would be, for all practical purposes, a profitless venture for the plaintiff to market its beans in competition with the defendant. The record shows that when the defendant purchases beans stored with it from its customers, the processing charge is waived by the defendant.

The defendant's sole reason for refusing to deliver the plaintiff's beans on February 19, 1974, was its insistence upon payment of an unreasonable and unjustifiable processing charge. This not being a lawful excuse for nondelivery, the defendant was liable to the plaintiff for conversion of the plaintiff's property as of that date. The measure of damages for conversion is the market value of the converted property on the date of conversion. Baburek v. Skomal, 176 Neb. 832, 127 N. W. 2d 731 (1964). The District Court found the value of the beans in question to be $32 per cwt. as of February 19, 1974. The District Court also allowed, as a set-off from the

amount due the plaintiff, charges made by the defendant for storage, insurance, and receiving in and loading out, totaling $23.89 on each receipt. On a cross-appeal, the plaintiff challenges the District Court's determination of damages.

Larry Birdsall testified that the market value of Great Northern beans on February 19, 1974, was $42 per cwt. Wayne Snyder, the defendant's sales manager, did not dispute this figure. The record shows that $32 per cwt. was the grower price for beans as of that date. The court should not have used the grower price but should instead have used the market price of $42 per cwt. to compute the plaintiff's damages. Were it otherwise, a warehouseman could convert beans, pay the grower price as damages, and obtain a profit by selling at the higher market price.

The District Court also allowed the defendant a set-off against the amount due the plaintiff for charges for storage, insurance, and receiving in and loading out. The plaintiff contends the defendant is not entitled to this set-off, citing section 7-209 (4), of the Uniform Commercial Code, which provides: "A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver."

The District Court properly allowed the set-off. A lien is merely a method by which to enforce an underlying claim. A warehouseman's right to compensation, generally secured by a warehouseman's lien on the property, survives a loss of the lien. See 78 Am. Jur. 2d, Warehouses, § 112, p. 252. While the defendant lost its ability to enforce these charges through the use of the warehouseman's lien, the underlying claim remains valid.

As previously stated, the defendant was entitled to a reasonable charge for processing. The charge it attempted to impose was clearly unreasonable. There is no evidence in the record as to what a rea-

sonable charge would be for processing dry edible beans as of February 19, 1974, and therefore we remand the cause to the District Court to ascertain what was a reasonable charge for processing on that date. Once determined, the defendant will be allowed a set-off for this against the amount due the plaintiff.

The judgment of the District Court is affirmed as modified, and the cause remanded to the District Court for further proceedings in accordance with this opinion.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. BOOKER LEON ROBINSON, APPELLANT.

255 N. W. 2d 835

Filed July 6, 1977. No. 41063.

1. **Criminal Law: Constitutional Law: Confessions.** Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
2. **Criminal Law: Confessions.** The determination of whether a statement was voluntarily made necessarily turns upon the consideration of whether or not the totality of the circumstances demonstrates the voluntariness or involuntariness of the statement.
3. **Criminal Law: Evidence: Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or indirect promises, however slight, nor by the exertion of any improper influence.
4. **Criminal Law: Constitutional Law: Due Process: New Trial.** An accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial, it is the duty of the Supreme Court to grant a new trial.
5. **Criminal Law: Trial: Jurors.** The retention or rejection of a juror is a matter of discretion for the trial court.
6. **Criminal Law: Constitutional Law: Trial: Jurors.** If the trial court is informed of matters during trial which might reasonably

constitute grounds for a challenge for cause of one or more jurors, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guarantee of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system.

7. **Criminal Law: Presentence Reports: Sentences: Statutes.** Police reports, affidavits, and other information may be considered by the trial judge in sentencing and such information is properly included in a presentence investigation report compiled pursuant to section 29-2261, R. R. S. 1943.

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

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

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

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

WHITE, C. THOMAS, J.

The defendant appeals from a conviction of second degree murder. He assigns as error: The trial court refused to suppress certain statements of the defendant obtained while he was in custody; a mistrial should have been granted since several jurors overheard a conversation questioning the credibility of a State's witness; and finally, the presentence investigation contained materials outside the scope of that allowed by section 29-2261 (3), R. R. S. 1943.

On February 2, 1976, at about 6 p.m., the defendant shot and killed Archie Robinson in a parking lot in Lincoln. The shooting was the result of an argument over a marijuana swindle. The defendant used a handgun which he had purchased earlier that day. Immediately after the shooting, the defendant left the scene on foot. He traveled several blocks to a bar where he called a cab. When the cab arrived,

defendant instructed the driver to go to the residence of Ricky Barnes, a friend of the defendant. While there, the defendant disposed of the handgun in a nearby garage. Subsequently, the defendant and Barnes got in the cab and instructed the driver to take them to Omaha. The cab was intercepted by the Nebraska State Patrol at a filling station in Sarpy County. The defendant was placed under arrest, read the Miranda warnings, and taken to the Sarpy County jail.

At approximately 11:20 p.m., Officer Ideen of the Lincoln police department entered the defendant's cell. Ideen advised the defendant that he would like to talk with him about the incident which had happened in Lincoln, the incident for which the defendant had been arrested. Ideen also told the defendant that he would advise him of his rights. The defendant replied that he did not want to talk about the incident there but would talk about it in Lincoln. Ideen then chatted briefly with the defendant and began to leave the room. As Ideen was on his way out, the defendant asked: " 'The dude died at the hospital, huh?' " Ideen answered that the victim had died.

Ideen then called Inspector LaPage who was in Lincoln and, at about 11:30 p.m., reentered the defendant's cell. Ideen advised that the police were concerned about the location of the weapon and that he would like to question the defendant as to its location. The Miranda rights card was then read to the defendant. After the defendant was asked if he waived the services of a lawyer, he stated that he did not want to talk about it. Ideen then stopped the questioning of the defendant.

At about 12:15 a.m., the defendant was transported back to Lincoln. Upon arrival at the Lincoln City-County jail, the defendant was met by Lt. Maxey of the Lincoln police. Maxey informed the defendant that he and the county attorney would like to talk

with him. Robinson answered, "Okay." At about 1:45 a.m. on February 3, 1976, the defendant was taken to the county attorney's office. The Miranda rights were again read to the defendant. The defendant admitted the shooting of Archie Robinson. The interview ended at about 2:30 a.m. The county attorney then asked to get a written statement. The defendant agreed. The county attorney then advised the defendant that he would be taken to a hospital for blood and urine tests and that afterwards they could get the written statement.

Robinson was taken to a hospital and returned at about 3:30 a.m. Maxey asked the defendant to make a written statement. The defendant answered that he was too tired and that he would do it in the morning. He was returned to his cell.

At about 8 a.m., Officer Van Butsel contacted the defendant and took him to the county attorney's office. The defendant was again advised of his Miranda rights. Subsequently, the defendant made a written statement in which he confessed to the shooting of Archie Robinson.

Defendant was charged by information of first degree murder. He entered a plea of not guilty and the cause was set for trial before a jury. On the second day of the trial, one of the jurors reported that he had heard remarks from some persons who had been in the courtroom to the effect that one of the witnesses was lying. The juror had heard the remarks as he was leaving the courtroom. The defense immediately moved for a mistrial. The trial judge noted that any possible prejudice would be against the State because the witnesses that day had been prosecution witnesses. The motion was denied. The judge questioned each juror individually whether he heard the remarks and, if so, would the remarks affect that juror's ability to be fair and impartial. Another juror and one alternate juror had heard the remarks. All three stated that the re-

marks would not impair their ability to be fair and impartial. The trial continued and, at the conclusion of jury deliberations, a verdict of guilty of second degree murder was rendered.

Defendant contends that the trial court erred in its determination not to exclude from evidence statements which had been made by the defendant at the Sarpy County jail and at the Lincoln City-County jail. The defendant argues that the statement made at the Sarpy County jail should be excluded because the police did not observe his rights as guaranteed by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Specifically, he quotes the following language from that opinion: "Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." The trial court, following a Jackson-Denno hearing, ruled that any statement made at the Sarpy County jail was made freely, voluntarily, intelligently, and understandingly.

The statement made at the Sarpy County jail was volunteered by the defendant. The question came as Ideen was leaving the cell. Clearly, it was a voluntary statement. In Miranda v. Arizona, *supra,* it is stated: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Defendant further contends that the oral and written statements which were obtained by the county attorney in Lincoln should be suppressed because they were obtained by promising medical attention to the defendant if he made the statements. Defendant claims that he was a heroin addict and that he was going through withdrawal at the time of the statements.

In State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8 (1976), we held that the basic determination is whether

or not the totality of the circumstances demonstrates the voluntariness or involuntariness of the statements. In doing so we followed the dictates of Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In the McDonald opinion, the following was said: "To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

The totality of the circumstances in the current case supports the trial court's conclusion, after the Jackson-Denno hearing, that the statements had been made freely, voluntarily, and intelligently. Defendant testified that prior to the first conversation he had complained about an upset stomach and a headache. He stated that the police told him he would be taken to a hospital following the conversation. However, it is clear that the hospital visit was intended to obtain a blood and urine sample from the defendant, not for treatment of his complaints. The defendant did not ask for treatment at the hospital. Following his return from the hospital, defendant was allowed to sleep. Defendant testified that he vomited during that time. The evidence shows that a nurse did see the defendant prior to the second conversation. Defendant received medication at that time; however, the medication was not for the withdrawal symptoms. Prior to the second conversation, defendant also indicated that he was sick; however, he stated to the police that he felt well enough to make a statement. Upon cross-examination, the defendant was asked if he was told that he would not receive medical attention unless he made a statement. The defendant answered, "No." By his own admission, the defendant has shown that no promises of medical attention were made. He now argues that the statements were not a product of a

free will. This argument is without a sound basis.

Defendant next contends that the trial court denied him the constitutional right to a fair trial before an impartial jury of his peers because the court did not grant a mistrial after the incident in which two of the jurors overheard statements concerning the truthfulness of one of the State's witnesses.

In State v. Goff, 174 Neb. 548, 118 N. W. 2d 625 (1962), we stated that an accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial it is the duty of the Supreme Court to grant a new trial.

The situation presented is one in which a juror may have become unfairly prejudiced during the course of a trial. The retention or rejection of a juror is a matter of discretion for the trial court.

In State v. Myers, 190 Neb. 466, 209 N. W. 2d 345 (1973), a question of prejudice of the jurors on one case was presented because they had earlier sat as jurors in a related case. We held: "Where a jury has been impaneled and sworn as one of several juries selected from a single jury panel for the subsequent trial of a series of criminal cases, if the court is informed before the presentation of evidence begins of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, *it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause.* A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system." (Emphasis supplied.) In the current case, the trial

judge followed a similar procedure in determining whether any of the jurors had heard statements which would render them incapable of giving a fair and impartial judgment. We hold that the defendant's constitutional right to a fair trial by impartial jurors was not violated by such procedure. The trial judge questioned the jurors as to the incident and was satisfied that a fair and impartial verdict could be rendered by each juror.

Defendant last contends that the presentence investigation report obtained by the trial court contained information outside the scope of that allowed by section 29-2261 (3), R. R. S. 1943, which provides: "(3) The presentence investigation and report shall include, where available, an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the court directs to be included. All local and state police agencies, and adult and correctional institutions shall furnish to the probation officer copies of such criminal records, in any such case referred to the probation officer by the court of proper jurisdiction, as the probation officer shall require without cost to the court or the probation officer." Defendant specifically objects to the massive compilation of police reports and county attorney memoranda which are within the report. Defendant objected to the report prior to sentencing.

We have previously held that "police reports, affidavits, and other information" may be considered by the trial judge in sentencing. See, State v. Lacy, *ante* p. 567, 254 N. W. 2d 83 (1977); State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670 (1974). Such information is allowable under section 29-2261 (3), R. R. S. 1943, under the language that the report may

include "any other matters that the probation officer deems relevant or the court directs to be included." The police reports and memoranda were properly included in the presentence investigation report. Defendant's assignment of error on that ground is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

EARL ANDERSON, APPELLEE, V. BOARD OF EDUCATIONAL LANDS AND FUNDS, A PUBLIC BODY, ET AL., APPELLANTS.

256 N. W. 2d 318

Filed July 6, 1977. No. 41084.

1. **Administrative Law: Schools and School Districts: Trusts.** The state holds the public school lands, including the income therefrom, as trustee. It is the duty of the trustee to obtain the maximum return to the trust estate from the trust properties under its control.
2. **Administrative Law: Schools and School Districts: Statutes: Leases.** Sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances.
3. **Administrative Law: Schools and School Districts: Constitutional Law: Trusts.** The Constitution of Nebraska requires that the trust property be dealt with in a manner consistent with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board of Educational Lands and Funds the duty of obtaining the highest price possible for all trust property that it may sell.
4. **Administrative Law: Schools and School Districts: Constitutional Law: Leases.** A fair construction of the statutes, viewed in the light of their constitutional background, requires a holding that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the Board of Educational Lands and Funds.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and dismissed.

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

Healey, Healey, Brown, Wieland & Glynn, for appellee.

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

SPENCER, J.

This is an action to require the Board of Educational Lands and Funds to issue a lease of certain school lands to Earl Anderson who was the highest bidder at a public sale. The issue presented is whether the defendant could reject the application for the lease from plaintiff, the highest bidder, and reoffer the land for lease with the post-sale offer as the starting bid. The trial court found the rejection of the bid to be void, vacated the action of the Board, and directed the issuance of a lease to the plaintiff. We reverse.

Pursuant to the provisions of section 72-233, R. R. S. 1943, the Board of Educational Lands and Funds, hereinafter referred to as Board, directed that the lease of certain school lands in Buffalo County be offered for sale. Notice of the lease sale was duly published. The last paragraph of the published notice provided: "All sales of educational land at public auctions are considered to be non-revocable offers, which only upon acceptance and approval by the Board of Educational Lands and Funds meeting in regular session, shall become binding contracts."

Ron Vance, an appraiser for the Board, conducted the sale on January 7, 1976. Plaintiff was the final bidder, with a bonus bid of $10,600. When he closed the sale, Vance informed all present that the final bid was subject to the acceptance and approval of the Board of Educational Lands and Funds, and would be presented to it at its regular meeting on January 12, 1976. After the sale, plaintiff made out

and signed an application for a lease, and submitted with it his check in the amount of the first year's rent plus his bonus bid of $10,600.

Prior to the meeting on January 12, the Board received an oral commitment for an upset bonus bid of $11,660 plus the stipulated rental. The Board did not accept plaintiff's application for lease, but directed that the tract be readvertised and the lease offered for sale. It further directed that the bonus bidding start with the bid of $11,660. Plaintiff thereafter filed this action, which stayed further proceedings.

Article VII, section 6, Constitution of Nebraska, so far as material herein, provides: "The general management of all land set apart for educational purposes shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds."

The state holds the public school lands, including the income therefrom, as trustee. It is the duty of the trustee to obtain the maximum return to the trust estate from the trust properties under its control. This is subject to the taking of necessary precautions for the preservation of the trust estate. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520 (1951).

We have previously held sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances. State ex rel. Raitt v. Peterson, 156 Neb. 678, 57 N. W. 2d 280 (1953).

The Board has the right to exercise its discretion in determining if the sale was fairly conducted and whether the lease sold for a fair and reasonable value. There is no universal test by which directory provisions of the statute may be distinguished from mandatory provisions. Ordinarily, such differences

must be determined by the intent of the Legislature as gleaned from the whole statute.

In the present case, the Constitution requires that the trust property be dealt with in a manner consonant with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board the duty of obtaining the highest price possible for all trust property that it may sell. A fair construction of the statutes, viewed in the light of their constitutional background, requires us to hold that the highest bidder at a public sale of school land leases is not entitled to lease until it has been approved by the Board. See, State ex rel. Raitt v. Peterson, *supra;* State ex rel. Ebke v. Board of Educational Lands & Funds, *supra.*

The notice of sale in this instance advised prospective bidders that all sales would be considered to be nonrevocable offers which would become binding contracts only upon acceptance and approval by the Board meeting in regular session. At the conclusion of the sale, Vance informed all present the final bid was subject to the approval and acceptance of the Board. He also stated that it would be presented to the Board at its next regular meeting on January 12, 1976.

Within the intervening 5 days, Gerald Geisler, who had been a bidder at the sale, submitted a bonus bid of $11,660 as an upset bid. This was an increased bid of 10 percent. He was advised that he was required to also submit a check for $250 to cover the expense of a new sale. This amount would not be refundable. He was also required to send a certified check for the first year's annual rent in the amount of $2,369.20, together with a check for $11,660.

In Raitt, we suggested that the rule governing upset bids at judicial sales was applicable in that case. However, as pointed out in Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794 (1970), this proceeding is not a judicial sale and

the rules applicable thereto are not relevant. That case involved the statute providing for the mandatory sale of school lands. We modify those statements by saying that the rules applied to judicial sales may be helpful in determining questions arising under the present statutes referring to sales by the Board. These sales are within the primary jurisdiction of the Board, and a court should not interfere with the discretion of the Board unless it is apparent that the Board's action is shown to be arbitrary and unreasonable.

In the present case the Board advertised that all bids were subject to its acceptance and approval, and until accepted there would be no binding contract. In its discretion, the Board saw fit to refuse the offer and to order a new sale, initating the auction at the amount of the upset bid, $11,660, which is 10 percent more than the plaintiff's bid. In Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417 (1969), this court unanimously approved the setting aside of a petition sale even after the sale had been initially confirmed by the court after a higher upset bid. The amount of the upset bid made after confirmation exceeded the initially confirmed bid by $50 more than 10 percent.

On the record, we cannot say that the action of the Board in rejecting the plaintiff's bid was arbitrary or unreasonable. It is the duty of the Board as trustee of school lands to obtain a maximum return for the trust estate from its sale of school lands or leases. While we do not believe that the Board should be too liberal in accepting an upset bid, we cannot say in this instance that its action was arbitrary or unreasonable. With the new sale, starting with the upset bid, it is very possible a greater sum may be realized. In any event, the Board will receive at least 10 percent more than the bid it refused to accept, and the upset bidder is paying the costs of the resale.

The judgment of the trial court is reversed. Its vacation of the action of the Board is vacated, and the action is dismissed.

REVERSED AND DISMISSED.

McCOWN, J., dissenting.

It is admitted that the public auction sale of a school land lease involved here was fully advertised and fairly conducted, that the plaintiff submitted the highest bid, and that the bid was a fair, adequate, and reasonable amount. Five days after the sale the Board of Educational Lands and Funds rejected the highest bid and ordered the lease to be resold. The upset bid, a 10 percent increase, was made by an unsuccessful bidder at the public auction sale who was also the previous leaseholder. At the time the board rejected the highest bid and ordered the lease resold, the upset bid was not even written, nor was there any specific amount involved. Neither had the upset bidder submitted any written offer, nor any guaranties or checks in support of the upset bid. Those documents were apparently executed later.

On those facts this court now holds that where a public auction sale of a school land lease is duly and fully advertised and fairly conducted, and the highest bid is for a fair, adequate, and reasonable amount, an unsuccessful bidder may obtain a resale simply by submitting a later upset bid for 10 percent more than the amount of the highest bid at the auction. Specifically this court holds that the action of the Board of Educational Lands and Funds in rejecting the highest bid at the public auction and ordering the lease resold was a reasonable exercise of its discretionary power to accept or reject all bids, and was not arbitrary or unreasonable. Indirectly this court holds that the rules governing upset bids at judicial sales are not applicable to sales of school land leases at public auction by the Board of Educational Lands and Funds. The decision in this case also

means that the stability and integrity of public auction sales of school land leases by the Board of Educational Lands and Funds is of little or no importance, and that the discretion of the board to accept or reject the highest bid is far broader than the judicial discretion vested in a court to confirm or reject a similar bid at a judicial sale. Such distinctions have no legal, logical, or practical foundation.

The majority opinion concedes that this court has previously "suggested" that the rules governing upset bids at judicial sales were applicable to public auction sales of school land leases, and also concedes that the rules applied to judicial sales "may be helpful" in determining considerations arising in sales by the Board of Educational Lands and Funds.

In a case involving the sale of a school land lease, State ex rel. Raitt v. Peterson, 156 Neb. 678, 57 N. W. 2d 280, this court said: "We think the rule governing upset bids at judicial sales is applicable here. If the sale was fairly conducted and the property sold for a reasonable and fair value under the circumstances, the board would ordinarily be required, in the exercise of a reasonable discretion, to approve the sale and make the lease. An upset bid, made after the sale and before the approval and acceptance of the highest bid at the public auction, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the public auction."

Where, as in the case at bar, it is admitted that the public auction sale was fairly conducted, and that the highest bid was for a fair, adequate, and reasonable amount, it seems clear that the refusal of the board to approve the highest bid and make the lease was arbitrary and unreasonable.

A crucial difference between the Raitt case and this case, however, is that in the Raitt case the upset bidder had not been a bidder at the public auction sale, and there was no evidence that the auction bid

was adequate or inadequate. That difference is critical and determinative. In Hull v. Hull, 183 Neb. 773, 164 N. W. 2d 455, this court referred to the problem involved in the stability and integrity of judicial sales where the upset bidder was present or bidding at the judicial sale. We held in that case that an upset bid following a judicial sale and before confirmation should be considered when it affords convincing proof that the property was sold at an inadequate price, and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance. We said: "It has been generally understood by the profession and enforced by the courts that for obvious reasons one who has been a bidder at the sale by himself or by an agent will not, as a general rule, be permitted to put in an upset bid." See, also, 47 Am. Jur. 2d, Judicial Sales, § 165, p. 429.

The only basis given for the majority policy decision in this case is the undisputed fact that the board holds the school lands as a fiduciary and must obtain the highest price possible. There is nothing unusual about that. The same thing is true in any sale by any fiduciary, and the same fact is certainly true in any judicial sale.

There is also a strong public policy in favor of preserving the stability and integrity of a public auction of school land leases, just as there is a strong public policy in favor of maintaining the stability and integrity of judicial sales. If a public auction sale for a fair and reasonable price can be upset and overturned by a later change of mind of a person who was present at the auction and had a chance to bid but was outbid, the stability and integrity of all school land lease auctions has been threatened and in the long run lower prices will result at auctions.

The facts in this case are admitted. As this court said in Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417: "If upset bids were permitted and accepted un-

der all circumstances, the holding of a judicial sale would be nothing more than preliminary bidding and not a method of purchasing the land. Such a practice would chill the bidding at the judicial sale by encouraging the filing of upset bids and render the judicial sale a mere formality and the elimination of the primary purpose of judicial sales. This is most harmful to the stability and true purpose of judicial sales which trial courts should not lightly disregard."

A decision which places the acceptance or rejection of the highest bid at a public auction sale of a school land lease under different rules than those applicable to judicial sales, in my opinion, is not good public policy nor good judicial policy. Where the evidence and pleadings establish that the sale was regularly held and fairly conducted, and that the lease was sold for a reasonable and adequate price, an upset bid should not outweigh all the other evidence, much less be treated as conclusive evidence to the contrary.

In the case before us the District Court specifically found from the pleadings and the undisputed evidence that the lease sale auction involved here "was fully advertised and fairly conducted, and the plaintiff made and submitted the highest bid for a fair, adequate, and reasonable amount, and thereafter complied with all requirements incumbent upon him as the successful bidder to obtain said lease." The District Court also found: "The persons having submitted the purported upset bid, having been present at the auction, having participated in the auction bidding, and having been available to submit a higher bid at that time, but not having done so, are barred and estopped from submitting an upset bid thereafter to overturn the results of the sale." The trial court's determination and judgment was eminently correct and should have been affirmed by this court.

BOSLAUGH, J., dissenting.

I concur fully in Judge McCown's dissenting opinion. If the successful bidder at the public auction of a school land lease buys only a lawsuit instead of a lease, there is little incentive to bid at the auction.

BARBARA S. OSTERHAUS, APPELLANT, V. RICHARD C. OSTERHAUS, APPELLEE.

255 N. W. 2d 432

Filed July 6, 1977. No. 41086.

Divorce: Parent and Child: Infants. Ordinarily, the findings of the trial court in child custody matters will not be disturbed on appeal unless there has been a clear abuse of discretion.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed as modified.

Jon J. Gergen and Edward L. Wintroub, for appellant.

Robert H. Beach, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The parties were married in 1968 and have two children, Shannon, born October 6, 1970, and Erin, born July 12, 1973.

The petition for dissolution was filed October 18, 1974. On November 27, 1974, the petitioner was granted temporary custody of the children. On August 6, 1975, after an investigation by the conciliation court, the trial court took custody of the children but left them in the possession and care of the petitioner.

The hearing on the petition for dissolution was

held on September 8, 1975. The decree, entered September 16, 1975, dissolved the marriage and divided the property of the parties. The trial court found that at that time neither party was fit to have the care, custody, and control of the children. Custody was continued in the court and the children were placed in a foster home subject to a further hearing to be held within a reasonable time.

On March 8, 1976, the respondent filed an application for an order granting custody to him. Hearings were held on March 16 and March 25, 1976. On March 30, 1976, the trial court retained custody of the children but granted possession to the father subject to "minimal visitation" by the petitioner. Motions for new trial filed by the petitioner after the decree of September 16, 1975, and the order of March 30, 1976, were overruled on September 3, 1976.

The petitioner has appealed and contends the trial court erred in finding she was not a fit and proper person to have the care, custody, and control of the children; in awarding possession of the children to the respondent; and in restricting the petitioner's cross-examination of the respondent at the hearing on March 16, 1976, concerning prior psychological problems.

In regard to the last assignment, evidence had been developed at the hearing on September 8, 1975, concerning the respondent's psychological problems. The ruling made was within the discretion of the trial court.

The petitioner is 30 years of age. She had been employed as a teacher in the public schools but was working as an employment counselor at the time of the hearing in September 1975. The petitioner admitted that she had committed an act of adultery with a friend, Jim Redwine, after she had separated from the respondent. Redwine lived in the same house with her and the children for a 2-week period and she also went to Florida with Redwine, the chil-

dren, and another couple. She maintained constant contact with Redwine while he was in jail in Lincoln, Nebraska, on a controlled substance charge. A man named Andy Schmidt had lived in the petitioner's home for 4 months but the petitioner denied having any relationship with Schmidt.

The evidence indicates generally that the children were well cared for when they were in the possession of the petitioner and there is no substantial evidence that she neglected them in any way while they were in her care. However, the trial court must have concluded that her relationship with Redwine and other circumstances in the case required that the children be removed from her care. Although she claimed that her association with Redwine had ended, the record indicates that the trial court did not accept her testimony fully and was not convinced that the children should be returned to her care.

The respondent is 32 years of age. He is employed as a physical education instructor and coach at St. Robert's grade school in Omaha, Nebraska. He has had psychological problems in the past and attempted to commit suicide on two occasions. However, at the hearing on March 25, 1976, a psychiatrist testified that he had made a recent evaluation of the respondent and found no "serious psychiatric illness." It was the opinion of this witness that the respondent was as capable of being a single parent as any male can be.

This court is reluctant to interfere with the discretion of a trial judge in custody matters where he has had the opportunity to see and hear the parties and the witnesses. Ordinarily, the findings of the trial court both as to the evaluation of the evidence and the determination of custody will not be disturbed on appeal unless there has been a clear abuse of discretion. Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682.

Although we are of the opinion that the order of March 30, 1976, was within the discretion of the trial court, there is evidence in this case which suggests doubt as to whether the respondent can or will furnish the proper care and supervision of the children. He has been emotionally unstable in the past and at times has exhibited a lack of interest in their welfare. For that reason we believe his possession of the children should be supervised as closely as is possible under the circumstances. This is a matter within the control of the trial court and regular reports should be obtained from the personnel performing the supervision.

The order of March 30, 1976, provided only for "minimal visitation" by the petitioner. We believe this was plain error and the order should be modified to grant reasonable visitation to the petitioner.

The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GILBERT L. KELLEY, APPELLANT.

255 N. W. 2d 840

Filed July 6, 1977. No. 41105.

1. **Criminal Law: Constitutional Law: Due Process: Appeal and Error.** A review by an appellate court of a final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. If, however, by virtue of state statutory or constitutional provisions appeal is made a matter of right, the procedure pertaining thereto must accord with the concept of due process.
2. _____: _____: _____: _____. Limitations placed upon the time within which to perfect an appeal from a conviction in a criminal case do not violate the due process provisions of the Constitutions of the United States or of this state.
3. _____: _____: _____: _____. The requirement of filing a motion for a new trial within 10 days after the verdict, which motion must specify the claimed errors which justify a new trial, does not

offend the provisions of Article I, section 23, of the Constitution of Nebraska, or the concepts of due process.

4. **Criminal Law: Constitutional Law: Statutes.** Sections 25-1143 and 29-2103, R. R. S. 1943, are constitutional.
5. **Criminal Law: Appeal and Error.** In cases where the trial court does not have power to correct its own errors as, e. g., in the case of excessive sentence, this court may on appeal consider such errors without them having been specified in the motion for a new trial.

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

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

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

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

CLINTON, J.

The principal issue raised on this appeal and the one which is determinative hereof is whether the statutory requirements directing that a motion for new trial must be filed within 10 days "after the verdict . . . was rendered" are violative of the provisions of Article I, section 23, of the Nebraska Constitution, which provides in part: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court"; or of the due process provisions of the Constitutions of the United States and the State of Nebraska. Specifically, the defendant argues that sections 25-1143 and 29-2103, R. R. S. 1943, are unconstitutional. Both statutes contain similar provisions.

Apparently, the defendant's argument is that under the provisions of Article I, section 23, of the Nebraska Constitution, any procedural requirements which in any way conditions the extent of appellate review is unconstitutional. However, he cites no authority supporting this view.

Before resolving the issue, we will first summarize the factual background under which the case and issue arise. On July 7, 1976, the jury returned a verdict finding the defendant guilty of three counts of forgery. The verdicts were accepted by the court and filed on the same day. No motion for new trial was filed within 10 days after the verdict as provided by the pertinent statute. On October 4, 1976, following a pretrial investigation, the defendant was sentenced by the court on each count to terms of 1½ to 3 years in the Nebraska Penal and Correctional Complex, the terms to be served concurrently. On October 4, 1976, the defendant filed a motion for a new trial and on October 5, 1976, he filed an amended motion for a new trial. The amended motion alleged the following grounds:

"1. That the verdict on all three Counts is contrary to the evidence.

"2. That the verdict on all three counts is contrary to the law.

"3. That the sentence is excessive.

"4. That the sentence is contrary to law.

"5. That the sentence is imposed with respect to matters not contained in the complaint or information and with respect to matters about which the Defendant was not tried.

"6. That the period of time between the judgment of the jury and the judgment of the Court denied the Defendant due process of law, constituted cruel and unusual punishment forbid by the U. S. Constitution, denied the Defendant his Sixth Amendment rights as provided by the U. S. Constitution, and violated the Defendants rights as granted by the Nebraska Constituion, Article I, Sections: . . . 23."

On October 5, 1976, the trial court quashed grounds 1 and 2 and overruled the motion insofar as it pertained to the other grounds stated. On October 5, 1976, the defendant filed his notice of appeal.

It is first to be noted that the failure of a defendant

in a criminal case to file a timely motion for a new trial does not prevent an appeal. Section 25-1912, R. R. S. 1943, provides in part: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, and, except as otherwise provided in section 29-2306, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court." Section 29-2306, R. R. S. 1943, contains an exception, eliminating the necessity of payment of docket fees where the appeal is in forma pauperis. The failure to file a timely motion for a new trial does limit the scope of review in the Supreme Court by preventing us from reviewing trial errors not called to the attention of the trial judge by a motion for a new trial. Such motion need be only in the broad language of the provisions of section 25-1142, R. R. S. 1943, except that specific attention must be called to errors in instructions. State v. Allen, 195 Neb. 560, 239 N. W. 2d 272; State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681.

The defendant has assigned several errors, but we note here that it is necessary only for us to determine whether the errors here asserted (1) violate Article I, section 23, of the Nebraska Constitution, and (2) violate the due process clause of the Constitutions of this state and of the United States.

It should first be said that a review by an appellate

court of a final judgment in a criminal case, no matter how grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469; Ortwein v. Schwab, 410 U. S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572. Limitations placed upon the time for appeal apparently do not offend this court's idea of due process. State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. However, when the Nebraska Constitution grants appeal as a matter of right, the procedure afforded must accord with the federal constitutional concepts of due process. Griffin v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891; Ruetz v. Lash, 500 F. 2d 1225; 16A C. J. S., Constitutional Law, § 594, p. 688. It is clear that where a state constitution grants an appeal as a matter of right, reasonable, nondiscriminatory requirements, which have a rational basis as a condition precedent to the exercise of a right, may be prescribed. Brown v. Allen, *supra;* Ortwein v. Schwab, *supra.*

The defendant argues that the requirement that a motion for a new trial be filed within 10 days after the verdict (at which time the sentence may not — and under current procedure probably has not — been imposed) is unreasonable because the defendant may not know whether he wishes to appeal until he knows what the sentence is.

The procedural purposes of requiring a motion for new trial are well known and have been stated by this court on numerous occasions. One purpose is to call to the trial court's attention trial errors, so that that court may remedy serious and prejudical errors by granting a new trial without the necessity of an appeal. The second reason is that the motion is a part of the procedure enabling the appellate court to note that claimed errors have been called to the at-

tention of the trial court and that it has had an opportunity to pass thereon. Appellate courts customarily do not pass upon questions not raised in the trial court. The timely filing of a motion for new trial may also extend the time for filing a notice of an appeal because section 25-1912, R. R. S. 1943, provides that if such a timely motion is filed, the time for filing the notice of appeal begins to run from the overruling of the motion for a new trial. It seems clear enough to us that all the purposes above recited are reasonable and have a rational basis. These governing rules have been followed by this and courts of other jurisdictions, apparently without challenge, ever since such procedures were first laid down. If the sentencing occurs after the motion for new trial has been overruled, then the time for computing the appeal runs from the date of the sentencing. See Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853.

In specific response to the defendant's argument that he may not know whether he wishes to appeal until after sentencing, we acknowledge this may be true. However, that uncertainty neither prevents the defendant from laying a timely foundation for a review of claimed trial errors, nor does the filing of the motion mandate an appeal if ultimately one is not desired by him. We have recently pointed out that in those cases where the trial court does not have the power to correct its own errors, e. g., in the case of excessive sentences, this court may on appeal consider such errors without their inclusion in a motion for new trial. State v. Price, *ante* p. 229, 252 N. W. 2d 165. No doubt the trial court in this case recognized that fact and for that reason struck only the portion of the untimely motion for a new trial insofar as it pertained to the trial errors.

We hold that sections 25-1143 and 29-2103, R. R. S. 1943, are constitutional and do not violate the provisions of Article I, section 23, of the Nebraska Consti-

tution, nor the due process requirements of the state and federal Constitutions.

We further find that the sentences imposed in this case are not excessive. The court did not err in quashing paragraphs 1 and 2 of the defendant's motion for a new trial because the same were untimely. No trial errors are presented to us for a review for the further reason that no bill of exceptions containing the trial evidence and rulings has been presented in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. MARTIN, APPELLANT.

255 N. W. 2d 844

Filed July 6, 1977. No. 41137.

1. **Criminal Law: Juries: Oaths and Affirmations.** In criminal cases it is essential to the validity of the proceeding that the jury should be sworn. The record should show that the jury was sworn, but it is not necessary that it show the exact form of the oath administered; and if the record recites that the jury was sworn, it will be presumed that the proper form of oath was employed.
2. **Criminal Law: Confessions: Evidence.** The general rule is that an oral statement taken down and reduced to writing by a stenographer and not signed by the defendant is inadmissible when it is not signed or acknowledged by the defendant, and cannot be tested for accuracy by examination of the stenographer at trial. However, this rule is not applicable where the oral statement was recorded, and the tape of such recording was properly received in evidence and was available for comparison with the transcription of the tape.
3. **Criminal Law: Witnesses: Evidence.** It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime.
4. **Criminal Law: Trial: Evidence: Due Process.** The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial.

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

John K. Sorensen of Raymond, Olsen, Coll & Sorensen, for appellant.

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

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

BRODKEY, J.

Terry L. Martin, defendant and appellant herein, was charged in the District Court for Scotts Bluff County with shooting Patty Martin with intent to kill under section 28-410, R. R. S. 1943. After trial by jury, defendant was found guilty as charged. He has appealed to this court, contending that the District Court erred in failing to disqualify a witness; in admitting into evidence a transcribed copy of a taped statement made by the defendant; in admitting into evidence testimony which tended to show that defendant committed a crime other than the one with which he was charged; and in failing to establish in the record that the jury was properly sworn. We affirm the judgment of the District Court.

The relevant facts are as follows. In January 1976, the defendant and his wife, Patty, began to have marital difficulties when she discovered he had been seeing a female friend. On the evening of January 28, 1976, Patty left the couple's home at 8:30 o'clock p.m., ostensibly to go to the store. She did not return, however, for several hours, and was intoxicated when she returned. Shortly before she arrived home at 11:30 o'clock p.m., the defendant's female friend visited him, and he sat with her in her automobile, a short distance from defendant's home. Patty arrived home while the defendant was still in the automobile. The defendant was also intoxicated, having consumed 9 or 10 beers that evening.

After Patty and the defendant went inside their

trailer house, they began to argue, and Patty was subsequently shot in the head with a revolver. Due to her injuries, she was unable to remember the events which led to the shooting, and therefore only the defendant testified as to how Patty was shot. His testimony is summarized as follows:

The defendant stated that after the argument erupted, he told Patty that he was going to leave, and went into the bedroom to pack some clothing. His .22 caliber revolver was in the dresser, and he threw it and a box of shells on the bed. He stated that Patty objected to his leaving, and began to scuffle with him in the bedroom, during the course of which a lamp and mirror were broken. Defendant testified that he then decided to get out of the trailer, and took the gun, which was already loaded, with him. When the defendant was at the door to the trailer, Patty allegedly grabbed his left arm, and told him he was not leaving. The revolver, which defendant was holding in his left hand, then discharged during the scuffle. Defendant has consistently maintained that the shooting was an accident.

After the shooting, the defendant immediately telephoned for the police and an ambulance. Officers who arrived on the scene found Patty lying near the entrance of the trailer. The revolver was on a chair nearby, the trailer was in disarray, and the box of shells was found lying open on the bed. The revolver was a single action revolver, and in order to be fired the hammer had to be cocked and the trigger pulled; or pressure must be applied to the trigger and the hammer pulled back and released.

Defendant was arrested in the early morning hours of January 29, 1976. At approximately 8 o'clock p.m. that evening he gave a statement to the police, which was recorded. In his statement defendant accounted for the shooting in the manner already described, and stated that it was an accident. During the trial, the tape of the statement and a

transcription of it were received in evidence by the trial court.

The evidence shows that Patty was shot in the head, slightly above the left eye. The bullet lodged in her brain, and she has suffered partial paralysis, a speech impediment, and loss of memory in regard to the shooting and circumstances immediately prior and subsequent to the shooting. Defendant continued to live with Patty after her release from the hospital, in the home of her parents, until shortly before the trial. Patty's mother, Wilma Knaub, testified that during this time the defendant once stated that "he didn't mean to shoot her [Patty], he just meant to nick her." This statement was received into evidence at the trial, over defendant's objection. Defendant's motion for a mistrial after this evidence was received was overruled. Defendant denied that he had made this statement.

Prior to trial, defendant moved to disqualify Patty as a witness on the grounds that she had "absolutely no recollection whatsoever of the event [the shooting], circumstances preceding or following the incident, or any other facts relevant, material, or at issue herein." Defendant alleged that the "probative value if any, of any of the witness' testimony would be far outweighed by the prejudicial and inflammatory effect of her presence in Court upon the jury." The trial court overruled this motion. Patty was called as a witness at the trial, over defendant's objection, and testified that she was unable to recall the shooting.

The defendant testified on his own behalf, again stating that the revolver discharged accidently when he and Patty were wrestling. As previously stated, the defendant was found guilty as charged by the jury. On appeal, his assignments of error are as follows: The District Court erred in (1) failing to sustain his motion to disqualify Patty as a witness and failing to sustain his objection to her testimony; (2)

admitting into evidence the transcribed copy of the taped statement made by him after his arrest; and (3) admitting into evidence the testimony of Wilma Knaub in regard to defendant's statement that he only meant to "nick" Patty; and failing to sustain his motion for mistrial after this testimony was given. Defendant also contends that the record does not adequately reflect that the jury was sworn in this case.

We first examine defendant's contention that the record does not adequately reflect that the jury was sworn in this case. Section 29-2009, R. R. S. 1943, provides that when "all challenges have been made, the following oath shall be administered: You shall well and truly try, and true deliverance make, between the State of Nebraska and the prisoner at the bar (giving his name), so help you God." In the present case the official court reporter did not report the swearing of the jury and her stenographic notes did not reflect that portion of the trial. The trial court, however, filed a journal entry which is included in the record, and which states that "the jury as selected was duly impaneled and sworn." After the trial, defendant's counsel obtained affidavits from four jurors stating that they had no recollection as to whether the oath was administered following the selection of the jury.

We agree with defendant's contention that in criminal cases it is essential to the validity of the proceeding that the jury should be sworn. See, 50 C. J. S., Juries, § 294, p. 1085; 47 Am. Jur. 2d, Jury, §§ 339 to 345, pp. 909 to 913. We disagree, however, that the record does not adequately show that the oath required by section 29-2009, R. R. S. 1943, was given. There is no requirement that there be a verbatim record of the oath administered. See Smith v. State, 4 Neb. 277 (1876). As stated in 24A C. J. S., Criminal Law, § 1732, p. 110, a "recital in the record that the jury were sworn, or duly sworn, or impaneled and

sworn, or sworn according to law, is sufficient." The record should show that the jury was sworn, but it is not necessary that it show the exact form of oath administered; and if the record recites that the jury was sworn, it will be presumed that the proper form of oath was employed. 47 Am. Jur. 2d, Jury, § 345, p. 912; 24A C. J. S., Criminal Law, § 1855, p. 648.

In this case there is an affirmative showing in the record that the jury was sworn. A journal entry in a duly authenticated record imports verity, and it is sufficient to support a finding unless there is proof to the contrary. State v. Goodrich, 194 Neb. 217, 231 N. W. 2d 142 (1975). Defendant made no showing that the jury was not sworn, as the affidavits he produced were merely statements by jurors that they could not recall whether the oath had been administered. This assignment of error is without merit.

We next consider defendant's contention that it was error to admit in evidence the transcription of the taped statement made by him after his arrest. The statement was taken by a police officer on the evening after the shooting, and was recorded on a cassette tape. The tape was given to a stenographer, who typed a transcription of the statement. Both the tape and the transcription were received into evidence, and a tape recorder was made available to the jurors so that they could listen to the tape as well as read the transcription.

On appeal, defendant contests only the admission in evidence of the transcribed statement, and does not challenge admission of the tape from which the transcription was made. Defendant contends that sufficient foundation for admission of the transcription was not established because the stenographer who made the transcription was not identified and did not appear at trial, the stenographer did not certify the accuracy of the transcription, and the police officer who took the statement from the defendant was not present while the stenographer was typing

the transcription. The defendant did not sign the transcription after it was typed. Defendant argues that an oral confession which has been reduced to writing by a third person is not admissible in evidence unless signed by the defendant, or otherwise acknowledged by him. See 29 Am. Jur. 2d, Evidence, § 532, p. 584.

This court has previously held that an oral statement taken down and reduced to writing by a stenographer is inadmissible when it is not signed or acknowledged by the defendant, and cannot be tested for accuracy by examination of the stenographer at trial. State v. Harding, 184 Neb. 159, 165 N. W. 2d 723 (1969). Admission of such a written statement without the presence of the stenographer at trial violates a defendant's right to confront and cross-examine witnesses. That rule, however, is not applicable under the facts of the present case. Defendant does not contest the admission of the tape made at the time of his statement, and a tape recording of relevant and material conversations is admissible as evidence. State v. Lynch, 196 Neb. 372, 243 N. W. 2d 62 (1976). The police officer who took the statement identified the tape and testified that it accurately reflected the defendant's statement. He further testified that he had compared the tape and the transcription and found the transcription to be accurate. Both the tape and the transcription were received in evidence and were available for the jury's consideration. The police officer who took the taped statement was available for cross-examination by the defendant.

In such circumstances, it was not error to receive the transcription in evidence since its accuracy was established by testimony of the officer who took the statement. Furthermore, an examination of the tape and transcription shows that the transcription in fact accurately reflects the statement on the tape. Since the original tape recording was admitted in

evidence as required by section 27-1002, R. R. S. 1943, it was not error to also admit a transcription of the tape. Furthermore, defendant has made no showing that he was prejudiced in any way by admission of the transcription, which included nothing more than what was included on the tape. Therefore, this assignment of error is without merit.

Defendant next contends that it was error to admit in evidence the testimony of Wilma Knaub, defendant's mother-in-law, who testified that the defendant told her that "he didn't mean to shoot her [Patty], he just meant to nick her." Defendant argues that he was charged only with shooting with intent to kill under section 28-410, R. R. S. 1943; and that the statement did not tend to prove him guilty of the crime charged, but of shooting with intent to wound, which is also a crime under section 28-410, R. R. S. 1943. He relies on the general rule that evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973).

Section 28-410, R. R. S. 1943, makes it unlawful to maliciously shoot, stab, cut, or shoot at any other person with the intent to kill, wound, or maim such person. This court has previously held that shooting with intent to kill and shooting with intent to wound are independent substantive crimes of equal rank. Tasich v. State, 110 Neb. 709, 194 N. W. 813 (1923). Defendant relies on Tasich to support his argument that the statement testified to by Wilma Knaub was proof of a crime other than the one with which he was charged, and that it was therefore not relevant and should not have been admitted in evidence.

Although defendant's argument is somewhat ingenious, it is without merit in this case. It is proper for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the elements of the crime charged, even though such facts and circumstances may prove or tend to

prove that the defendant committed other crimes. The problem concerning the admissibility of evidence of other offenses is an aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on trial. State v. Brown, *supra*. Section 27-401, R. R. S. 1943, provides that: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In the present case, one of the primary issues on trial was whether the defendant deliberately shot Patty, or whether the shooting was accidental. In addition there was a further issue as to whether he shot Patty with intent to kill her. The statement objected to by the defendant was relevant to the factual issue of how the shooting occurred, and whether the shooting was deliberate or accidental. "It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. These are circumstances to be shown." State v. Meints, 189 Neb. 264, 202 N. W. 2d 202 (1972). The purpose of the rule which prohibits admission in evidence of other wholly independent offenses is to prevent the jury from convicting the defendant because he has a propensity for crime in general, and not because he is guilty of the offense with which he is charged. State v. Moore, 197 Neb. 294, 249 N. W. 2d 200 (1976). The statement received in evidence in this case was not admitted to show that the defendant had a propensity for crime in general, or was guilty of a wholly independent offense. Its purpose was to show defendant's conduct, statements, attitude, and relation to the crime charged. Although it did not specifically prove that the defendant shot Patty with intent to kill, it was relevant to the issue of whether the shooting was deliberate,

which was in dispute since defendant claimed that the shooting was accidental. Therefore the testimony was properly received in evidence.

Defendant's final contention is that it was error not to disqualify Patty as a witness and to receive her testimony at the trial. As previously stated, defendant moved before trial to disqualify her as a witness on the grounds that she had no recollection of the shooting and that the probative value of her testimony would be far outweighed by the prejudicial and inflammatory effect of her presence in court upon the jury. The trial court overruled the motion before trial, stating: "* * * I don't know what this witness will testify to except what counsel has informed me, that she has no recollection of the event. This may well be. However, there are other factors and it's a question of whether the testimony has probative value. I refuse to prejudge every witness."

The defendant renewed his motion to disqualify Patty from testifying during trial immediately prior to her taking the witness stand. The trial court again overruled the motion, and stated: "I admonish counsel for the State and the Defendant that if there are serious problems with the demeanor of this witness, because of whatever limited probative value this is, I will have no hesitancy in shutting off testimony and continuing with the trial if this is going to cause a serious problem in front of the jury." Patty's entire testimony, as recorded in the bill of exceptions, was as follows: "Q. Would you state your name, please? A. Patty — His name, (indicating). I don't know. Q. Do you have, Patty, any recollection at all of what occurred on the night of the 28th of January, 1976, or early in the morning of January 29? A. No. I don't. Q. Nothing whatever, is that correct? A. Well, I don't remember that day at all."

Defendant's contention that the apperance of Patty as a witness and her testimony constitute re-

versible error is twofold. First, he contends that she was incompetent as a witness. Secondly he argues that her appearance and testimony inflamed and prejudiced the members of the jury against him.

Defendant's contention that Patty was not competent to be a witness is not supported by the record. Section 27-601, R. R. S. 1943, provides that every "person is competent to be a witness except as otherwise provided in these rules." Section 27-602, R. R. S. 1943, provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Defendant did not object to Patty's appearance as a witness on the general ground of incompetency. She was duly sworn as a witness, and defendant did object to her being sworn on the ground that she was unable to understand the oath. Patty did not testify in regard to the shooting, but stated that she could not remember the day on which it occurred. Patty was clearly competent to so testify, and she did not testify to any matter of which she had no personal knowledge.

The primary contention of the defendant is not that Patty was incompetent to testify as she did, but that her mere presence before the jury inflamed and prejudiced it against the defendant. He contends that a medical doctor, a witness for the State who testified prior to Patty's testimony, had already stated that Patty could not remember the day of the shooting, and that therefore there was no need for Patty to take the stand and herself state that she had no recollection; and that her testimony was irrelevant and immaterial. The State argues that the jury was entitled to hear Patty's testimony in order to understand why the victim of an alleged crime was not able to state what happened on the night it occurred.

Determination of the admissiblity of evidence gen-

erally rests within the sound discretion of the trial court. State v. King, 197 Neb. 729, 250 N. W. 2d 655 (1977). The underlying principle of relevance is the logical, probative value of the evidence. State v. Wright, 189 Neb. 783, 205 N. W. 2d 351 (1973). Under the particular facts of the present case, where the only eyewitnesses to the alleged crime were the defendant and Patty, we cannot say that it was an abuse of discretion on the part of the trial court to permit Patty to testify that she had no recollection of the shooting. The jury may have speculated as to why Patty did not testify if it had not been apprised that she could not recall the shooting; and could have drawn inferences, favorable or unfavorable to the defendant, if no explanation were given it. Although the medical doctor who testified stated that it was probably impossible for Patty to have any recollection of the shooting, he had not examined her for a substantial period before trial, and could not testify in regard to her ability to remember at the time of trial.

We disagree with defendant's contention that Patty's appearance as a witness and her testimony should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. See, § 27-403, R. R. S. 1943; State v. Fleming, 182 Neb. 249, 154 N. W. 2d 65 (1967). The testimony itself was in no way prejudicial because it consisted only of a statement that Patty had no recollection of the day of the shooting. The record does not indicate that her appearance as a witness, which was not in and of itself evidence, was prejudicial or inflammatory. Testimony at trial made the jury aware, prior to her appearance, that she had been shot in the head, that the bullet had lodged in her brain, and that she had suffered partial paralysis and a speech impediment. In order to minimize any possible effect on the jury which could be caused by her appearance as a witness, the trial court had

Patty take and leave the witness stand outside the presence of the jury. Even if it were assumed that Patty's appearance as a witness and her testimony were irrelevant, the admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Gurule, 194 Neb. 618, 234 N. W. 2d 603 (1975). Under circumstances, where the jury was aware of the nature and extent of Patty's injuries prior to her appearance as a witness, her appearance and testimony did not constitute prejudice to the defendant or prevent him from having a fair trial.

For the reasons given above, the defendant's assignments of error are without merit, and therefore the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRADLEY DAVIS, APPELLANT.

255 N. W. 2d 434

Filed July 6, 1977. No. 41156.

1. **Criminal Law: Evidence: Verdicts.** A conviction may rest upon circumstantial evidence if it is substantial.
2. _____: _____: _____. In a criminal case, where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong.
3. **Judges: Trial: Motions, Rules, and Orders: Appeal and Error.** The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.

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

Neil R. McCluhan, for appellant.

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

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

MCCOWN, J.

Defendant was found guilty by a jury of the offense of breaking and entering an automobile. The District Court sentenced him to 2 years imprisonment.

Shortly before midnight on June 8, 1976, two police officers of South Sioux City, Nebraska, on patrol in a police car, noticed an automobile being driven slowly in the parking lot of a motel in South Sioux City. The brake lights of the vehicle intermittently went on and off, and the two officers became suspicious that the occupants of the car were "casing" the parking lot. The officers observed the automobile leave the parking lot and saw two persons get out of the car and the car was driven on. At that point, one of the officers got out of the patrol car with a walkie-talkie and hid in the bushes nearby to observe. The other officer drove the patrol car a block or two away, parked, and waited. The officer on foot recognized the two persons who had gotten out of the automobile. Shortly thereafter the automobile went by again. The two men on foot whistled, flagged the car down, and then waved it on. The officer at that time identified the passenger in the car, but did not see who was driving. The officer saw the two men on foot go into the motel parking lot. He observed one of the men breaking into a vehicle in the parking lot and arrested the man in the act of attempting to remove a C. B. radio from the vehicle. The other individual ran, but was later apprehended. At this point the officer noticed that the suspicious automobile was again in the area and he called by radio for the police car to stop the vehicle. The automobile was stopped within a block and a half of the motel parking lot. The defendant was driving and he and the passenger were arrested.

Defendant's first assignment of error is that the court erred in denying a motion for a directed verdict because the evidence was insufficient to sustain the conviction of the defendant. The basic thrust of the argument is that there was no direct proof that defendant knew that the other men intended to commit a crime. The individual who was caught red-handed pleaded guilty and was sentenced. He later testified as a witness at defendant's trial. After some questioning he was ruled to be a hostile witness but refused to answer questions as to whether he had made a statement to police that he went to the parking lot to steal a C. B. radio, and that he had stated and discussed that intention in the presence of the defendant. The defendant contends that the testimony sought to be elicited was inadmissible because it was hearsay. This is not the usual situation in which a witness seeks to testify as to a statement made by someone else. Instead, the witness here indisputably was a competent witness, and the statements about which he was being questioned were his own statements. They were not hearsay. Cases relied on by the defendant have no application to the facts here. In Nebraska whoever aids and abets another in the commission of any offense may be prosecuted and punished as if he were the principal offender. See § 28-201, R. R. S. 1943.

While the evidence as to defendant is partially circumstantial, it is nevertheless amply sufficient to sustain the conviction of the defendant. A conviction may rest upon circumstantial evidence if it is substantial. State v. Von Suggs, 196 Neb. 757, 246 N. W. 2d 206. In a criminal case, where there is sufficient evidence to justify the verdict, the verdict will not be set aside unless clearly wrong. State v. Record, *ante* p. 530, 253 N. W. 2d 847.

The defendant's only other assignment of error is that the trial court failed to disqualify himself because he was allegedly biased and prejudiced

against the defendant. The basis for the claim of prejudice is the assertion that the trial judge, at a previous time when he was county attorney, had made statements indicating his intention to prosecute defendant to the maximum extent for any future crime, and that the court had required the hostile witness to answer questions directed to him. It is also asserted that bias and prejudice were shown by the court in setting bail, and in the fact that defendant received a maximum sentence. Bail had no effect whatever on the trial. It is not even contended that the sentence is excessive. In view of defendant's record it would be virtually frivolous to make such a contention. It is equally frivolous to assert that the sentence was the result of bias or prejudice.

It should be noted that defendant accepted and made no objections to any of the instructions given to the jury, nor does he contend that any evidence was improperly admitted except for the testimony of the coparticipant who had already pleaded guilty and been sentenced prior to defendant's trial. The determination of defendant's guilt was made by the jury here and not by the judge. The record is void of any evidence that defendant did not have a fair trial. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. 46 Am. Jur. 2d, Judges, § 222, p. 244. Defendant's contentions of bias and prejudice are without merit.

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

AFFIRMED.

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Abandonment.

The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be expressed but may be inferred from the conduct of the parties and the attendant circumstances. Davco Realty Co. v. Picnic Foods, Inc. 193

Administrative Law.

1. The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it. American Motors Sales Corp. v. Perkins 97
2. The 30-day period specified in section 48-1008, R. R. S. 1943, of the Act Prohibiting Unjust Discrimination in Employment Because of Age, is not a period limiting the right of action of the Equal Opportunity Commission, but the elapse of the 30-day period is a condition precedent to the ripening of the individual cause of action of the aggrieved employee. Equal Opportunity Commission v. Weyerhaeuser Co. 104
3. In a proceeding to review an order of the Nebraska State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Herink v. State ex rel. State Real Estate Commission 241
   Haller v. State ex rel. State Real Estate Commission .. 437
4. In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Minshull v. School Dist. of Sutherland 418
5. A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power,

is unconstitutional. Haller v. State ex rel. State Real Estate Commission 437
6. In an appeal from a ruling of an administrative agency, the agency is usually considered a necessary, or at least a proper, party. Winkelmann v. Nebraska Liquor Control Commission 481
7. Where the subject matter of the appeal does not give rise to issues affecting the public interest generally, the administrative agency, if made a party, need take no active part in the litigation, but may leave it to the parties directly concerned. Winkelmann v. Nebraska Liquor Control Commission 481
8. On an appeal from the Nebraska Liquor Control Commission, this court shall determine whether the findings of the commission are supported by substantial evidence and whether the District Court and the commission followed the proper statutory criteria. Winkelmann v. Nebraska Liquor Control Commission 481
9. The power to regulate and control alcoholic liquors is vested exclusively in the Nebraska Liquor Control Commission except as otherwise provided by statute. Winkelmann v. Nebraska Liquor Control Commission 481
10. A recommendation by the appropriate governmental unit upon the issuance of a liquor license is not binding upon the Nebraska Liquor Control Commission. Winkelmann v. Nebraska Liquor Control Commission 481
11. The Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders upon 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. Winkelmann v. Nebraska Liquor Control Commission 481
12. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Winkelmann v. Nebraska Liquor Control Commission 481
13. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Hugelman v. A & A Trucking, Inc. 628
14. The state holds the public school lands, including the income therefrom, as trustee. It is the duty of the trustee to obtain the maximum return to the trust estate from the trust properties under its control. Anderson v. Board of Educational Lands & Funds 793
15. Sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school

land lease be executed and delivered to the highest bidder under any and all circumstances. Anderson v. Board of Educational Lands & Funds 793

16. The Constitution of Nebraska requires that the trust property be dealt with in a manner consistent with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board of Educational Lands and Funds the duty of obtaining the highest price possible for all trust property that it may sell. Anderson v. Board of Educational Lands and Funds ... 793

17. A fair construction of the statutes, viewed in the light of their constitutional background, requires a holding that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the Board of Educational Lands and Funds. Anderson v. Board of Educational Lands & Funds 793

Administrators and Executors.

Under a will providing that a son of the testatrix who, also, was designated as executor of her estate be granted an option to purchase certain real estate at its fair market value to be fixed by an appraiser named in the will, the fair market value fixed by the appraiser named in the will is controlling in the absence of bad faith or fraud. Overbeck v. Estate of Bock 121

Adverse Possession.

1. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. Fischer v. Grinsbergs 329

2. The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Fischer v. Grinsbergs 329

3. A permissive use is not adverse, and cannot ripen into an easement. Where a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the

presumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence. Fischer v. Grinsbergs 329
4. It is the general rule and weight of authority that where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party. Fischer v. Grinsbergs 329
5. The extent of an easement is determined from the use actually made of the property during the running of the prescriptive period. Fischer v. Grinsbergs 329

Affidavits.

1. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. Sempek v. Sempek 300
2. Although affidavits not included in the bill of exceptions will not be considered as evidence by this court, an affidavit charging contempt may be considered by this court, even if not offered and received in evidence, for the limited purpose of determining whether the pleadings support the judgment. Sempek v. Sempek 300
3. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective. Sempek v. Sempek 300

Annexation.

1. A city of the first class has the power to annex lands, contiguous to its corporate limits, which are urban or suburban in character. Piester v. City of North Platte 220
2. The character of a segment of an Interstate Highway sought to be annexed by a city of the first class is determined by the characteristic of the land immediately adjacent to the segment sought to be annexed. Piester v. City of North Platte 220

Appeal and Error.

1. If attorney's fees should be, but are not, allowed by the Workmen's Compensation Court, and the issue is properly preserved on appeal, the District Court has the

power to remedy the error of the compensation court and award such fees. Harrington v. State 4
2. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Buck v. Iowa Beef Processors, Inc. 125
Hyatt v. Kay Windsor, Inc. 580
3. Appeals from the county court to the District Court in probate matters are tried in the District Court de novo and not de novo on the record. §§ 24-541, 30-1601, R. R. S. 1943. Boosalis v. Horace Mann Ins. Co. 148
4. 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. Boosalis v. Horace Mann Ins. Co. 148
State v. Allen 755
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. Boosalis v. Horace Mann Ins. Co. 148
6. Where a default judgment has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere. Boosalis v. Horace Mann Ins. Co. 148
7. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Lincoln Fire Fighters Assn. v. City of Lincoln 174
8. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. McDowell Road Associates v. Barnes 207
9. Where it is disclosed that the record presents nothing but a moot question for the determination of the Supreme Court, ordinarily the judgment of the District Court will be affirmed. Haller v. Chiles, Heider & Co., Inc. 216
10. An appeal shall be deemed perfected and the court shall have jurisdiction of the cause when a notice of appeal has been filed and the docket fee deposited in

the office of the clerk of the District Court within the time provided by statute. State v. Price 229
11. While this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned. State v. Price 229
12. In a proceeding to review an order of the Nebraska State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Herink v. State ex rel. State Real Estate Commission 241
Haller v. State ex rel. State Real Estate Commission .. 437
13. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents 243
14. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect, and this court will not review alleged errors occurring during trial unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Sempek v. Sempek 300
15. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Jenkins 311
16. Because of the provisions of section 29-2315.01, R. R. S. 1943, the State cannot cross-appeal from an order granting the defendant a new trial in a criminal case. State v. Martinez 347
17. The Supreme Court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Wittwer v. Dorland 361
18. Under the rules of this court only errors assigned and discussed in the brief will be considered. State v. Bear Runner 368
19. Error may not be predicated on the refusal to give an

instruction which either erroneously or only partially covers the applicable law. State v. Bear Runner 368
20. Under section 48-185, R. S. Supp., 1976, a judgment, order, or award of the Workmen's Compensation Court may be modified, reversed, or set aside by this court when there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or when the findings of fact by the court do not support the order, judgment, or award. Jeffers v. Pappas Trucking, Inc. 379
21. A party cannot appeal from an order or judgment which was made with his consent or upon his application. Reinertson v. Long 397
22. In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Minshull v. School Dist. of Sutherland 418
23. An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. A.H. 444
24. In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda 465
25. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion. Shover v. General Motors Corp. 470
26. The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. Shover v. General Motors Corp. 470
27. To review errors of law occurring upon the trial of an equity case a motion for a new trial is necessary. McClintock v. Nemaha Valley Schools 477
28. In an appeal from a ruling of an administrative agency, the agency is usually considered a necessary, or at

least a proper, party. Winkelmann v. Nebraska Liquor Control Commission 481
29. Where the subject matter of the appeal does not give rise to issues affecting the public interest generally, the administrative agency, if made a party, need take no active part in the litigation, but may leave it to the parties directly concerned. Winkelmann v. Nebraska Liquor Control Commission 481
30. On an appeal from the Nebraska Liquor Control Commission, this court shall determine whether the findings of the commission are supported by substantial evidence and whether the District Court and the commission followed the proper statutory criteria. Winkelmann v. Nebraska Liquor Control Commission 481
31. Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska Supreme Court on appeals from the Nebraska Public Service Commission. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
32. When an equity action is appealed to the Supreme Court, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the District Court. Brewer v. Tracy 503
33. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. State v. Worrell 507
34. In appeals in equity from the District Court to the Supreme Court, this court reviews the issues by trial de novo on the record. State v. Worrell 507
35. An appeal from a finding and judgment of the District Court involving dependent or neglected children under Chapter 43, article 2, R. R. S. 1943, is disposed of in this court by trial de novo on the record. State v. Worrell 507
36. An appeal is limited to the issues presented by the motion for new trial; it may not include issues presented by a later motion overruled after the appeal is taken. Prochazka v. Prochazka 525
37. The failure to object to instructions after they have been submitted to counel for review will preclude raising an objection on appeal. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542

38. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542
39. Appeals from the Separate Juvenile Court in cases brought under Chapter 43, article 2, R. R. S. 1943, are heard de novo upon the record, with weight given to the findings of fact because the Juvenile Court heard and observed the witnesses. State v. Bailey 604
40. A bill of exceptions is the only vehicle for bringing evidence before this court. Hanson v. Hanson 675
41. Evidence which does not appear in the record cannot be considered by this court on appeal. Hanson v. Hanson 675
42. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. Hanson v. Hanson 675
43. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. House Officers Assn. v. University of Nebraska Medical Center 697
44. Misdemeanor appeals from the county or municipal court are triable de novo in the District Court on the record made in the lower court. State v. Stone 721
45. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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. Allen 755
46. A review by an appellate court of a final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. If, however, by virtue of state statutory or constitutional provisions appeal is made a matter of right, the procedure pertaining thereto must accord with the concept of due process. State v. Kelley 805

47. Limitations placed upon the time within which to perfect an appeal from a conviction in a criminal case do not violate the due process provisions of the Constitutions of the United States or of this state. State v. Kelley 805
48. The requirement of filing a motion for a new trial within 10 days after the verdict, which motion must specify the claimed errors which justify a new trial, does not offend the provisions of Article I, section 23, of the Constitution of Nebraska, or the concepts of due process. State v. Kelley 805
49. In cases where the trial court does not have power to correct its own errors as, e. g., in the case of excessive sentence, this court may on appeal consider such errors without them having been specified in the motion for a new trial. State v. Kelley 805
50. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Davis 823

Arrest.

1. Where the arrest of the defendant and the circumstances surrounding it are material to the issues of the case, evidence to explain the arrest of a defendant and the circumstances surrounding it is admissible even if other crimes are disclosed. State v. Bear Runner 368
2. The use of force is not justifiable under section 28-836(2), R. R. S. 1943, to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful. State v. Bear Runner 368

Attorneys at Law.

1. If attorney's fees should be, but are not, allowed by the Workmen's Compensation Court, and the issue is properly preserved on appeal, the District Court has the power to remedy the error of the compensation court and award such fees. Harrington v. State 4
2. Where the employer appeals to the District Court from the award of the Workmen's Compensation Court and fails to obtain any reduction in the amount of the award, the District Court ordinarily should allow the employee a reasonable attorney's fee. Harrington v. State 4
3. Where the conduct of attorneys violates provisions of the Nebraska Code of Professional Responsibility and their oaths as attorneys at law, but does not involve moral turpitude or characterize them as unsuitable to practice law, a judgment of reprimand and censure

is appropriate. State ex rel. Nebraska State Bar Assn. v. Addison & Levy 61
4. A city attorney is not a "principal officer" within the meaning of that phrase as used in section 48-813, R. S. Supp., 1976. Communication Workers of America, AFL-CIO v. City of Hastings 668

Bail.

1. The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety. State v. Starks 433
2. A trial court has broad powers to insure the orderly and expeditious process of a trial, and this includes the power to revoke bail and remit the defendant to custody. State v. Starks 433
3. In the absence of prejudice, an erroneous revocation of bail does not affect the merits of the case. State v. Starks 433

Bailments.

1. In an action for the bailee's failure to exercise required care whereby bailed property becomes lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury. Nash v. City of North Platte 623
2. The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial. Nash v. City of North Platte 623

Banks and Banking.

1. The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public. Labenz v. Labenz 548
2. Corporate directors may not delegate their responsibilities and are not excused from liability because they committed some of their duties to an executive committee or to other individual directors. Fowler v. Elm Creek State Bank 631
3. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his

ignorance of facts he had a duty to know and should have known. Fowler v. Elm Creek State Bank 631
4. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. Fowler v. Elm Creek State Bank 631
5. Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities. Fowler v. Elm Creek State Bank 631

Bonds.

1. Where the defendant fails to appear in court as required by the conditions of his bond, the liability on the bond becomes absolute and forfeiture is proper. State v. Hart 164
2. In the absence of a showing excusing the defendant's failure to appear as required by the conditions of his bond the trial court may on motion enter judgment on the bond. State v. Hart 164
3. The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety. State v. Starks 433
4. A performance bond guarantees that the contractor will perform the contract, and a labor and material payment bond guarantees that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults. Cagle, Inc. v. Sammons 595

Burden of Proof.

1. A movant who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of proof to show that the warrant was invalid. State v. Kohout 90
2. The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Fischer v. Grinsbergs 329
3. A permissive use is not adverse, and cannot ripen into an easement. Where a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the pre-

sumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence. Fischer v. Grinsbergs 329

4. In order to sustain an action on an express or implied warranty the plaintiff must prove, among other things, that the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the product or goods. Durrett v. Baxter Chrysler-Plymouth, Inc. 392
5. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Durrett v. Baxter Chrysler-Plymouth, Inc. 392
6. Ordinarily a party suing to recover an alleged overpayment on a contract has not only the burden of proving the overpayment but also the burden of proving that the overpayment was involuntary. Hersch Buildings, Inc. v. Steinbrecher 486
7. In an action against a contractor to recover alleged overcharges by the contractor the plaintiff has the burden of proving that it was overcharged. Hersch Buildings, Inc. v. Steinbrecher 486
8. It is error to give the jury instructions which place the burden of proof on the wrong party, or contain inconsistent and conflicting paragraphs relating to the burden of proof. Hersch Buildings, Inc. v. Steinbrecher .. 486
9. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Hyatt v. Kay Windsor, Inc. 580
10. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Hyatt v. Kay Windsor, Inc. 580
11. In an action for the bailee's failure to exercise required care whereby bailed property becomes lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury. Nash v. City of North Platte 623
12. The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but

merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial. Nash v. City of North Platte 623

Canons.

Where the conduct of attorneys violates provisions of the Nebraska Code of Professional Responsibility and their oaths as attorneys at law, but does not involve moral turpitude or characterize them as unsuitable to practice law, a judgment of reprimand and censure is appropriate. State ex rel. Nebraska State Bar Assn. v. Addison & Levy 61

Census.

1. When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943. Pelzer v. City of Bellevue 19
2. The language in section 5-108, R. R. S. 1943, "the most recent federal census," refers to the most recent federal census available to the particular locality, either the regular decennial one or a special census. Pelzer v. City of Bellevue 19

Collateral Attack.

In a tax foreclosure action where jurisdiction was obtained for service by publication, a petition by a dissolved corporation to vacate the decree and allow it to redeem after confirmation on the ground the affidavit regarding a diligent investigation and inquiry was fraudulent is subject to demurrer in the absence of an allegation that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other person having charge of the assets. County of Madison v. City of Norfolk 718

Common Carriers.

1. Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska Supreme Court on appeals from the Nebraska Public Service Commission. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
2. Withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
3. General fears of potential diversion as contrasted with

specific evidence indicating probable harm do not constitute proof that harm will result to competitive carriers because of an application. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491

Condemnation.

1. Under section 76-705, R. R. S. 1943, if any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined. Krambeck v. City of Gretna 608
2. Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the taken property, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken. Krambeck v. City of Gretna 608
3. Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for 10 years, the requisite period to establish title by prescription. Krambeck v. City of Gretna 608

Confessions.

1. The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, knowingly, and intelligently, after the required Miranda warnings have been given. State v. Thompson 48
2. The determination of whether a statement was voluntarily made turns on the consideration of the totality of the circumstances present in each case. State v. Thompson 48
3. A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on

appeal unless the finding is clearly erroneous. State v. Thompson 48
4. The form of a statement, as oral or written, is immaterial in the determination of its admissibility as an admission. Both oral and written statements of a defendant are admissible if voluntary. State v. Thompson 48
5. An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. State v. Keesecker 426
6. After such warnings as set out in Miranda have been given, and such opportunity afforded him, an individual may knowingly and intelligently waive those rights and agree to answer questions or make a statement. State v. Keesecker 426
7. The rule is that where the evidence as to what occurred immediately prior to and at the time of making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence. State v. Keesecker 426
8. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Keesecker 426
9. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). State v. Robinson 785
10. The determination of whether a statement was voluntarily made necessarily turns upon the consideration of whether or not the totality of the circumstances demonstrates the voluntariness or involuntariness of the statement. State v. Robinson 785
11. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or indirect promises, however slight, nor by the exertion of any improper influence. State v. Robinson 785
12. The general rule is that an oral statement taken down and reduced to writing by a stenographer and not signed by the defendant is inadmissible when it is not signed or acknowledged by the defendant, and cannot be tested for accuracy by examination of the stenographer at trial. However, this rule is not applicable where the oral statement was recorded, and the tape of

such recording was properly received in evidence and was available for comparison with the transcription of the tape. State v. Martin 811

Conspiracy.

1. A charge of conspiracy to unlawfully distribute a controlled substance to third parties may be sustained by proof of an agreement by two or more parties to participate in the chain of distribution and proof of an overt act in furtherance of the agreement. State v. Dent & Bodeman 110
2. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means. Dangberg v. Sears, Roebuck & Co. 234
3. A statement is not hearsay if it is offered against a party and is a statement made by a coconspirator of the party during the course and in furtherance of the conspiracy. State v. Bobo 551
4. Before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. State v. Bobo 551

Constitutional Law.

1. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law. State v. One 1968 Volkswagen 45
2. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it, and at the same time and in the same action question its constitutionality. American Motors Sales Corp. v. Perkins 97
3. An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove 319
4. A search prosecuted in violation of the Constitution of the United States or the Nebraska Constitution is not made lawful by what it brings to light. State v. Colgrove 319
5. A prima facie case of discrimination in jury selection can be established upon demonstration that a signifi-

cant disparity exists between the percentage of a particular minority chosen for jury duty and the percentage of that minority available in the population from which the jurors are drawn. State v. Martinez 347
6. The Nebraska system of selecting jurors is clearly within constitutional limits. State v. Martinez 347
7. A motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not by one aggrieved solely by the introduction of the incriminating evidence. State v. Martinez 347
8. A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional. Haller v. State ex rel. State Real Estate Commission 437
9. In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Haller v. State ex rel. State Real Estate Commission 437
10. The key-number system for the selection of jurors from voter registration lists is constitutionally valid. State v. Addison 442
11. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. A. H. 444
12. Under both the Constitution of Nebraska and the Constitution of the United States, a defendant in a criminal trial in this state has a right to proceed without counsel and represent himself if he voluntarily and intelligently elects to do so. State v. Kirby 646
13. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). State v. Robinson 785
14. An accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial, it is the duty of the Supreme Court to grant a new trial. State v. Robinson 785
15. If the trial court is informed of matters during trial which might reasonably constitute grounds for a challenge for cause of one or more jurors, it is the duty of

the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guarantee of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system. State v. Robinson 785

16. The Constitution of Nebraska requires that the trust property be dealt with in a manner consistent with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board of Educational Lands and Funds the duty of obtaining the highest price possible for all trust property that it may sell. Anderson v. Board of Educational Lands & Funds 793

17. A fair construction of the statutes, viewed in the light of their constitutional background, requires a holding that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the Board of Educational Lands and Funds. Anderson v. Board of Educational Lands & Funds 793

18. A review by an appellate court of a final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. If, however, by virtue of state statutory or constitutional provisions appeal is made a matter of right, the procedure pertaining thereto must accord with the concept of due process. State v. Kelley 805

19. Limitations placed upon the time within which to perfect an appeal from a conviction in a criminal case do not violate the due process provisions of the Constitutions of the United States or of this state. State v. Kelley 805

20. The requirement of filing a motion for a new trial within 10 days after the verdict, which motion must specify the claimed errors which justify a new trial, does not offend the provisions of Article I, section 23, of the Constitution of Nebraska, or the concepts of due process. State v. Kelley 805

21. Sections 25-1143 and 29-2103, R. R. S. 1943, are constitutional. State v. Kelley 805

Contempt.

1. A motion for new trial under section 25-1143, R. R. S. 1943, is required in cases involving constructive con-

tempts committed outside the presence of the court. Sempek v. Sempek 300
2. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. Sempek v. Sempek 300
3. Although affidavits not included in the bill of exceptions will not be considered as evidence by this court, an affidavit charging contempt may be considered by this court, even if not offered and received in evidence, for the limited purpose of determining whether the pleadings support the judgment. Sempek v. Sempek 300
4. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective. Sempek v. Sempek 300

Contracts.

1. A vehicle which has liability insurance coverage effective and applicable to it at the time of an accident in limits not less than the amounts required by section 60-509, R. R. S. 1943, is not an uninsured motor vehicle within the meaning of section 60-509.01, R. R. S. 1943. Crossley v. Pacific Employers Ins. Co. 26
2. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorists to the insured for the personal injuries sustained. Crossley v. Pacific Employers Ins. Co. 26
3. Contracts which are valid where made do not offend the public policy of a forum, although they provide for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such contract, if made in the law of the forum. Grady v. Denbeck 31
4. The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it. American Motors Sales Corp. v. Perkins 97
5. An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. Timmerman Bros., Inc. v. Quigley 129
6. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Timmerman Bros., Inc. v. Quigley 129
7. The interpretation given a contract by the parties them-

selves while engaged in the performance of the contract is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced. Nebraska State Bank v. Dudley 132

8. Unless otherwise agreed, there is no privity of contract between an owner and a subcontractor. Barnes v. Hampton 151

9. A surety, which is subrogated to the rights of the principal against a third person, takes the rights subject to all defenses which the third person had as against the principal. Barnes v. Hampton 151

10. The establishment of a pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract. Lincoln Fire Fighters Assn. v. City of Lincoln 174

11. It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements wth respect thereto. Davco Realty Co. v. Picnic Foods, Inc. 193

12. Absolute certainty in the terms of an agreement is not required, only reasonable certainty is necessary. A contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested. Davco Realty Co. v. Picnic Foods, Inc. 193

13. In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the structure will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. Davco Realty Co. v. Picnic Foods, Inc. 193

14. In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances. Davco Realty Co. v. Picnic Foods, Inc. 193

15. The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be expressed but may be inferred from the conduct of the parties and the attendant circumstances. Davco Realty Co. v. Picnic Foods, Inc. .. 193

16. Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to

their original rights with relation to the subject matter, and they are entitled to be placed in status quo so far as possible. All rights under the rescinded contract are terminated, and the parties are discharged from their obligations thereunder. Davco Realty Co. v. Picnic Foods, Inc. 193

17. Ordinarily a party suing to recover an alleged overpayment on a contract has not only the burden of proving the overpayment but also the burden of proving that the overpayment was involuntary. Hersch Buildings, Inc. v. Steinbrecher 486

18. In an action against a contractor to recover alleged overcharges by the contractor the plaintiff has the burden of proving that it was overcharged. Hersch Buildings, Inc. v. Steinbrecher 486

19. In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. Brewer v. Tracy 503

20. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Brewer v. Tracy 503

21. A contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed. Brewer v. Tracy 503

22. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. Don Nelson Constr. Co. v. Landen 533

23. Ambiguities in a contract are construed most strictly against its author. Don Nelsen Constr. Co. v. Landen . 533

24. A performance bond guarantees that the contractor will perform the contract, and a labor and material payment bond guarantees that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults. Cagle, Inc. v. Sammons 595

25. Section 25-206, R. R. S. 1943, provides that an action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within 4 years. Krambeck v. City of Gretna 608
26. Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677
27. The vendee under a land contract may assign the interest he acquires under the contract in whole or part, and the effect of such an assignment is to convey the vendee's equitable interest in the land to the assignee. The vendee may properly reserve or except rights in the land in such conveyance. Beren Corp. v. Spader .. 677
28. A contractual provision providing for an award of liquidated damages for delay in performance of a contract may be waived. Wiebe Constr. Co. v. School Dist. of Millard 730
29. In an action for a liquidated sum which is the balance owing on a contract, the amount claimed does not become unliquidated merely because of the assertion of an offset, and if the trier of fact finds against the defendant on the offset, prejudgment interest should be awarded on the claim. Wiebe Constr. Co. v. School Dist. of Millard 730
30. In a contract action, if the plaintiff has fully performed his contract he is entitled to the contract price. Wiebe Constr. Co. v. School Dist. of Millard 730
31. Words technical or ambiguous on their face, or peculiar to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage. Associated Bean Growers v. Chester B. Brown Co. 775

Controlled Substances.

1. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law. State v. One 1968 Volkswagen 45
2. A charge of conspiracy to unlawfully distribute a controlled substance to third parties may be sustained by proof of an agreement by two or more parties to

participate in the chain of distribution and proof of an overt act in furtherance of the agreement. State v. Dent & Bodeman 110

Conversion.

The measure of damages for conversion is the market value of the converted property on the date of conversion. Associated Bean Growers v. Chester B. Brown Co. 775

Corporations.

1. It is the duty of a corporation when it learns of an unauthorized act committed in its name, or one who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time. CIT Financial Services of Kansas v. Egging Co. 514
2. Corporate directors may not delegate their responsibilities and are not excused from liability because they committed some of their duties to an executive committee or to other individual directors. Fowler v. Elm Creek State Bank 631
3. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Fowler v. Elm Creek State Bank 631
4. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. Fowler v. Elm Creek State Bank 631
5. Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefore in their individual capacities. Fowler v. Elm Creek State Bank 631

Counties.

A county board has discretion to determine the character of repairs to be made to bridges, and, when there are not sufficient funds for all, to decide which bridges shall be repaired. State ex rel. Goossen v. Board of Supervisors 9

Court of Industrial Relations.

1. The establishment of a pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract. Lincoln Fire Fighters Assn. v. City of Lincoln 174
2. The burden of proof is satisfied by actual proof of the

facts, of which proof is necessary, regardless of which party introduces the evidence. Lincoln Fire Fighters Assn. v. City of Lincoln 174
3. Prevalent wage rates for firemen must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. Lincoln Fire Fighters Assn. v. City of Lincoln 174
4. In selecting cities in reasonably similar labor markets, for the purposes 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 to make comparisons appropriate. Lincoln Fire Fighters Assn. v. City of Lincoln 174
5. A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. Lincoln Fire Fighters Assn. v. City of Lincoln 174
6. In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates. Lincoln Fire Fighters Assn. v. City of Lincoln 174
7. 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. Lincoln Fire Fighters Assn. v. City of Lincoln 174
8. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Lincoln Fire Fighters Assn. v. City of Lincoln 174
9. The considerations set forth in section 48-838(2), R. S. Supp., 1974, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. American Assn. of University Professors v. Board of Regents 243
10. A basic inquiry in bargaining unit determination is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. American Assn. of University Professors v. Board of Regents 243
11. In determining whether a particular group of employees constitutes an appropriate bargaining unit where an employer operates a number of facilities, relevant fac-

tors include prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence of autonomy of the facilities; differences or similarities in skills or functions of the employees; geographical location of the facilities in relation to each other; and possibility of over-fragmentation of bargaining units. American Assn. of University Professors v. Board of Regents 243

12. The faculties of the College of Law and the College of Dentistry were entitled to separate bargaining units where the evidence showed that those faculty members shared a community of interest separate from other faculty members, in that they have separate buildings; have separate accreditation standards; have different academic calendars; have significant operational independence on a day-to-day basis; and receive higher salaries, and promotions and tenure in a shorter period of time, than do other faculty members of the University. American Assn. of University Professors v. Board of Regents 243

13. Department chairmen are properly included in bargaining units of faculty employees at the University where their decision-making power is diffused among the department faculty under the by laws of the Board of Regents of the University of Nebraska, and pursuant to the principle of collegiality. American Assn. of University Professors v. Board of Regents 243

14. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents 243

15. Section 48-813, R. S. Supp., 1976, is the controlling statute in regard to service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked. Communication Workers of America, AFL-CIO v. City of Hastings 668

16. House Officers of the University of Nebraska Medical Center are employees of the State of Nebraska as defined under section 48-801, R. R. S. 1943, and are entitled to participate in an appropriate bargaining unit. House Officers Assn. v. University of Nebraska Medical Center 697

17. Review by this court of orders and decisions of the Court

of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. House Officers Assn. v. University of Nebraska Medical Center 697

18. The decision of the Court of Industrial Relations separating House Officers of the University of Nebraska Medical Center from other "A" line employees at the Medical Center, except graduate students, is not supported by substantial evidence. House Officers Assn. v. University of Nebraska Medical Center 697

19. The evidence supports the decision of the Court of Industrial Relations that House Officers at the University of Nebraska Medical Center have a community of interest separate from graduate students and assistants at the Medical Center to warrant the separation of the House Officers from the graduate students and assistants for the purposes of collective bargaining. House Officers Assn. v. University of Nebraska Medical Center 697

Courts.

1. The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect. Pelzer v. City of Bellevue 19
2. The statutory provision concerning progress reports is permissive and whether such reports shall be required is within the discretion of the judge authorizing the wiretap. State v. Kohout 90
3. The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 145
4. Appeals from the county court to the District Court in probate matters are tried in the District Court de novo and not de novo on the record. §§ 24-541, 30-1601, R. R. S. 1943. Boosalis v. Horace Mann Ins. Co. 148
5. Where a default judgment has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere. Boosalis v. Horace Mann Ins. Co. 148
6. A journal entry of an arraigning court stating facts

showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Addison 166
7. An appeal shall be deemed perfected and the court shall have jurisdiction of the cause when a notice of appeal has been filed and the docket fee deposited in the office of the clerk of the District Court within the time provided by statute. State v. Price 229
8. While this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned. State v. Price 229
9. In a proceeding in juvenile court under sections 43-202(2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Jenkins ... 311
10. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Jenkins 311
11. The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. State v. Bear Runner 368
12. We interpret section 42-364, R. S. Supp., 1976, to authorize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce. Perkins v. Perkins 401
13. Judicial notice is taken of the status of public officers and their official positions within the jurisdiction of the court. State v. Kolosseus 404
14. It is within the sound discretion of the trial court to remand a defendant to custody during trial. State v. Starks 433
15. A trial court has broad powers to insure the orderly and expeditious process of a trial, and this includes the power to revoke bail and remit the defendant to custody. State v. Starks 433
16. A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment

for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional. Haller v. State ex rel. State Real Estate Commission 437

17. In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Haller v. State ex rel. State Real Estate Commission 437

18. An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. A. H. 444

19. A court may terminate parental rights when it finds such action to be in the best interests of the child. Rejda v. Rejda 465

20. In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda 465

21. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion. Shover v. General Motors Corp. 470

22. The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. Shover v. General Motors Corp. 470

23. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. State v. Worrell 507

24. In appeals in equity from the District Court to the Supreme Court, this court reviews the issues by trial de novo on the record. State v. Worrell 507

25. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable,

it binds both the parties and the court. Prochazka v. Prochazka 525
26. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. Casper v. Casper 615
27. Cases in which the decision to grant or not grant probation are of delicate balance, and in those cases the judicial discretion of the trial court should be accorded great weight. State v. McCurry 673
28. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Beren Corp. v. Spader 677
29. Misdemeanor appeals from the county or municipal court are triable de novo in the District Court on the record made in the lower court. State v. Stone 721
30. This court will not overturn factual findings in a case tried by the judge with jury waived unless the findings are clearly wrong. Wiebe Constr. Co. v. School Dist. of Millard 730
31. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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. Allen 755
32. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Allen 755
33. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. A sentencing judge is not denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable in a criminal trial. State v. Bevins 761
34. Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the

due process rights of a defendant may be violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. State v. Bevins 761

Criminal Law.

1. 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 this general rule is that in prosecutions for sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. State v. Erich 1
2. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. State v. Benson 14
3. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14
4. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Benson 14
5. The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, knowingly, and intelligently, after the required Miranda warnings have been given. State v. Thompson 48
6. The determination of whether a statement was voluntarily made turns on the consideration of the totality of the circumstances present in each case. State v. Thompson 48
7. A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Thompson 48
8. The form of a statement, as oral or written, is immaterial in the determination of its admissibility as an admission. Both oral and written statements of a de-

fendant are admissible if voluntary. State v. Thompson 48
9. It is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Thompson 48
10. Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case. State v. Thompson 48
11. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Thompson 48
12. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head .. 58
State v. Leal 233
State v. Adams 729
State v. Schoneweis 749
State v. Torres 771
13. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wounded Head 58
State v. Flye 171
State v. Leal 233
State v. McKenney 564
State v. Hawkman 578
State v. McCurry 673
State v. Frederick 739
State v. Briner 766
State v. Torres 771
14. Any aggrieved person may move to suppress the contents of any intercepted wire or oral communication, or the evidence derived therefrom, on the grounds the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order. State v. Kohout 90
15. A movant who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of proof to show that the warrant was invalid. State v. Kohout 90
16. The statutory provision concerning progress reports is permissive and whether such reports shall be required

is within the discretion of the judge authorizing the wiretap. State v. Kohout 90
17. No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused. State v. Kohout 90
18. A conviction may rest upon circumstantial evidence if it is substantial. State v. Dent & Bodeman 110
19. A charge of conspiracy to unlawfully distribute a controlled substance to third parties may be sustained by proof of an agreement by two or more parties to participate in the chain of distribution and proof of an overt act in furtherance of the agreement. State v. Dent & Bodeman 110
20. A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Kluge 115
21. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the ground for withdrawal is established by clear and convincing evidence. State v. Kluge 115
22. When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Kluge 115
23. Where the defendant fails to appear in court as required by the conditions of his bond, the liability on the bond becomes absolute and forfeiture is proper. State v. Hart 164
24. In the absence of a showing excusing the defendant's failure to appear as required by the conditions of his bond the trial court may on motion enter judgment on the bond. State v. Hart 164
25. Appointments of counsel other than the public defender shall be limited to situations in which there are multiple defendants requiring separate representation, or where exigent circumstances are present which, in the opinion of the court, require appointment of other than the public defender. State v. Addison 166
26. A journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Addison 166
27. In a criminal case one has the right to represent him-

self after knowingly and intelligently waiving the assistance of counsel. State v. Addison 166
28. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. State v. Flye 171
29. An appeal shall be deemed perfected and the court shall have jurisdiction of the cause when a notice of appeal has been filed and the docket fee deposited in the office of the clerk of the District Court within the time provided by statute. State v. Price 229
30. While this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned. State v. Price 229
31. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter. State v. Price 229
32. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Moore 317
33. Proportionality in sentencing mandates that the more serious offenses generally merit the greater punishment and that those offenders who offer the greater menace to society deserve the greater punishment. State v. Moore 317
34. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943. State v. Colgrove 319
35. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Colgrove 319
36. An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove 319
37. A search prosecuted in violation of the Constitution of the United States or the Nebraska Constitution is not made lawful by what it brings to light. State v. Colgrove 319

38. A motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not by one aggrieved solely by the introduction of the incriminating evidence. State v. Martinez 347
39. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Martinez 347
40. Because of the provisions of section 29-2315.01, R. R. S. 1943, the State cannot cross-appeal from an order granting the defendant a new trial in a criminal case. State v. Martinez 347
41. A sentence, in the absence of an abuse of discretion, will not be disturbed on appeal if it is within the range of the statutory penalities. State v. Martinez 347
42. The general rule is that an accused has a right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings. State v. Bear Runner 368
43. The defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge. State v. Bear Runner 368
44. Where the arrest of the defendant and the circumstances surrounding it are material to the issues of the case, evidence to explain the arrest of a defendant and the circumstances surrounding it is admissible even if other crimes are disclosed. State v. Bear Runner 368
45. The use of force is not justifiable under section 28-836(2), R. R. S. 1943, to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful. State v. Bear Runner 368
46. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Ford 376
47. In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted. State v. Ford 376
48. The phrase "punishable by imprisonment for more than one year" as used in the statute permitting interception of communications when such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more

than 1 year, modifies only the catch-all category of "all other crimes"; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized; the statute was not simply aimed at major crimes. State v. Kolosseus 404
49. A prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met. State v. Kolosseus 404
50. The statutes require suppression of the contents of any wiretap interception and any evidence derived therefrom if the communication was unlawfully intercepted. State v. Kolosseus 404
51. In a wiretap application, allegations under subsection (1) (c) of section 2518, Title 18 U.S.C.A., play a "substantial role" in judicial authorization and if the allegations are insufficient to meet these statutory requirements, the interception is unlawful. State v. Kolosseus 404
52. Congress did not attempt to require "specific" or "all-possible" investigative techniques be tried before orders for wiretaps could be issued. State v. Kolosseus 404
53. Wiretap procedures cannot be routinely employed as an initial step in criminal investigation, but neither is government required to use a wiretap only as a last resort. State v. Kolosseus 404
54. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Oziah 423
55. An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. State v. Keesecker 426
56. An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. State v. Keesecker 426
57. After such warnings as set out in Miranda have been given, and such opportunity afforded him, an individual may knowingly and intelligently waive those rights and agree to answer questions or make a statement. State v. Keesecker 426
58. The rule is that where the evidence as to what occurred immediately prior to and at the time of making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper induce-

ments or threats, the confession is voluntary and may be received in evidence. State v. Keesecker 426
59. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Keesecker 426
60. It is within the sound discretion of the trial court to remand a defendant to custody during trial. State v. Starks 433
61. The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety. State v. Starks 433
62. A trial court has broad powers to insure the orderly and expeditious process of a trial, and this includes the power to revoke bail and remit the defendant to custody. State v. Starks 433
63. In the absence of prejudice, an erroneous revocation of bail does not affect the merits of the case. State v. Starks 433
64. The key-number system for the selection of jurors from voter registration lists is constitutionally valid. State v. Addison 442
65. Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to show. State v. Record 530
66. In criminal cases, where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong. State v. Record 530
State v. Davis 823
67. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian. State v. Bobo 551
68. A statement is not hearsay if it is offered against a party and is a statement made by a coconspirator of the party during the course and in furtherance of the conspiracy. State v. Bobo 551
69. Before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. State v. Bobo 551
70. An order denying probation and a sentence imposed

within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Michon 562
71. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used to secure a further review of issues already litigated. State v. Lacy 567
72. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal. State v. Lacy 567
73. In the determination of a proper sentence, the trial court may consider police reports of crimes which have not resulted in conviction. State v. Lacy 567
74. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Nichols 570
75. A sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Childress 576
76. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Hawkman 578
77. The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. State v. Hawkman 578
78. Under both the Constitution of Nebraska and the Constitution of the United States, a defendant in a criminal trial in this state has a right to proceed without counsel and represent himself if he voluntarily and intelligently elects to do so. State v. Kirby 646
79. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. Branch v. Wilkinson 649
80. Cases in which the decision to grant or not grant probation are of delicate balance, and in those cases the judicial discretion of the trial court should be accorded great weight. State v. McCurry 673
81. Misdemeanor appeals from the county or municipal court are triable de novo in the District Court on the record made in the lower court. State v. Stone 721

82. It is inherent in the right to a trial de novo that there be an adequate notice of the time and place of the hearing, an opportunity to be heard, and the right to an effective representation by counsel. State v. Stone 721
83. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Frederick 739
84. 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. Alegria 750
85. 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. Alegria 750
86. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. State v. Alegria 750
87. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Allen 755
88. In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. State v. Allen 755
89. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Allen 755
90. A sentence which denies probation and is within the statutory limits will not be disturbed on appeal, absent an abuse of discretion. State v. Rice 758
91. If the proposed disposition of a case would depreciate the seriousness of the crime, then a sentence of probation is not appropriate. State v. Rice 758
92. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. A sentencing judge is not denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable in a criminal trial. State v. Bevins 761
93. Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the due process rights of a defenant may be violated when

a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. State v. Bevins 761

94. Where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld. State v. Bevins 761

95. A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Bevins 761

96. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Briner 766

97. A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the trial court. State v. Randolph 772

98. An order by the trial court which denies probation will not be overturned absent an abuse of discretion. State v. Randolph 772

99. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). State v. Robinson 785

100. The determination of whether a statement was voluntarily made necessarily turns upon the consideration of whether or not the totality of the circumstances demonstrates the voluntariness or involuntariness of the statement. State v. Robinson 785

101. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or indirect promises, however slight, nor by the exertion of any improper influence. State v. Robinson 785

102. An accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial, it is the duty of the Supreme Court to grant a new trial. State v. Robinson 785

103. The retention or rejection of a juror is a matter of discretion for the trial court. State v. Robinson 785

104. If the trial court is informed of matters during trial which might reasonably constitute grounds for a chal-

enge for cause of one or more jurors, it is the duty of the court to hear evidence and examine the jurors, and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guarantee of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system. State v. Robinson 785

105. Police reports, affidavits, and other information may be considered by the trial judge in sentencing and such information is properly included in a presentence investigation report compiled pursuant to section 29-2261, R. R. S. 1943. State v. Robinson 785

106. A review by an appellate court of a final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. If, however, by virtue of state statutory or constitutional provisions appeal is made a matter of right, the procedure pertaining thereto must accord with the concept of due process. State v. Kelley 805

107. Limitations placed upon the time within which to perfect an appeal from a conviction in a criminal case do not violate the due process provisions of the Constitutions of the United States or of this state. State v. Kelley 805

108. The requirement of filing a motion for a new trial within 10 days after the verdict, which motion must specify the claimed errors which justify a new trial, does not offend the provisions of Article I, section 23, of the Constitution of Nebraska, or the concepts of due process. State v. Kelley 805

109. Sections 25-1143 and 29-2103, R. R. S. 1943, are constitutional. State v. Kelley 805

110. In cases where the trial court does not have power to correct its own errors as, e.g., in the case of excessive sentence, this court may on appeal consider such errors without them having been specified in the motion for a new trial. State v. Kelley 805

111. In criminal cases it is essential to the validity of the proceeding that the jury should be sworn. The record should show that the jury was sworn, but it is not necessary that it show the exact form of the oath administered; and if the record recites that the jury was

sworn, it will be presumed that the proper form of oath was employed. State v. Martin 811
112. The general rule is that an oral statement taken down and reduced to writing by a stenographer and not signed by the defendant is inadmissible when it is not signed or acknowledged by the defendant, and cannot be tested for accuracy by examination of the stenographer at trial. However, this rule is not applicable where the oral statement was recorded, and the tape of such recording was properly received in evidence and was available for comparison with the transcription of the tape. State v. Martin 811
113. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. State v. Martin 811
114. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Martin ... 811
115. A conviction may rest upon circumstantial evidence if it is substantial. State v. Davis 823

Damages.

1. Even though a landowner does not come under the protection of section 31-201, R. R. S. 1943, he may drain off his impounded waters so long as he does not damage or threaten others. Arkfeld v. Volk 77
2. In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Arkfeld v. Volk 77
3. Under the provisions of section 2-713, U. C. C., the measure of damages for nondelivery or repudiation by the seller is the difference between the market price and the contract price at the place of tender at the time the buyer learned of the breach. Burgess v. Curly Olney's, Inc. 153
4. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. § 2-715(2), U. C. C. Burgess v. Curly Olney's, Inc. 153
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 the plaintiff's injury or a cause which proximately contributed to it. Hosford v. Doherty 211

6. The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies. Hosford v. Doherty 211
7. An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned. Peitz v. Hausman 344
8. Under section 76-705, R. R. S. 1943, if any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined. Krambeck v. City of Gretna 608
9. Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the taken property, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken. Krambeck v. City of Gretna 608
10. Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for 10 years, the requisite period to establish title by prescription. Krambeck v. City of Gretna 608
11. The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial. Nash v. City of North Platte 623
12. A contractual provision providing for an award of liqui-

dated damages for delay in performance of a contract may be waived. Wiebe Constr. Co. v. School Dist. of Millard 730
13. In an action for a liquidated sum which is the balance owing on a contract, the amount claimed does not become unliquidated merely because of the assertion of an offset, and if the trier of fact finds against the defendant on the offset, prejudgment interest should be awarded on the claim. Wiebe Constr. Co. v. School Dist. of Millard 730
14. A warehouseman's right to compensation, generally secured by a warehouseman's lien on the property, survives a loss of the lien. Associated Bean Growers v. Chester B. Brown Co. 775
15. The measure of damages for conversion is the market value of the converted property on the date of conversion. Associated Bean Growers v. Chester B. Brown Co. 775

Deeds.

Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same. Beren Corp. v. Spader 677

Default.

A performance bond guarantees that the contractor will perform the contract, and a labor and material payment bond guarantees that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults. Cagle, Inc. v. Sammons 595

Demurrer.

1. A petition which fails to plead actionable facts is vulnerable to a general demurrer. Danberg v. Sears, Roebuck & Co. 234
2. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be

drawn from the facts which are pleaded. Dangberg v. Sears, Roebuck & Co. 234
3. A demurrer ore tenus is recognized by this court as a permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Contois Motor Co. v. Saltz 455
4. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover. Clyde v. Buchfinck 586
Cagle, Inc. v. Sammons 595
5. A demurrer reaches only defects which appear on the face of the petition, and admits all allegations of fact which are relevant, material, and well pleaded, but does not admit the pleader's conclusions of law. Clyde v. Buchfinck 586
6. A demurrer reaches an instrument filed with the petition and made a part thereof, but does not admit any construction placed on any instrument pleaded and set forth in the petition. Clyde v. Buchfinck 586
7. When a demurrer is interposed stating several grounds, the trial court should, when sustaining the demurrer, specify the grounds upon which it is sustained, so that this court will be informed in regard to where the complaint is deficient. Clyde v. Buchfinck 586
8. A demurrer reaches an instrument filed with the petition and made a part thereof. Cagle, Inc. v. Sammons 595
9. The right to amend a petition after the sustaining of a demurrer is not absolute, and an application to amend is addressed to the sound discretion of the trial court. Before error can be predicated upon the refusal of the trial court to permit an amendment, the record must show that the ruling of the trial court was an abuse of discretion. Cagle, Inc. v. Sammons 595
10. It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint. Cagle, Inc. v. Sammons 595
11. In a tax foreclosure action where jurisdiction was obtained for service by publication, a petition by a dissolved corporation to vacate the decree and allow it to redeem after confirmation on the ground the affidavit regarding a diligent investigation and inquiry was

fraudulent is subject to demurrer in the absence of an allegation that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other person having charge of the assets. County of Madison v. City of Norfolk 718

Disciplinary Proceedings.

Where the conduct of attorneys violates provisions of the Nebraska Code of Professional Responsibility and their oaths as attorneys at law, but does not involve moral turpitude or characterize them as unsuitable to practice law, a judgment of reprimand and censure is appropriate. State ex rel. Nebraska State Bar Assn. v. Addison & Levy 61

Divorce.

1. We interpret section 42-364, R. S. Supp., 1976, to authorize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce. Perkins v. Perkins 401
2. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Perkins v. Perkins 401
3. The natural rights of a parent to the custody of his children are not absolute. Rejda v. Rejda 465
4. Courts may not properly deprive a parent of the 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. State v. Worrell 507
5. Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial. Prochazka v. Prochazka 525
6. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court. Prochazka v. Prochazka 525
7. A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side. Prochazka v. Prochazka 525

8. This court is not inclined to disturb a division of property made by the trial court unless it is patently unfair on the record. Allen v. Allen 544
9. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Allen v. Allen 544
10. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen 544
11. The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may only be exercised by visitation at the institution. Casper v. Casper 615
12. In the determination of custody and visitation matters, the primary concern is the best interests of the children. Casper v. Casper 615
13. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. Casper v. Casper 615
14. Ordinarily, the findings of the trial court in child custody matters will not be disturbed on appeal unless there has been a clear abuse of discretion. Osterhaus v. Osterhaus 802

Domicile.

Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned. § 25-409, R. R. S. 1943. Peitz v. Hausman 344

Due Process.

1. The general rule is that an accused has a right to be present at all stages of the trial when his absence might

frustrate the fairness of the proceedings. State v. Bear Runner 368
2. The defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge. State v. Bear Runner 368
3. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. A.H. 444
State v. Briner 766
4. It is inherent in the right to a trial de novo that there be an adequate notice of the time and place of the hearing, an opportunity to be heard, and the right to an effective representation by counsel. State v. Stone 721
5. Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the due process rights of a defendant may be violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. State v. Bevins 761
6. An accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial, it is the duty of the Supreme Court to grant a new trial. State v. Robinson 785
7. A review by an appellate court of a final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law; and a period of limitation on a right of appeal accords with the United States Supreme Court's concept of proper procedure. If, however, by virtue of state statutory or constitutional provisions appeal is made a matter of right, the procedure pertaining thereto must accord with the concept of due process. State v. Kelley 805
8. Limitations placed upon the time within which to perfect an appeal from a conviction in a criminal case do not violate the due process provisions of the Constitutions of the United States or of this state. State v. Kelley 805
9. The requirement of filing a motion for a new trial within 10 days after the verdict, which motion must specify the claimed errors which justify a new trial, does not offend the provisions of Article I, section 23, of the

Constitution of Nebraska, or the concepts of due process. State v. Kelley 805

10. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Martin ... 811

Easements.

1. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. Fischer v. Grinsbergs 329

2. The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Fischer v. Grinsbergs 329

3. A permissive use is not adverse, and cannot ripen into an easement. Where a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence. Fischer v. Grinsbergs 329

4. It is the general rule and weight of authority that where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party. Fischer v. Grinsbergs 329

5. The extent of an easement is determined from the use actually made of the property during the running of the prescriptive period. Fischer v. Grinsbergs 329

Elections.

When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943. Pelzer v. City of Bellevue 19

Electricity.

Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. Steel Containers, Inc. v. Omaha P.P. Dist. 81

Eminent Domain.

1. The nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. Carter v. State 519
2. In the absence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee. Carter v. State 519
3. Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for 10 years, the requisite period to establish title by prescription. Krambeck v. City of Gretna 608

Employer and Employee.

1. The 30-day period specified in section 48-1008, R. R. S. 1943, of the Act Prohibiting Unjust Discrimination in Employment Because of Age, is not a period limiting the right of action of the Equal Opportunity Commission, but the elapse of the 30-day period is a condition

precedent to the ripening of the individual cause of action of the aggrieved employee. Equal Opportunity Commission v. Weyerhaeuser Co. 104

2. As to employees having fixed hours and place of work, injuries occurring on the premises of the employer while the employee is going to and coming from work before or after working hours or at lunchtime are compensable. Buck v. Iowa Beef Processors, Inc. 125

3. An accidental injury sustained by an employee on the premises where she is employed during her lunch period while going to or coming from work is an injury arising out of and in the course of her employment. Buck v. Iowa Beef Processors, Inc. 125

4. A basic inquiry in bargaining unit determination is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. American Assn. of University Professors v. Board of Regents 243

5. In determining whether a particular group of employees constitutes an appropriate bargaining unit where an employer operates a number of facilities, relevant factors include prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence of autonomy of the facilities; differences or similarities in skills or functions of the employees; geographical location of the facilities in relation to each other; and possibility of over-fragmentation of bargaining units. American Assn. of University Professors v. Board of Regents 243

6. The faculties of the College of Law and the College of Dentistry were entitled to separate bargaining units where the evidence showed that those faculty members shared a community of interest separate from other faculty members, in that they have separate buildings; have separate accreditation standards; have different academic calendars; have significant operational independence on a day-to-day basis; and receive higher salaries, and promotions and tenure in a shorter period of time, than do other faculty members of the University. American Assn. of University Professors v. Board of Regents 243

7. Department chairmen are properly included in bargaining units of faculty employees at the University where their decision-making power is diffused among the department faculty under the by laws of the Board of Regents of the University of Nebraska, and pursuant

to the principle of collegiality. American Assn. of University Professors v. Board of Regents 243
8. In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. Brewer v. Tracy 503
9. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Brewer v. Tracy 503
10. A contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed. Brewer v. Tracy 503
11. House Officers of the University of Nebraska Medical Center are employees of the State of Nebraska as defined under section 48-801, R. R. S. 1943, and are entitled to participate in an appropriate bargaining unit. House Officers Assn. v. University of Nebraska Medical Center 697
12. The decision of the Court of Industrial Relations separating House Officers of the University of Nebraska Medical Center from other "A" line employees at the Medical Center, except graduate students, is not supported by substantial evidence. House Officers Assn. v. University of Nebraska Medical Center 697
13. The evidence supports the decision of the Court of Industrial Relations that House Officers at the University of Nebraska Medical Center have a community of interest separate from graduate students and assistants at the Medical Center to warrant the separation of the House Officers from the graduate students and assistants for the purposes of collective bargaining. House Officers Assn. v. University of Nebraska Medical Center 697

Equity.

1. To review errors of law occurring upon the trial of an equity case a motion for a new trial is necessary. McClintock v. Nemaha Valley Schools 477
2. When an equity action is appealed to the Supreme Court, it is the duty of this court to try the issues de

novo and to reach an independent conclusion without reference to the findings of the District Court. Brewer v. Tracy 503

3. Section 25-202, R. R. S. 1943, provides that an action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within 10 years after the cause of action shall have accrued. Krambeck v. City of Gretna 608

Evidence.

1. 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 this general rule is that in prosecutions for sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. State v. Erich 1
2. Findings of fact by the trial court in a mandamus proceeding will not be disturbed on appeal unless they are clearly wrong. State ex rel. Goossen v. Board of Supervisors 9
3. The mere fact that property is served by a private sewer adequate to present immediate needs of the property does not conclusively establish that there is no benefit from construction of a public sewer adjacent to the property. Nebco, Inc. v. Speedlin 34
4. In calculating the amount of special benefit to property arising from construction of a public sewer, connection costs need not be subtracted. Nebco, Inc. v. Speedlin 34
5. Future use of property is an element which may be considered in determining the amount of special benefit. Nebco, Inc. v. Speedlin 34
6. The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, knowingly, and intelligently, after the required Miranda warnings have been given. State v. Thompson 48
7. The determination of whether a statement was voluntarily made turns on the consideration of the totality of the circumstances present in each case. State v. Thompson 48
8. A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on

appeal unless the finding is clearly erroneous. State v. Thompson 48
9. The form of a statement, as oral or written, is immaterial in the determination of its admissibility as an admission. Both oral and written statements of a defendant are admissible if voluntary. State v. Thompson ... 48
10. It is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Thompson 48
11. Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case. State v. Thompson 48
12. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Thompson 48
13. 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 on appeal if there is sufficient competent evidence to support it; and the verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it. State v. Thompson 48
14. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can be reasonably deduced from it. Koepf v. County of York 67
15. Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. Steel Containers, Inc. v. Omaha P.P. Dist. 81
16. Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to the jury. Hrabik v. Gottsch 86
17. A movant who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of proof to show that the warrant was invalid. State v. Kohout 90
18. No evidence shall be suppressed because of technical

irregularities not affecting the substantial rights of the accused. State v. Kohout 90
19. The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it. American Motors Sales Corp. v. Perkins 97
20. A conviction may rest upon circumstantial evidence if it is substantial. State v. Dent & Bodeman 110
21. A charge of conspiracy to unlawfully distribute a controlled substance to third parties may be sustained by proof of an agreement by two or more parties to participate in the chain of distribution and proof of an overt act in furtherance of the agreement. State v. Dent & Bodeman 110
22. A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Kluge 115
23. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the ground for withdrawal is established by clear and convincing evidence. State v. Kluge 115
24. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Buck v. Iowa Beef Processors, Inc. 125
25. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Buck v. Iowa Beef Processors, Inc. 125
Hyatt v. Kay Windsor, Inc. 580
26. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Jensen v. Shadegg 139
27. 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. Jensen v. Shadegg 139
28. 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. Boosalis v. Horace Mann Ins. Co. 148
29. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Burgess v. Curly Olney's, Inc. 153
30. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Burgess v. Curly Olney's, Inc. 153
31. The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence. Lincoln Fire Fighters Assn. v. City of Lincoln 174
32. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Lincoln Fire Fighters Assn. v. City of Lincoln 174
33. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. McDowell Road Associates v. Barnes 207
34. A motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Hosford v. Doherty ... 211
35. 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 the plaintiff's injury or a cause which proximately

contributed to it. Hosford v. Doherty 211
36. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. Hosford v. Doherty 211
37. The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies. Hosford v. Doherty 211
38. In a proceeding to review an order of the Nebraska State Real Estate Commission the questions to be determined are whether the order of the Commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Herink v. State ex rel. State Real Estate Commission 241
39. In a proceeding in juvenile court under sections 43-202(2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Jenkins 311
40. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Jenkins 311
41. Matters admitted by the pleadings need not be proved. Peitz v. Hausman 344
42. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Martinez ... 347
43. Rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. Cromer v. Farmland Service Coop, Inc. 355
44. It is within the discretion of the trial court to allow

the introduction of evidence in rebuttal which would have been proper evidence upon the case-in-chief or should have been introduced at that time. Cromer v. Farmland Service Coop, Inc. 355

45. A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Wittwer v. Dorland 361

46. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. State v. Bear Runner 368

47. Where the arrest of the defendant and the circumstances surrounding it are material to the issues of the case, evidence to explain the arrest of a defendant and the circumstances surrounding it is admissible even if other crimes are disclosed. State v. Bear Runner 368

48. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Durrett v. Baxter Chrysler-Plymouth, Inc. 392

49. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Perkins v. Perkins 401

50. The statutes require suppression of the contents of any wiretap interception and any evidence derived therefrom if the communication was unlawfully intercepted. State v. Kolosseus 404

51. In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Minshull v. School Dist. of Sutherland 418

52. The rule is that where the evidence as to what occurred immediately prior to and at the time of making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may

be received in evidence. State v. Keesecker 426
53. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Keesecker 426
54. Failure of a petition to state a cause of action may be challenged at any time during the pendency of the ligitation, and an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is proper, and if the petition is totally defective, the objection should be sustained. Contois Motor Co. v. Saltz 455
55. In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda 465
56. An expert may testify by opinion "or otherwise." This includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues. Shover v. General Motors Corp. 470
57. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; an apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly. Shover v. General Motors Corp. 470
58. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion. Shover v. General Motors Corp. 470
59. It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient. Shover v. General Motors Corp. 470
60. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Shover v. General Motors Corp. 470
61. Expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. Shover v. General Motors Corp. 470
62. The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling

will be upheld in the absence of an abuse of discretion. Shover v. General Motors Corp. 470
63. On an appeal from the Nebraska Liquor Control Commission, this court shall determine whether the findings of the commission are supported by substantial evidence and whether the District Court and the commission followed the proper statutory criteria. Winkelmann v. Nebraska Liquor Control Commission 481
64. The Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders upon 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. Winkelmann v. Nebraska Liquor Control Commission 481
65. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Winkelmann v. Nebraska Liquor Control Commission 481
66. Ordinarily a party suing to recover an alleged overpayment on a contract has not only the burden of proving the overpayment but also the burden of proving that the overpayment was involuntary. Hersch Buildings, Inc. v. Steinbrecher 486
67. In an action against a contractor to recover alleged overcharges by the contractor the plaintiff has the burden of proving that it was overcharged. Hersch Buildings, Inc. v. Steinbrecher 486
68. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Brewer v. Tracy .. 503
69. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. CIT Financial Services of Kansas v. Egging Co. 514
70. Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial. Prochazka v. Prochazka 525
71. A new trial will not be granted to a party for the purpose of introducing a new issue, unless the judgment cannot be sustained on the issues previously submitted. Prochazka v. Prochazka 525
72. Photographs, although of a gruesome nature, are admis-

sible in evidence if they are relevant and a true representation of what they purport to show. State v. Record 530
73. In criminal cases, where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong. State v. Record 530
State v. Davis 823
74. Evidence that an employee had drunk intoxicating liquor prior to an injury and that a subsequent blood alcohol test showed a content of .175 percent, shown by expert testimony to indicate intoxication, with impairment of reflexes, depth perception, coordination, and other motor activities, is sufficient to support a finding by the Workmen's Compensation Court that the employee was injured by reason of being in a state of intoxication. Sandage v. Adolf's Roofing, Inc. 539
75. Evidence that the employer knew of an employee drinking on several prior occasions over a long period, but had no knowledge of his drinking at or about the time of injury, is not sufficient to establish consent, knowledge, or acquiescence in any intoxication at the time of injury. Sandage v. Adolf's Roofing, Inc. 539
76. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian. State v. Bobo 551
77. A statement is not hearsay if it is offered against a party and is a statement made by a coconspirator of the party during the course and in furtherance of the conspiracy. State v. Bobo 551
78. Before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. State v. Bobo 551
79. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Hyatt v. Kay Windsor, Inc. 580
80. In myocardial infarcation cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case. Hyatt v. Kay Windsor, Inc. 580
81. The presence of a preexisting disease or condition en-

hances the degree of proof required to establish that the injury arose out of and in the course of employment. Hyatt v. Kay Windsor, Inc. 580
82. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Hyatt v. Kay Windsor, Inc. 580
83. The Juvenile Court is presumed to disregard irrelevant evidence and the admission of irrelevant evidence is not prejudicial. State v. Bailey 604
84. The strict rules of evidence shall not be applied at any dispositional hearing. § 43-206.03 (4), R. S. Supp., 1976. The trial court will exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence at such hearings; and its exercise of discretion will be upheld on appeal unless an abuse of discretion is shown. State v. Bailey 604
85. Where there is substantial evidence to sustain the order of the Public Service Commission this court cannot say the order was unreasonable and arbitrary. Hugelman v. A & A Trucking, Inc. 628
86. The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination. Branch v. Wilkinson 649
87. The party seeking to exclude evidence on the ground of privilege has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient. Branch v. Wilkinson 649
88. To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties. Where the information is not obtained for this purpose, it is not privileged. Branch v. Wilkinson 649
89. A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. Branch v. Wilkinson .. 649
90. Where there is no evidence presented as to the effect of intoxicants on the part of the party involved, it is not proper to submit that issue directly to the jury. Branch v. Wilkinson 649
91. 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. Negligence is never presumed. Branch v. Wilkinson 649

92. A bill of exceptions is the only vehicle for bringing evidence before this court. Hanson v. Hanson 675
93. Evidence which does not appear in the record cannot be considered by this court on appeal. Hanson v. Hanson 675
94. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. Hanson v. Hanson 675
95. The meritorious defense which must be shown in support of an application to open or vacate a default judgment is one worthy of judicial inquiry because it either raises a question of law deserving some investigation and discussion, or a real controversy as to the essential facts. Beren Corp. v. Spader 677
96. The decision of the Court of Industrial Relations separating House Officers of the University of Nebraska Medical Center from other "A" line employees at the Medical Center, except graduate students, is not supported by substantial evidence. House Officers Assn. v. University of Nebraska Medical Center 697
97. The evidence supports the decision of the Court of Industrial Relations that House Officers at the University of Nebraska Medical Center have a community of interest separate from graduate students and assistants at the Medical Center to warrant the separation of the House Officers from the graduate students and assistants for the purpose of collective bargaining. House Officers Assn. v. University of Nebraska Medical Center 697
98. This court will not overturn factual findings in a case tried by the judge with jury waived unless the findings are clearly wrong. Wiebe Constr. Co. v. School Dist. of Millard 730
99. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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. Allen 755
100. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Allen 755
101. In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the find-

ing of guilt beyond a reasonable doubt. State v. Allen 755
102. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Allen 755
103. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. A sentencing judge is not denied the opportunity to obtain pertinent information in a manner free from the requirement of rigid adherence to restrictive rules of evidence which are properly applicable in a criminal trial. State v. Bevins 761
104. Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the due process rights of a defendant may be violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. State v. Bevins 761
105. Where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld. State v. Bevins 761
106. Words technical or ambiguous on their face, or peculiar to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage. Associated Bean Growers v. Chester B. Brown Co. 775
107. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or indirect promises, however slight, nor by the exertion of any improper influence. State v. Robinson 785
108. The general rule is that an oral statement taken down and reduced to writing by a stenographer and not signed by the defendant is inadmissible when it is not signed or acknowledged by the defendant, and cannot be tested for accuracy by examination of the stenographer at trial. However, this rule is not applicable where the oral statement was recorded, and the tape of such recording was properly received in evidence and was available for comparison with the transcription of the tape. State v. Martin 811
109. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. State v. Martin 811

110. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Martin ... 811
111. A conviction may rest upon circumstantial evidence if it is substantial. State v. Davis 823

False Imprisonment.

False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go may constitute false imprisonment. Danberg v. Sears, Roebuck & Co. 234

Fees.

1. If attorney's fees should be, but are not, allowed by the Workmen's Compensation Court, and the issue is properly preserved on appeal, the District Court has the power to remedy the error of the compensation court and award such fees. Harrington v. State 4
2. Where the employer appeals to the District Court from the award of the Workmen's Compensation Court and fails to obtain any reduction in the amount of the award, the District Court ordinarily should allow the employee a reasonable attorney's fee. Harrington v. State 4

Foreclosure.

1. The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 145
2. A foreclosure action is not a suit to quiet title but for the purpose of determining the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises in satisfaction thereof in case no redemption is made. Wittwer v. Dorland 361
3. In a tax foreclosure action where jurisdiction was obtained for service by publication, a petition by a dissolved corporation to vacate the decree and allow it to redeem after confirmation on the ground the affidavit regarding a diligent investigation and inquiry was fraudulent is subject to demurrer in the absence of an allegation that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other per-

son having charge of the assets. County of Madison v. City of Norfolk 718

Fraud.

Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities. Fowler v. Elm Creek State Bank 631

Gambling.

A prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met. State v. Kolosseus 404

Gifts.

1. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance of the donee. Rorabaugh v. Garvis 223
2. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of the undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. Rorabaugh v. Garvis 223
3. When the clear intention of the donor to make a gift can be carried out without doing violence to the established principles of law the courts should not seek highly technical reasons for defeating the gift. Rorabaugh v. Garvis 223

Governmental Subdivisions.

A recommendation by the appropriate governmental unit upon the issuance of a liquor license is not binding upon the Nebraska Liquor Control Commission. Winkelmann v. Nebraska Liquor Control Commission 481

Guilty Plea.

1. A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Kluge 115
2. A motion to withdraw a plea of guilty or nolo contendere

should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the ground for withdrawal is established by clear and convincing evidence. State v. Kluge 115
3. When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Kluge 115
4. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter. State v. Price 229
5. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Ford 376
6. 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. Alegria 750
7. 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. Alegria 750
8. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. State v. Alegria 750

Hearings.

1. The Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders upon 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. Winkelmann v. Nebraska Liquor Control Commission 481
2. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Winkelmann v. Nebraska Liquor Control Commission 481

Highways.

1. A county board has discretion to determine the character of repairs to be made to bridges, and, when there are not sufficient funds for all, to decide which bridges shall be repaired. State ex rel. Goossen v. Board of Supervisors 9
2. One who attempts to cross a street between intersec-

tions without looking is guilty of such negligence as would bar recovery as a matter of law. Hrabik v. Gottsch 86
3. A pedestrian who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Hrabik v. Gottsch 86
4. The character of a segment of an Interstate Highway sought to be annexed by a city of the first class is determined by the characteristic of the land immediately adjacent to the segment sought to be annexed. Piester v. City of North Platte 220
5. When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. § 39-635(1), R. R. S. 1943. Reese v. Mayer 499
6. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is the right to proceed in a lawful manner in preference to the vehicle on the left. Reese v. Mayer 499
7. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. Reese v. Mayer 499
8. In the absence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee. Carter v. State 519
9. One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway. Rief v. Foy 572
10. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Rief v. Foy 572
11. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Rief v. Foy 572

Immunity.

1. The liability of a political subdivision under the Political

Subdivisions Tort Claims Act consists of such liability as would exist in a private person or corporation without that immunity. Koepf v. County of York 67
2. A public prosecutor when acting in the general scope of his official authority in making a determination whether to file a juvenile court petition is exercising a quasi-judicial function and is immune from suit for an erroneous or negligent determination when he acts in good faith. Koepf v. County of York 67
3. A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. Koepf v. County of York 67

Incarceration.

1. The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may only be exercised by visitation at the institution. Casper v. Casper 615
2. In the determination of custody and visitation matters, the primary concern is the best interests of the children. Casper v. Casper 615
3. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. Casper v. Casper 615

Infants.

1. A public prosecutor when acting in the general scope of his official authority in making a determination whether to file a juvenile court petition is exercising a quasi-judicial function and is immune from suit for an erroneous or negligent determination when he acts in good faith. Koepf v. County of York 67
2. The decisions of a county welfare department for the maintenance, care, or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such decisions do not achieve the level of basic policy decisions and do not fall within the discretionary-function exception as stated in section 23-2409, R. R. S. 1943, of the Political Subdivisions Tort Claims Act. Koepf v. County of York 67
3. We interpret section 42-364, R. S. Supp., 1976, to author-

ize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce. Perkins v. Perkins 401
4. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Perkins v. Perkins 401
5. The right of a parent to maintain the custody of his or her children is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child. State v. A. H. 444
6. An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. A. H. 444
7. The first and paramount consideration in any case involving the custody of a child is the best interests of the child. State v. A.H. 444
8. The natural rights of a parent to the custody of his children are not absolute. Rejda v. Rejda 465
9. A court may terminate parental rights when it finds such action to be in the best interests of the child. Rejda v. Rejda 465
10. An appeal from a finding and judgment of the District Court involving dependent or neglected children under Chapter 43, article 2, R. R. S. 1943, is disposed of in this court by trial de novo on the record. State v. Worrell 507
11. Courts may not properly deprive a parent of the 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. State v. Worrell 507
12. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Allen v. Allen 544
13. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen 544
14. The natural right of parents to the custody of their

children is not inalienable but is subject to the public obligation to protect and preserve the best interests of such children. State v. Bailey 604
15. The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may only be exercised by visitation at the institution. Casper v. Casper 615
16. In the determination of custody and visitation matters, the primary concern is the best interests of the children. Casper v. Casper 615
17. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. Casper v. Casper 615
18. Ordinarily, the findings of the trial court in child custody matters will not be disturbed on appeal unless there has been a clear abuse of discretion. Osterhaus v. Osterhaus 802

Injunction.

In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Arkfeld v. Volk 77

Instructions.

1. It is error to instruct on a theory not raised by the pleadings, over the objection of the opponent, not having afforded the opponent the opportunity to plead to that theory or present evidence thereon. Montgomery v. Quantum Labs, Inc. 160
2. The defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge. State v. Bear Runner 368
3. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Bear Runner ... 368
4. The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. State v. Bear Runner 368
5. Error may not be predicated on the refusal to give an

instruction which either erroneously or only partially covers the applicable law. State v. Bear Runner 368
6. It is error to give the jury instructions which place the burden of proof on the wrong party, or contain inconsistent and conflicting paragraphs relating to the burden of proof. Hersch Buildings, Inc. v. Steinbrecher .. 486
7. Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. CIT Financial Services of Kansas v. Egging Co. 514
8. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542
9. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly refused. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542

Insurance.

1. A vehicle which has liability insurance coverage effective and applicable to it at the time of an accident in limits not less than the amounts required by section 60-509, R. R. S. 1943, is not an uninsured motor vehicle within the meaning of section 60-509.01, R. R. S. 1943. Crossley v. Pacific Employers Ins. Co. 26
2. In an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will ordinarily be applied, and that law governs not only the amount of recovery but also the right to recover. Crossley v. Pacific Employers Ins. Co. 26
3. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. Crossley v. Pacific Employers Ins. Co. 26

Intent.

1. An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. Timmerman Bros., Inc. v. Quigley 129
2. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Timmerman Bros., Inc. v. Quigley 129

Interest.

In an action for a liquidated sum which is the balance owing on a contract, the amount claimed does not become unliquidated merely because of the assertion of an offset, and if the trier of fact finds against the defendant on the offset, prejudgment interest should be awarded on the claim. Wiebe Constr. Co. v. School Dist. of Millard 730

Intoxicating Liquors.

1. The power to regulate and control alcoholic liquors is vested exclusively in the Nebraska Liquor Control Commission except as otherwise provided by statute. Winkelmann v. Nebraska Liquor Control Commission . 481
2. Evidence that an employee had drunk intoxicating liquor prior to an injury and that a subsequent blood alcohol test showed a content of .175 percent, shown by expert testimony to indicate intoxication, with impairment of reflexes, depth perception, coordination, and other motor activities, is sufficient to support a finding by the Workmen's Compensation Court that the employee was injured by reason of being in a state of intoxication. Sandage v. Adolf's Roofing, Inc. 539
3. Evidence that the employer knew of an employee drinking on several prior occasions over a long period, but had no knowledge of his drinking at or about the time of injury, is not sufficient to establish consent, knowledge, or acquiescence in any intoxication at the time of injury. Sandage v. Adolf's Roofing, Inc. 539
4. A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. Branch v. Wilkinson .. 649
5. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. Branch v. Wilkinson 649
6. Where there is no evidence presented as to the effect of intoxicants on the part of the party involved, it is not proper to submit that issue directly to the jury. Branch v. Wilkinson 649

Inviter and Invitee.

1. 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. Heck v. American Community Stores 619
2. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence. Heck v. American Community Stores 619

Judges.
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. Alegria 750
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. Alegria 750
3. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. State v. Alegria 750
4. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Davis 823

Judgments.
1. 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 on appeal if there is sufficient competent evidence to support it; and the verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it. State v. Thompson 48
2. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can be reasonably deduced from it. Koepf v. County of York . 67
3. On an appeal of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Steel Containers, Inc. v. Omaha P. P. Dist. 81
4. 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. Boosalis v. Horace Mann Ins. Co. 148
5. Where a default judgment has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere. Boosalis v. Horace Mann Ins. Co. 148
6. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. Burgess v. Curly Olney's, Inc. 153
7. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Burgess v. Curly Olney's, Inc. 153
8. It shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943. Burgess v. Curly Olney's, Inc. 153
9. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Burgess v. Curly Olney's, Inc. 153
10. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Burgess v. Curly Olney's, Inc. 153
11. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically. Burgess v. Curly Olney's, Inc. 153
12. In the absence of a showing excusing the defendant's failure to appear as required by the conditions of his bond the trial court may on motion enter judgment on the bond. State v. Hart 164
13. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Lincoln Fire Fighters Assn. v. City of Lincoln 174
14. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve

conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. McDowell Road Associates v. Barnes 207

15. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. McDowell Road Associates v. Barnes 207
Dial Realty, Inc. v. Cudahy Co. 641

16. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Jenkins 311

17. A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Wittwer v. Dorland 361

18. One seeking to open up a judgment under sections 25-525 and 25-2001, R. R. S. 1943, must file a meritorious answer. Wittwer v. Dorland 361

19. The opening up of a judgment upon complying with sections 25-525 and 25-2001, R. R. S. 1943, is a matter of right. Wittwer v. Dorland 361

20. A party cannot appeal from an order or judgment which was made with his consent or upon his application. Reinertson v. Long 397

21. In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda 465

22. A new trial will not be granted to a party for the purpose of introducing a new issue, unless the judgment cannot be sustained on the issues previously submitted. Prochazka v. Prochazka 525

23. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Don Nelsen Constr. Co. v. Landen 533

24. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Hyatt v. Kay Windsor, Inc. 580

25. When a demurrer is interposed stating several grounds, the trial court should, when sustaining the demurrer, specify the grounds upon which it is sustained, so that this court will be informed in regard to where the complaint is deficient. Clyde v. Buchfinck 586
26. It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint. Cagle, Inc. v. Sammons 595
27. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Beren Corp. v. Spader 677
28. A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense. Such party is not required to show that he will ultimately prevail in the action, but only that he has a defense which is recognized by the law and is not frivolous. Beren Corp. v. Spader 677
29. The meritorious defense which must be shown in support of an application to open or vacate a default judgment is one worthy of judicial inquiry because it either raises a question of law deserving some investigation and discussion, or a real controversy as to the essential facts. Beren Corp. v. Spader 677
30. No judgment is rendered until the pronouncement thereof is entered on the trial docket. Spanheimer Roofing & Supply Co. v. Thompson 710
31. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. Spanheimer Roofing & Supply Co. v. Thompson 710
32. This court will not overturn factual findings in a case tried by the judge with jury waived unless the findings are clearly wrong. Wiebe Constr. Co. v. School Dist. of Millard 730
33. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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. Allen 755
34. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credi-

bility of witnesses, or weigh the evidence. State v. Allen 755

Juries.

1. Where there is no evidence presented as to the effect of intoxicants on the part of the party involved, it is not proper to submit that issue directly to the jury. Branch v. Wilkinson 649
2. 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. Negligence is never presumed. Branch v. Wilkinson 649
3. In making the comparisons required by section 25-1151, R. R. S. 1943, the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff. The determination of questions of negligence and contributory negligence, and the comparative measuring of them, are basically factual issues which are generally for determination by the jury. C. C. Natvig's Sons, Inc. v. Summers 741
4. In criminal cases it is essential to the validity of the proceeding that the jury should be sworn. The record should show that the jury was sworn, but it is not necessary that it show the exact form of the oath administered; and if the record recites that the jury was sworn, it will be presumed that the proper form of oath was employed. State v. Martin 811

Jurisdiction.

1. In an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will ordinarily be applied, and that law governs not only the amount of recovery but also the right to recover. Crossley v. Pacific Employers Ins. Co. 26
2. Section 48-813, R. S. Supp., 1976, is the controlling statute in regard to service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked. Communication Workers of America, AFL-CIO v. City of Hastings 668

Jurors.

1. A prima facie case of discrimination in jury selection can be established upon demonstration that a significant disparity exists between the percentage of a particular minority chosen for jury duty and the percent-

age of that minority available in the population from which the jurors are drawn. State v. Martinez 347
2. The Nebraska system of selecting jurors is clearly within constitutional limits. State v. Martinez 347
3. The key-numbered system for the selection of jurors from voter registration lists is constitutionally valid. State v. Addison 442
4. The retention or rejection of a juror is a matter of discretion for the trial court. State v. Robinson 785
5. If the trial court is informed of matters during trial which might reasonably constitute grounds for a challenge for cause of one or more jurors, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guarantee of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system. State v. Robinson 785

Juvenile Courts.

1. Appeals from the Separate Juvenile Court in cases brought under Chapter 43, article 2, R. R. S. 1943, are heard de novo upon the record, with weight given to the findings of fact because the Juvenile Court heard and observed the witnesses. State v. Bailey 604
2. The Juvenile Court is presumed to disregard irrelevant evidence and the admission of irrelevant evidence is not prejudicial. State v. Bailey 604
3. The strict rules of evidence shall not be applied at any dispositional hearing. § 43-206.03(4), R. S. Supp., 1976. The trial court will exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence at such hearings; and its exercise of discretion will be upheld on appeal unless an abuse of discretion is shown. State v. Bailey 604

Labor and Labor Relations.

1. The establishment of a pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract. Lincoln Fire Fighters Assn. v. City of Lincoln 174
2. Prevalent wage rates for firemen must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. Lincoln Fire Fighters Assn. v. City of Lincoln 174
3. In selecting cities in reasonably similar labor markets,

for the purposes 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 to make comparisons appropriate. Lincoln Fire Fighters Assn. v. City of Lincoln 174

4. A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. Lincoln Fire Fighters Assn. v. City of Lincoln ... 174

5. In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates. Lincoln Fire Fighters Assn. v. City of Lincoln 174

6. 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. Lincoln Fire Fighters Assn. v. City of Lincoln 174

7. The considerations set forth in section 48-838(2), R. S. Supp., 1974, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. American Assn. of University Professors v. Board of Regents 243

8. A basic inquiry in bargaining unit determination is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. American Assn. of University Professors v. Board of Regents 243

9. In determining whether a particular group of employees constitutes an appropriate bargaining unit where an employer constitutes an appropriate bargaining unit where an employer operates a number of facilities, relevant factors include prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence of autonomy of the facilities; differences or similarities in skills or functions of the employees; geographical location of the facilities in relation to each other; and possibility of over-fragmentation of bargaining units. American Assn. of University Professors v. Board of Regents 243

10. The faculties of the College of Law and the College of Dentistry were entitled to separate bargaining units

where the evidence showed that those faculty members shared a community of interest separate from other faculty members, in that they have separate buildings; have separate accreditation standards; have different academic calendars; have significant operational independence on a day-to-day basis; and receive higher salaries, and promotions and tenure in a shorter period of time, than do other faculty members of the University. American Assn. of University Professors v. Board of Regents 243

11. Department chairmen are properly included in bargaining units of faculty employees at the University where their decision-making power is diffused among the department faculty under the by laws of the Board of Regents of the University of Nebraska, and pursuant to the principle of collegiality. American Assn. of University Professors v. Board of Regents 243

12. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents 243

13. In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Minshull v. School Dist. of Sutherland 418

14. House Officers of the University of Nebraska Medical Center are employees of the State of Nebraska as defined under section 48-801, R. R. S. 1943, and are entitled to participate in an appropriate bargaining unit. House Officers Assn. v. University of Nebraska Medical Center 697

15. It is the intent of the Legislature and the policy of this court to avoid undue fragmentation of bargaining units. House Officers Assn. v. University of Nebraska Medical Center 697

16. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority;

and whether its action was arbitrary, capricious, or unreasonable. House Officers Assn. v. University of Nebraska Medical Center 697
17. The decision of the Court of Industrial Relations separating House Officers of the University of Nebraska Medical Center from other "A" line employees at the Medical Center, except graduate students, is not supported by substantial evidence. House Officers Assn. v. University of Nebraska Medical Center 697
18. The evidence supports the decision of the Court of Industrial Relations that House Officers at the University of Nebraska Medical Center have a community of interest separate from graduate students and assistants at the Medical Center to warrant the separation of the House Officers from the graduate students and assistants for the purposes of collective bargaining. House Officers Assn. v. University of Nebraska Medical Center..... 697

Leases.

1. Sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances. Anderson v. Board of Educational Lands & Funds 793
2. A fair construction of the statutes, viewed in the light of their constitutional background, requires a holding that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the Board of Educational Lands and Funds. Anderson v. Board of Educational Lands & Funds 793

Legislature.

1. The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect. Pelzer v. City of Bellevue 19
2. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. Pelzer v. City of Bellevue 19
3. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Equal Opportunity Commission v. Weyerhaeuser Co. 104
4. The legislative intention is to be determined from the

general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. Equal Opportunity Commission v. Weyerhaeuser Co. .. 104

5. The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent. Equal Opportunity Commission v. Weyerhaeuser Co. 104
6. All the rules of construction should be considered when it is necessary to construe a statute, and no particular rule should be followed to the exclusion of all others. Equal Opportunity Commission v. Weyerhaeuser Co. .. 104
7. A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional. Haller v. State ex rel. State Real Estate Commission 437
8. It is the intent of the Legislature and the policy of this court to avoid undue fragmentation of bargaining units. House Officers Assn. v. University of Nebraska Medical Center 697

Lessor and Lessee.

A lessee of real estate or of gas, oil, and mineral rights in land may maintain an action to quiet title to his leasehold, but a lessee takes his leasehold subject to all claims of title which are enforceable against his lessor; and in a quiet title action he is required to recover on the strength of his own title, and not upon the weakness of his adversary's title. Beren Corp. v. Spader ... 677

Licenses and Permits.

A recommendation by the appropriate governmental unit upon the issuance of a liquor license is not binding upon the Nebraska Liquor Control Commission. Winkelmann v. Nebraska Liquor Control Commission 481

Liens.

1. A foreclosure action is not a suit to quiet title but for the purpose of determining the existence of a mortgage

lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises in satisfaction thereof in case no redemption is made. Wittwer v. Dorland 361
2. A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. Associated Bean Growers v. Chester B. Brown Co. 775
3. A warehouseman's right to compensation, generally secured by a warehouseman's lien on the property, survives a loss of the lien. Associated Bean Growers v. Chester B. Brown Co. 775

Limitations of Actions.

1. Section 25-206, R. R. S. 1943, provides that an action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within 4 years. Krambeck v. City of Gretna 608
2. Section 25-202, R. R. S. 1943, provides that an action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within 10 years after the cause of action shall have accrued. Krambeck v. City of Gretna 608
3. Where a party having a lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but the owner waives this feature and treats it as if the law had been followed, with only the question of compensation to be settled, then the law of compensation under eminent domain applies. It is as if condemnation proceedings were begun and not yet completed. In such cases the action for just compensation is not barred except by adverse possession of the land taken for 10 years, the requisite period to establish title by prescription. Krambeck v. City of Gretna 608

Mandamus.

1. Findings of fact by the trial court in a mandamus proceeding will not be disturbed on appeal unless they are clearly wrong. State ex rel. Goossen v. Board of Supervisors 9
2. An action in mandamus is an appropriate remedy to compel public officials to perform duties imposed on them by law, which exist at the time of the application for the writ and when such duty to act is clear. State ex rel. Goossen v. Board of Supervisors 9

3. A writ of mandamus will be granted to compel a particular discretionary act by public officials only when their decision not to act is unreasonable, arbitrary, or capricious. State ex rel. Goossen v. Board of Supervisors 9

Mines and Minerals.

A lessee of real estate or of gas, oil, and mineral rights in land may maintain an action to quiet title to his leasehold, but a lessee takes his leasehold subject to all claims of title which are enforceable against his lessor; and in a quiet title action he is required to recover on the strength of his own title, and not upon the weakness of his adversary's title. Beren Corp. v. Spader 677

Minors.

1. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it. Boker v. Luebbe 282
2. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Jenkins 311
3. In a proceeding in juvenile court under sections 43-202(2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Jenkins 311

Misdemeanors.

Misdemeanor appeals from the county or municipal court are triable de novo in the District Court on the record made in the lower court. State v. Stone 721

Mortgages.

1. A foreclosure action is not a suit to quiet title but for the purpose of determining the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises in satisfaction thereof in case no redemption is made. Wittwer v. Dorland 361

2. Where title has been made an issue by the parties to the foreclosure action, the court may properly consider and decide that issue. Wittwer v. Dorland 361
3. A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Wittwer v. Dorland 361

Motions, Rules, and Orders.
1. A motion for new trial under section 25-1143, R. R. S. 1943, is required in cases involving constructive contempts committed outside the presence of the court. Sempek v. Sempek 300
2. A motion for new trial must be made within 10 days of the verdict or decision rendered, except where a person is "unavoidably prevented." That term refers to circumstances beyond the control of the party desiring to file a pleading in our courts, and signifies something that was beyond the ability of the person affected to have avoided. Sempek v. Sempek 300
3. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect, and this court will not review alleged errors occurring during trial unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Sempek v. Sempek 300
4. A motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not by one aggrieved solely by the introduction of the incriminating evidence. State v. Martinez 347
5. To review errors of law occurring upon the trial of an equity case a motion for a new trial is necessary. McClintock v. Nemaha Valley Schools 477
6. Where the issues before the Public Service Commission are issues of fact, and the order contains a statement of the basic or undelying facts together with the ultimate facts and the findings of the commission, the requirement of section 75-134, R. R. S. 1943, that the order contain a statement of the "reasoning" of the commission is satisfied. Hugelman v. A & A Trucking, Inc. ... 628
7. Where there is substantial evidence to sustain the order of the Public Service Commission this court cannot say the order was unreasonable and arbitrary. Hugelman v. A & A Trucking, Inc. 628
8. No judgment is rendered until the pronouncement thereof is entered on the trial docket. Spanheimer Roofing & Supply Co. v. Thompson 710

9. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Davis 823

Motor Carriers.

The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Hugelman v. A & A Trucking, Inc. 628

Motor Vehicles.

1. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. State v. Benson 14
2. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Benson 14
3. A vehicle which has liability insurance coverage effective and applicable to it at the time of an accident in limits not less than the amounts required by section 60-509, R. R. S. 1943, is not an uninsured motor vehicle within the meaning of section 60-509.01, R. R. S. 1943. Crossley v. Pacific Employers Ins. Co. 26
4. In an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will ordinarily be applied, and that law governs not only the amount of recovery but also the right to recover. Crossley v. Pacific Employers Ins. Co. 26
5. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. Crossley v. Pacific Employers Ins. Co. 26
6. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law. State v. One 1968 Volkswagen 45
7. One who sees or could have seen the approach of a moving vehicle in close proximity to him, who suddenly moves from a place of safety into the path of such vehicle and is struck, is guilty of contributory negligence

more than slight as a matter of law. Hrabik v. Gottsch 86
8. The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it. American Motors Sales Corp. v. Perkins 97
9. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it. Boker v. Luebbe 282
10. In order to sustain an action on an express or implied warranty the plaintiff must prove, among other things, that the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the product or goods. Durrett v. Baxter Chrysler-Plymouth, Inc. 392
11. When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. § 39-635(1), R. R. S. 1943. Reese v. Mayer 499
12. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is the right to proceed in a lawful manner in preference to the vehicle on the left. Reese v. Mayer 499
13. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard to the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. Reese v. Mayer 499
14. One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway. Rief v. Foy 572
15. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Rief v. Foy 572
16. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he

is unable to stop in time to avoid a collision with an object within his range of vision. Rief v. Foy 572
17. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. Branch v. Wilkinson 649
18. Gross negligence within the meaning of a motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Negligence that is purely momentary in nature generally does not constitute gross negligence. Branch v. Wilkinson 649
19. A driver who operates his vehicle at such a rate of speed that he is unable to stop or turn aside in time to avoid a collision after a danger becomes apparent is negligent as a matter of law. Vrba v. Kelly 723
20. When range of vision is reduced by blowing snow, a driver is required to take such condition into consideration and to be more alert and vigilant for dangers. Vrba v. Kelly 723
21. The requirements of section 39-670(1), R. R. S. 1943, do not apply to disabled vehicles, if the driver thereof observes such requirements so far as he is able and so far as weather conditions permit. Vrba v. Kelly 723
22. It is generally negligence as a matter of law for a motorist to drive his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. C. C. Natvig's Sons, Inc. v. Summers 741

Municipal Corporations.

1. When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943. Pelzer v. City of Bellevue 19
2. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Nebco, Inc. v. Speedlin 34
3. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbi-

trary, constructively fraudulent, and therefore void, and subject to collateral attack. Nebco, Inc. v. Speedlin 34
4. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Nebco, Inc. v. Speedlin 34
5. The mere fact that property is served by a private sewer adequate to present immediate needs of the property does not conclusively establish that there is no benefit from construction of a public sewer adjacent to the property. Nebco, Inc. v. Speedlin 34
6. In calculating the amount of special benefit to property arising from construction of a public sewer, connection costs need not be subtracted. Nebco, Inc. v. Speedlin 34
7. Future use of property is an element which may be considered in determining the amount of special benefit. Nebco, Inc. v. Speedlin 34
8. Nebraska statutes governing the levying of a special assessment in sewer districts contemplate the levying of an assessment to the extent of the benefit and there need not always be an immediate and proportionate increase in the market value of the property by reason of the improvement. Nebco, Inc. v. Speedlin 34
9. In selecting cities in reasonably similar labor markets, for the purposes 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 to make comparisons appropriate. Lincoln Fire Fighters Assn. v. City of Lincoln 174
10. A city of the first class has the power to annex lands, contiguous to its corporate limits, which are urban or surburban in character. Piester v. City of North Platte 220
11. The character of a segment of an Interstate Highway sought to be annexed by a city of the first class is determined by the characteristic of the land immediately adjacent to the segment sought to be annexed. Piester v. City of North Platte 220

Negligence.

1. Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. Steel Containers, Inc. v. Omaha P.P. Dist. 81
2. One who attempts to cross a street between intersec-

tions without looking is guilty of such negligence as would bar recovery as a matter of law. Hrabik v. Gottsch 86
3. A pedestrian who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Hrabik v. Gottsch 86
4. One who sees or could have seen the approach of a moving vehicle in close proximity to him, who suddenly moves from a place of safety into the path of such vehicle and is struck, is guilty of contributory negligence more than slight as a matter of law. Hrabik v. Gottsch 86
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. Jensen v. Shadegg 139
6. 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 the plaintiff's injury or a cause which proximately contributed to it. Hosford v. Doherty 211
7. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it. Boker v. Luebbe 282
8. A tort-feasor whose negligence has caused injury to another is also liable for any injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. Watkins v. Hand 451
9. If the driver if an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Rief v. Foy 572
10. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Rief v. Foy 572
11. 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 rea-

sonably be expected to discover them and be able to protect himself. Heck v. American Community Stores 619
12. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence. Heck v. American Community Stores 619
13. The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, specifically excludes from its provisions any claim arising in respect to the detention of goods or merchandise by any law enforcement officer. Such an exception does not and was not intended to bar actions based upon the negligent destruction, injury, or loss of goods in the possession of a political subdivision. Nash v. City of North Platte 623
14. In an action for the bailee's failure to exercise required care whereby bailed property becomes lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury. Nash v. City of North Platte 623
15. The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial. Nash v. City of North Platte 623
16. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Negligence that is purely momentary in nature generally does not constitute gross negligence. Branch v. Wilkinson 649
17. 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. Negligence is never presumed. Branch v. Wilkinson 649
18. A driver who operates his vehicle at such a rate of speed that he is unable to stop or turn aside in time to avoid a collision after a danger becomes apparent is negligent as a matter of law. Vrba v. Kelly 723
19. When range of vision is reduced by blowing snow, a driver is required to take such condition into consideration and to be more alert and vigilant for dangers. Vrba v. Kelly 723

20. The requirements of section 39-670(1), R. R. S. 1943, do not apply to disabled vehicles, if the driver thereof observes such requirement so far as he is able and so far as weather conditions permit. Vrba v. Kelly 723
21. It is generally negligence as a matter of law for a motorist to drive his vehicle on a highway in such a manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. C. C. Natvig's Sons, Inc. v. Summers 741
22. The words "slight" and "gross" as used in section 25-1151, R. R. S. 1943, are comparative terms, and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence. C. C. Natvig's Sons, Inc. v. summers 741
23. In making the comparisons required by section 25-1151, R. R. S. 1943, the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff. The determination of questions of negligence and contributory negligence, and the comparative measuring of them, are basically factual issues which are generally for determination by the jury. C. C. Natvig's Sons, Inc. v. Summers 741

New Trial.

1. A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Kluge 115
2. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter. State v. Price 229
3. Because of the provisions of section 29-2315.01, R. R. S. 1943, the State cannot cross-appeal from an order granting the defendant a new trial in a criminal case. State v. Martinez 347
4. An appeal is limited to the issues presented by the motion for new trial; it may not include issues presented by a later motion overruled after the appeal is taken. Prochazka v. Prochazka 525
5. Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial. Prochazka v. Prochazka 525
6. A new trial will not be granted to a party for the pur-

pose of introducing a new issue, unless the judgment cannot be sustained on the issues previously submitted. Prochazka v. Prochazka 525
7. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Hawkman 578
8. The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. State v. Hawkman 578
9. An application for new trial must be made within 10 days after the verdict, report, or decision was rendered. Spanheimer Roofing & Supply Co. v. Thompson 710
10. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. Spanheimer Roofing & Supply Co. v. Thompson 710
11. An accused has a constitutional right to a public trial by an impartial jury, and where it appears to the Supreme Court that the accused has not been afforded a fair trial, it is the duty of the Supreme Court to grant a new trial. State v. Robinson 785

Notice.

1. A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Wittwer v. Dorland 361
2. Where a secured party conducts a private sale of repossessed collateral security, the only notice required by section 9-504(3), Uniform Commercial Code, is reasonable notification of the time and place after which any private sale is to be made. Contois Motor Co. v. Saltz 455

Oaths and Affirmations.

In criminal cases it is essential to the validity of the proceeding that the jury should be sworn. The record should show that the jury was sworn, but it is not necessary that it show the exact form of the oath administered; and if the record recites that the jury was sworn, it will be presumed that the proper form of oath was employed. State v. Martin 811

Officers and Directors.

1. Corporate directors may not delegate their responsibilities and are not excused from liability because they

committed some of their duties to an executive committee or to other individual directors. Fowler v. Elm Creek State Bank 631
2. An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Fowler v. Elm Creek State Bank 631
3. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. Fowler v. Elm Creek State Bank 631
4. Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities. Fowler v. Elm Creek State Bank 631

Orders.

1. The Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders upon 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. Winkelmann v. Nebraska Liquor Control Commission 481
2. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Winkelmann v. Nebraska Liquor Control Commission 481

Ordinances.

A prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met. State v. Kolosseus 404

Parent and Child.

1. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it. Boker v. Luebbe 282
2. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Jenkins 311

3. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Jenkins ... 311
4. In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Jenkins 311
5. The right of a parent to maintain the custody of his or her children is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child. State v. A.H. 444
6. An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. State v. A.H. 444
7. The first and paramount consideration in any case involving the custody of a child is the best interests of the child. State v. A.H. 444
8. The natural rights of a parent to the custody of his children are not absolute. Rejda v. Rejda 465
9. A court may terminate parental rights when it finds such action to be in the best interests of the child. Rejda v. Rejda 465
10. In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda 465
11. Courts may not properly deprive a parent of the 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. State v. Worrell 507
12. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Allen v. Allen 544

13. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen 544
14. The natural right of parents to the custody of their children is not inalienable but is subject to the public obligation to protect and preserve the best interests of such children. State v. Bailey 604
15. The mere fact of incarceration is not a sufficient justification for the denial of the right of visitation even though the same may only be exercised by visitation at the institution. Casper v. Casper 615
16. In the determination of custody and visitation matters, the primary concern is the best interests of the children. Casper v. Casper 615
17. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to an evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. Casper v. Casper 615
18. Ordinarily, the findings of the trial court in child custody matters will not be disturbed on appeal unless there has been a clear abuse of discretion. Osterhaus v. Osterhaus 802

Parties.

1. In an appeal from a ruling of an administrative agency, the agency is usually considered a necessary, or at least a proper, party. Winkelmann v. Nebraska Liquor Control Commission 481
2. Where the subject matter of the appeal does not give rise to issues affecting the public interest generally, the administrative agency, if made a party, need take no active part in the litigation, but may leave it to the parties directly concerned. Winkelmann v. Nebraska Liquor Control Commission 481

Pedestrians.

1. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar recovery as a matter of law. Hrabik v. Gottsch 86
2. A pedestrian who crosses a street between intersec-

tions is required to keep a constant lookout for his own safety in all directions of anticipated danger. Hrabik v. Gottsch 86
3. One who sees or could have seen the approach of a moving vehicle in close proximity to him, who suddenly moves from a place of safety into the path of such vehicle and is struck, is guilty of contributory negligence more than slight as a matter of law. Hrabik v. Gottsch 86

Physician and Patient.
1. The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination. Branch v. Wilkinson 649
2. The party seeking to exclude evidence on the ground of privilege has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient. Branch v. Wilkinson 649
3. To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties. Where the information is not obtained for this purpose, it is not privileged. Branch v. Wilkinson 649
4. A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. Branch v. Wilkinson 649

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. Alegria 750
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. Alegria 750
3. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. State v. Alegria 750

Pleadings.
1. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it, and at the same time and in the same action ques-

tion its constitutionality. American Motors Sales Corp. v. Perkins 97
2. The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it. American Motors Sales Corp. v. Perkins 97
3. 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. Boosalis v. Horace Mann Ins. Co. 148
State v. Allen 755
4. It is error to instruct on a theory not raised by the pleadings, over the objection of the opponent, not having afforded the opponent the opportunity to plead to that theory or present evidence thereon. Montgomery v. Quantum Labs, Inc. 160
5. A petition which fails to plead actionable facts is vulnerable to a general demurrer. Dangberg v. Sears, Roebuck & Co. 234
6. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. Dangberg v. Sears, Roebuck & Co. 234
7. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. Sempek v. Sempek 300
8. Although affidavits not included in the bill of exceptions will not be considered as evidence by this court, an affidavit charging contempt may be considered by this court, even if not offered and received in evidence, for the limited purpose of determining whether the pleadings support the judgment. Sempek v. Sempek 300
9. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective. Sempek v. Sempek 300
10. The matter of improper venue in a transitory action must be raised in the answer, or earlier, or it is waived. Peitz v. Hausman 344
11. Matters admitted by the pleadings need not be proved. Peitz v. Hausman 344
12. Where title has been made an issue by the parties to

the foreclosure action, the court may properly consider and decide that issue. Wittwer v. Dorland 361
13. One seeking to open up a judgment under sections 25-525 and 25-2001, R. R. S. 1943, must file a meritorious answer. Wittwer v. Dorland 361
14. A demurrer ore tenus is recognized by this court as a permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Contois Motor Co. v. Saltz 455
15. Failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation, and an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is proper, and if the petition is totally defective, the objection should be sustained. Contois Motor Co. v. Saltz 455
16. Questions relating to the sufficiency of the petition should be determined before the cause comes on for trial, and where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained; and any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. Contois Motor Co. v. Saltz 455
17. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover. Clyde v. Buchfinck 586
Cagle, Inc. v. Sammons 595
18. A demurrer reaches only defects which appear on the face of the petition, and admits all allegations of fact which are relevant, material, and well pleaded, but does not admit the pleader's conclusions of law. Clyde v. Buchfinck 586
19. A demurrer reaches an instrument filed with the petition and made a part thereof, but does not admit any construction placed on any instrument pleaded and set forth in the petition. Clyde v. Buchfinck 586
20. When a demurrer is interposed stating several grounds, the trial court should, when sustaining the demurrer, specify the grounds upon which it is sustained,

so that this court will be informed in regard to where the complaint is deficient. Clyde v. Buchfinck 586
21. A demurrer reaches an instrument filed with the petition and made a part thereof. Cagle, Inc. v. Sammons 595
22. The right to amend a petition after the sustaining of a demurrer is not absolute, and an application to amend is addressed to the sound discretion of the trial court. Before error can be predicated upon the refusal of the trial court to permit an amendment, the record must show that the ruling of the trial court was an abuse of discretion. Cagle, Inc. v. Sammons 595
23. It generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint. Cagle, Inc. v. Sammons 595
24. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. Hanson v. Hanson 675
25. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Beren Corp. v. Spader 677
26. A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense. Such party is not required to show that he will ultimately prevail in the action, but only that he has a defense which is recognized by the law and is not frivolous. Beren Corp. v. Spader 677
27. The meritorious defense which must be shown in support of an application to open or vacate a default judgment is one worthy of judicial inquiry because it either raises a question of law deserving some investigation and discussion, or a real controversy as to the essential facts. Beren Corp. v. Spader 677

Police Officers and Sheriffs.

1. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14
2. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where

there is sufficient foundation as to the expertise of the officer. State v. Benson 14
3. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943. State v. Colgrove 319
4. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Colgrove 319
5. The use of force is not justifiable under section 28-836 (2), R. R. S. 1943, to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful. State v. Bear Runner 368
6. The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, specifically excludes from its provisions any claim arising in respect to the detention of goods or merchandise by any law enforcement officer. Such an exception does not and was not intended to bar actions based upon the negligent destruction, injury, or loss of goods in the possession of a political subdivision. Nash v. City of North Platte 623

Political Subdivisions.

1. When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943. Pelzer v. City of Bellevue 19
2. The liability of a political subdivision under the Political Subdivisions Tort Claims Act consists of such liability as would exist in a private person or corporation without that immunity. Koepf v. County of York 67
3. The decisions of a county welfare department for the maintenance, care, or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such decisions do not achieve the level of basic policy decisions and do not fall within the discretionary-function exception as stated in section 23-2409, R. R. S. 1943, of the Political Subdivisions Tort Claims Act. Koepf v. County of York 67
4. Under the Political Subdivisions Tort Claims Act, the findings of the District Court will not be disturbed on appeal unless they are clearly wrong. Koepf v. County of York 67

5. On an appeal of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Steel Containers, Inc. v. Omaha P.P. Dist. 81
6. The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, specifically excludes from its provisions any claim arising in respect to the detention of goods or merchandise by any law enforcement officer. Such an exception does not and was not intended to bar actions based upon the negligent destruction, injury, or loss of goods in the possession of a political subdivision. Nash v. City of North Platte 623

Post Conviction.

1. In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted. State v. Ford 376
2. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Oziah 423
3. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used to secure a further review of issues already litigated. State v. Lacy 567
4. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal. State v. Lacy 567

Presentence Reports.

1. In the determination of a proper sentence, the trial court may consider police reports of crimes which have not resulted in conviction. State v. Lacy 567
2. Police reports, affidavits, and other information may be considered by the trial judge in sentencing and such information is properly included in a presentence investigation report compiled pursuant to section 29-2261, R. R. S. 1943. State v. Robinson 785

Principal and Agent.

1. It is the duty of a corporation when it learns of an unauthorized act committed in its name, or one who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time. CIT Financial Services of Kansas v. Egging Co. 514
2. It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have complete knowledge of the unauthorized act

and of all matters related to it. C I T Financial Services of Kansas v. Egging Co. 514

Principal and Surety.

1. Upon payment of the obligation of the principal, a surety is subrogated to the rights of the creditor against the principal. Barnes v. Hampton 151
2. A surety, which is subrogated to the rights of the principal against a third person, takes the rights subject to all defenses which the third person had as against the principal. Barnes v. Hampton 151

Privileged Communications.

1. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it, or stands in such relation that it is a reasonble duty or is proper for the writer to give the information. Dangberg v. Sears, Roebuck & Co. .. 234
2. The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination. Branch v. Wilkinson 649
3. The party seeking to exclude evidence on the ground of privilege has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient. Branch v. Wilkinson 649
4. To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties. Where the information is not obtained for this purpose, it is not privileged. Branch v. Wilkinson 649
5. A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. Branch v. Wilkinson 649

Probable Cause.

1. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. State v. Benson 14
2. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle

registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14
3. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Benson 14
4. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943. State v. Colgrove 319
5. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Colgrove 319
6. An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove 319

Probation and Parole.

1. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head .. 58
State v. Leal 233
State v. Adams 729
State v. Schoneweis 749
State v. Torres 771
2. An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Michon 562
3. Cases in which the decision to grant or not grant probation are of delicate balance, and in those cases the judicial discretion of the trial court should be accorded great weight. State v. McCurry 673
4. A sentence which denies probation and is within the statutory limits will not be disturbed on appeal, absent an abuse of discretion. State v. Rice 758
5. If the proposed disposition of a case would depreciate the seriousness of the crime, then a sentence of probation is not appropriate. State v. Rice 758
6. An order by the trial court which denies probation will not be overturned absent an abuse of discretion. State v. Randolph 772

Process.

Section 48-813, R. S. Supp., 1976, is the controlling statute in regard to service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked. Communication Workers of America, AFL-CIO v. City of Hastings 668

Proof.

In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Arkfeld v. Volk 77

Property.

1. Even though a landowner does not come under the protection of section 31-201, R. R. S. 1943, he may drain off his impounded waters so long as he does not damage or threaten others. Arkfeld v. Volk 77
2. An option to purchase property of an estate, whether it be at an appraised value, or at a price named or agreed upon, may be created by will. Overbeck v. Estate of Bock 121
3. Under a will providing that a son of the testatrix who, also, was designated as executor of her estate be granted an option to purchase certain real estate at its fair market value to be fixed by an appraiser named in the will, the fair market value fixed by the appraiser named in the will is controlling in the absence of bad faith or fraud. Overbeck v. Estate of Bock 121
4. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period. Fischer v. Grinsbergs 329
5. It is the general rule and weight of authority that where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land, and in these circumstances the mutual use of the whole of the way or alley will be considered

adverse to a separate and exclusive use by either party. Fischer v. Grinsbergs 329
6. The extent of an easement is determined from the use actually made of the property during the running of the prescriptive period. Fischer v. Grinsbergs 329
7. An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned. Peitz v. Hausman 344
8. The nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. Carter v. State 519
9. In the absence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee. Carter v. State 519
10. This court is not inclined to disturb a division of property made by the trial court unless it is patently unfair on the record. Allen v. Allen 544
11. Under section 76-705, R. R. S. 1943, if any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined. Krambeck v. City of Gretna 608
12. Inverse condemnation is analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the taken property, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken. Krambeck v. City of Gretna 608
13. The term "sale" ordinarily means a transmutation of property from one man to another in consideration of some price or recompense in value. Dial Realty, Inc. v. Cudahy Co. 641
14. Generally, where there is an arm's length exchange of

properties, and one of the properties lacks a readily ascertainable value, it is presumed that the properties exchanged are equal in value. Dial Realty, Inc. v. Cudahy Co. 641

15. A lessee of real estate or of gas, oil, and mineral rights in land may maintain an action to quiet title to his leasehold, but a lessee takes his leasehold subject to all claims of title which are enforceable against his lessor; and in a quiet title action he is required to recover on the strength of his own title, and not upon the weakness of his adversary's title. Beren Corp. v. Spader 677
16. Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677
17. The vendee under a land contract may assign the interest he acquires under the contract in whole or part, and the effect of such an assignment is to convey the vendee's equitable interest in the land to the assignee. The vendee may properly reserve or except rights in the land in such conveyance. Beren Corp. v. Spader 677
18. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same. Beren Corp. v. Spader 677
19. The measure of damages for conversion is the market value of the converted property on the date of conversion. Associated Bean Growers v. Chester B. Brown Co. 775

Property Settlement Agreements.

1. Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial. Prochazka v. Prochazka 525
2. A property settlement agreement by the parties to an

action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court. Prochazka v. Prochazka 525

3. A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side. Prochazka v. Prochazka 525

Prosecuting Attorneys.

1. A public prosecutor when acting in the general scope of his official authority in making a determination whether to file a juvenile court petition is exercising a quasi-judicial function and is immune from suit for an erroneous or negligent determination when he acts in good faith. Koepf v. County of York 67
2. Judicial notice is taken of the status of public officers and their official positions within the jurisdiction of the court. State v. Kolosseus 404

Proximate Cause.

A tort-feasor whose negligence has caused injury to another is also liable for any injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. Watkins v. Hand 451

Public Officers and Employees.

1. An action in mandamus is an appropriate remedy to compel public officials to perform duties imposed on them by law, which exist at the time of the application for the writ and when such duty to act is clear. State ex rel. Goossen v. Board of Supervisors 9
2. A county board has discretion to determine the character of repairs to be made to bridges, and, when there are not sufficient funds for all, to decide which bridges shall be repaired. State ex rel. Goossen v. Board of Supervisors 9
3. A writ of mandamus will be granted to compel a particular discretionary act by public officials only when their decision not to act is unreasonable, arbitrary, or capricious. State ex rel. Goossen v. Board of Supervisors 9

4. As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials. Pelzer v. City of Bellevue 19
5. A public prosecutor when acting in the general scope of his official authority in making a determination whether to file a juvenile court petition is exercising a quasi-judicial function and is immune from suit for an erroneous or negligent determination when he acts in good faith. Koepf v. County of York 67
6. A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. Koepf v. County of York 67
7. The decisions of a county welfare department for the maintenance, care, or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such decisions do not achieve the level of basic policy decisions and do not fall within the discretionary-function exception as stated in section 23-2409, R. R. S. 1943, of the Political Subdivisions Tort Claims Act. Koepf v. County of York 67
8. Judicial notice is taken of the status of public officers and their official positions within the jurisdiction of the court. State v. Kolosseus 404
9. A city attorney is not a "principal officer" within the meaning of that phrase as used in section 48-813, R. S. Supp., 1976. Communication Workers of America, AFL-CIO v. City of Hastings 668

Public Service Commissions.

1. Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska Supreme Court on appeals from the Nebraska Public Service Commission. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
2. Withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
3. General fears of potential diversion as contrasted with specific evidence indicating probable harm do not constitute proof that harm will result to competitive car-

riers because of an application. Moore's Transfer, Inc. v. Nebraska Public Service Commission 491
4. Where the issues before the Public Service Commission are issues of fact, and the order contains a statement of the basic or underlying facts together with the ultimate facts and the findings of the commission, the requirement of section 75-134, R. R. S. 1943, that the order contain a statement of the "reasoning" of the commission is satisfied. Hugelman v. A & A Trucking, Inc. 628
5. The issue of public convenience and necessity is ordinarily one of fact. Hugelman v. A & A Trucking, Inc. 628
6. Where there is substantial evidence to sustain the order of the Public Service Commission this court cannot say the order was unreasonable and arbitrary. Hugelman v. A & A Trucking, Inc. 628
7. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Hugelman v. A & A Trucking, Inc. 628

Public Utilities.

Evidence of custom and usage in the electrical power indusry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. Steel Containers, Inc. v. Omaha, P.P. Dist. 81

Quiet Title.

A lessee of real estate or of gas, oil, and mineral rights in land may maintain an action to quiet title to his leasehold, but a lessee takes his leasehold subject to all claims of title which are enforceable against his lessor; and in a quiet title action he is required to recover on the strength of his own title, and not upon the weakness of his adversary's title. Beren Corp. v. Spader 677

Rape.

1. 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 this general rule is that in prosecutions for sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. State v. Erich 1
2. It is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which con-

stitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Thompson 48
3. Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case. State v. Thompson 48

Ratification.
1. It is the duty of a corporation when it learns of an unauthorized act committed in its name, or one who desires to repudiate it, to disaffirm the transaction and refuse to be bound by it within a reasonable time. CIT Financial Services of Kansas v. Egging Co. 514
2. It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have complete knowledge of the unauthorized act and of all matters related to it. C I T Financial Services of Kansas v. Egging Co. 514

Receivers.
The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 145

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. Boosalis v. Horace Mann Ins. Co. 148
2. A journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Addison 166
3. 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. Allen 755
4. It is the duty of the appellant to prosecute the appeal by seeing that the record of the evidence in the municipal court or 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. Allen 755

Reports.

The statutory provision concerning progress reports is permissive and whether such reports shall be required is within the discretion of the judge authorizing the wiretap. State v. Kohout 90

Res Judicata.

Where it is disclosed that the record presents nothing but a moot question for the determination of the Supreme Court, ordinarily the judgment of the District Court will be affirmed. Haller v. Chiles, Heider & Co., Inc. 216

Rescission.

Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter, and they are entitled to be placed in status quo so far as possible. All rights under the rescinded contract are terminated, and the parties are discharged from their obligations thereunder. Davco Realty Co. v. Picnic Foods, Inc. 193

Restraints of Trade.

1. In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. Brewer v. Tracy 503
2. Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Brewer v. Tracy 503
3. A contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed. Brewer v. Tracy 503

Right to Counsel.

1. Appointments of counsel other than the public defender shall be limited to situations in which there are multiple defendants requiring separate representation, or where exigent circumstances are present which, in the opinion of the court, require appointment of other than the public defender. State v. Addison 166
2. A journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Addison 166
3. In a criminal case one has the right to represent himself after knowingly and intelligently waiving the assistance of counsel. State v. Addison 166
4. An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. State v. Keesecker 426
5. An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. State v. Keesecker 426
6. After such warnings as set out in Miranda have been given, and such opportunity afforded him, an individual may knowingly and intelligently waive those rights and agree to answer questions or make a statement. State v. Keesecker 426
7. Under both the Constitution of Nebraska and the Constitution of the United States, a defendant in a criminal trial in this state has a right to proceed without counsel and represent himself if he voluntarily and intelligently elects to do so. State v. Kirby 646
8. It is inherent in the right to a trial de novo that there be an adequate notice of the time and place of the hearing, an opportunity to be heard, and the right to an effective representation by counsel. State v. Stone 721

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. Boosalis v. Horace Mann Ins. Co. 148
2. The Supreme Court reserves the right to note and correct plain error which appears on the face of the record

in furtherance of the interests of substantial justice. Wittwer v. Dorland 361
3. Under the rules of this court only errors assigned and discussed in the brief will be considered. State v. Bear Runner 368
4. 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. Allen 755

Sales.

1. Where a secured party conducts a private sale of repossessed collateral security, the only notice required by section 9-504(3), Uniform Commercial Code, is reasonable notification of the time and place after which any private sale is to be made. Contois Motor Co. v. Saltz 455
2. The term "sale" ordinarily means a transmutation of property from one man to another in consideration of some price or recompense in value. Dial Realty, Inc. v. Cudahy Co. 641
3. Generally, where there is an arm's length exchange of properties, and one of the properties lacks a readily ascertainable value, it is presumed that the properties exchanged are equal in value. Dial Realty, Inc. v. Cudahy Co. 641

Schools and School Districts.

1. The state holds the public school lands, including the income therefrom as trustee. It is the duty of the trustee to obtain the maximum return to the trust estate from the trust properties under its control. Anderson v. Board of Educational Lands & Funds 793
2. Sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances. Anderson v. Board of Educational Lands & Funds 793
3. The Constitution of Nebraska requires that the trust property be dealt with in a manner consistent with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board of Educational Lands and Funds the duty of obtaining the highest price possible for all trust property that it may sell. Anderson v. Board of Educational Lands & Funds 793
4. A fair construction of the statutes, viewed in the light of

their constitutional background, requires a holding that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the Board of Educational Lands and Funds. Anderson v. Board of Educational Lands & Funds 793

Searches and Seizures.

1. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. State v. Benson 14
2. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14
3. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Benson 14
4. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law. State v. One 1968 Volkswagen 45
5. Any aggrieved person may move to suppress the contents of any intercepted wire or oral communication, or the evidence derived therefrom, on the grounds the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order. State v. Kohout 90
6. A movant who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of proof to show that the warrant was invalid. State v. Kohout 90
7. An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove 319
8. A search prosecuted in violation of the Constitution of the United States or the Nebraska Constitution is not made lawful by what it brings to light. State v. Colgrove 319

Security Agreements.

A clause in a security instrument providing that the creditor may at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the debtor is about to do, or has done, some act which tends to impair the security. Nebraska State Bank v. Dudley 132

Security Interest.

Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677

Sentences.

1. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Wounded Head 58
   State v. Leal 233
   State v. Adams 729
   State v. Schoneweis 749
   State v. Torres 771
2. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Wounded Head 58
   State v. Flye 171
   State v. Leal 233
   State v. McKenney 564
   State v. Hawkman 578
   State v. McCurry 673
   State v. Frederick 739
   State v. Briner 766
   State v. Torres 771
3. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. State v. Flye 171
4. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Moore 317
5. Proportionality in sentencing mandates that the more serious offenses generally merit the greater punishment and that those offenders who offer the greater

menace to society deserve the greater punishment. State v. Moore 317
6. A sentence, in the absence of an abuse of discretion, will not be disturbed on appeal if it is within the range of the statutory penalties. State v. Martinez 347
7. An order denying probation and a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Michon 562
8. In the determination of a proper sentence, the trial court may consider police reports of crimes which have not resulted in conviction. State v. Lacy 567
9. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Nichols 570
10. A sentence which is within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Childress 576
11. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Frederick 739
12. In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. State v. Alegria 750
13. A sentence which denies probation and is within the statutory limits will not be disturbed on appeal, absent an abuse of discretion. State v. Rice 758
14. If the proposed disposition of a case would depreciate the seriousness of the crime, then a sentence of probation is not appropriate. State v. Rice 758
15. Although the sentencing judge may use all pertinent evidence or information in regard to sentencing, the due process rights of a defendant may be violated when a defendant is sentenced on the basis of assumptions which are materially untrue, or on information of little or no reliability. State v. Bevins 761
16. Where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld. State v. Bevins 761
17. A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion on the part of the sentencing judge. State v. Bevins 761
18. A sentence imposed within the statutorily prescribed

limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the trial court. State v. Randolph 772
19. An order by the trial court which denies probation will not be overturned absent an abuse of discretion. State v. Randolph 772
20. Police reports, affidavits, and other information may be considered by the trial judge in sentencing and such information is properly included in a presentence investigation report compiled pursuant to section 29-2261, R. R. S. 1943. State v. Robinson 785

Service.

In a tax foreclosure action where jurisdiction was obtained for service by publication, a petition by a dissolved corporation to vacate the decree and allow it to redeem after confirmation on the ground the affidavit regarding a diligent investigation and inquiry was fraudulent is subject to demurrer in the absence of an allegation that diligent investigation and inquiry would have located an assignee, trustee, receiver, or other person having charge of the assets. County of Madison v. City of Norfolk 718

Sewers and Sewer Districts.

1. The mere fact that property is served by a private sewer adequate to present immediate needs of the property does not conclusively establish that there is no benefit from construction of a public sewer adjacent to the property. Nebco, Inc. v. Speedlin 34
2. In calculating the amount of special benefit to property arising from construction of a public sewer, connection costs need not be subtracted. Nebco, Inc. v. Speedlin 34
3. Future use of property is an element which may be considered in determining the amount of special benefit. Nebco, Inc. v. Speedlin 34
4. Nebraska statutes governing the levying of a special assessment in sewer districts contemplate the levying of an assessment to the extent of the benefit and there need not always be an immediate and proportionate increase in the market value of the property by reason of the improvement. Nebco, Inc. v. Speedlin 34

Sexual Assault.

1. 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 this general rule is that in prosecutions for

sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. State v. Erich 1
2. It is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Thompson 48
3. Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case. State v. Thompson 48

Special Assessments.

1. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Nebco, Inc. v. Speedlin 34
2. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and subject to collateral attack. Nebco, Inc. v. Speedlin 34
3. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Nebco, Inc. v. Speedlin 34
4. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Nebco, Inc. v. Speedlin 34
5. The mere fact that property is served by a private sewer adequate to present immediate needs of the property does not conclusively establish that there is no benefit from construction of a public sewer adjacent to the property. Nebco, Inc. v. Speedlin 34
6. In calculating the amount of special benefit to property arising from construction of a public sewer, connection costs need not be subtracted. Nebco, Inc. v. Speedlin 34
7. Future use of property is an element which may be considered in determining the amount of special benefit. Nebco, Inc. v. Speedlin 34
8. Nebraska statutes governing the levying of a special assessment in sewer districts contemplate the levying of an assessment to the extent of the benefit and there need not always be an immediate and proportionate increase in the market value of the property by reason of the improvement. Nebco, Inc. v. Speedlin 34

Statutes.

1. Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14
2. When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943. Pelzer v. City of Bellevue 19
3. The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect. Pelzer v. City of Bellevue 19
4. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. Pelzer v. City of Bellevue 19
5. As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials. Pelzer v. City of Bellevue 19
6. The language in section 5-108, R. R. S. 1943, "the most recent federal census," refers to the most recent federal census available to the particular locality, either the regular decennial one or a special census. Pelzer v. City of Bellevue 19
7. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law. State v. One 1968 Volkswagen 45
8. Even though a landowner does not come under the protection of section 31-201, R. R. S. 1943, he may drain off his impounded waters so long as he does not damage or threaten others. Arkfeld v. Volk 77
9. The statutory provision concerning progress reports is permissive and whether such reports shall be required is within the discretion of the judge authorizing the wiretap. State v. Kohout 90
10. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it, and at the same time and in the same action question its constitutionality. American Motors Sales Corp. v. Perkins 97

11. The 30-day period specified in section 48-1008, R. R. S. 1943, of the Act Prohibiting Unjust Discrimination in Employment Because of Age, is not a period limiting the right of action of the Equal Opportunity Commission, but the elapse of the 30-day period is a condition precedent to the ripening of the individual cause of action of the aggrieved employee. Equal Opportunity Commission v. Weyerhaeuser Co. 104
12. Where, because a statute is ambiguous, it is necessary to contrue it, the principal objective is to determine the legislative intention. Equal Opportunity Commission v. Weyerhaeuser Co. 104
13. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. Equal Opportunity Commission v. Weyerhaeuser Co. 104
14. The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent. Equal Opportunity Commission v. Weyerhaeuser Co. 104
15. All the rules of construction should be considered when it is necessary to construe a statute, and no particular rule should be followed to the exclusion of all others. Equal Opportunity Commission v. Weyerhaeuser Co. 104
16. Appeals from the county court to the District Court in probate matters are tried in the District Court de novo and not de novo on the record. §§ 24-541, 30-1601, R. R. S. 1943. Boosalis v. Horace Mann Ins. Co. 148
17. It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943. Burgess v. Curly Olney's, Inc. 153
18. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Burgess v. Curly Olney's, Inc. 153
19. 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. Lincoln Fire Fighters Assn. v. City of Lincoln 174

20. The considerations set forth in section 48-838(2), R. S. Supp., 1974, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. American Assn. of University Professors v. Board of Regents 243

21. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it. Boker v. Luebbe 282

22. A motion for new trial under section 25-1143, R. R. S. 1943, is required in cases involving constructive contempts committed outside the presence of the court. Sempek v. Sempek 300

23. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Jenkins 311

24. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943. State v. Colgrove 319

25. Because of the provisions of section 29-2315.01, R. R. S. 1943, the State cannot cross-appeal from an order granting the defendant a new trial in a criminal case. State v. Martinez 347

26. A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. Wittwer v. Dorland 361

27. One seeking to open up a judgment under sections 25-525 and 25-2001, R. R. S. 1943, must file a meritorious answer. Wittwer v. Dorland 361

28. The opening up of a judgment upon complying with sections 25-525 and 25-2001, R. R. S. 1943, is a matter of right. Wittwer v. Dorland 361
29. The use of force is not justifiable under section 28-836 (2), R. R. S. 1943, to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful. State v. Bear Runner 368
30. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. S. Supp., 1976, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Jeffers v. Pappas Trucking, Inc. 379
31. Where an injury falls under either subdivision (1) or (2) of section 48-121, R. S. Supp., 1976, a determination must be made as to the employee's loss of employability or earning capacity; and loss of bodily function is not at issue. Jeffers v. Pappas Trucking, Inc. 379
32. An injury to the ball and socket of the hip joint, where the residual impairment of the injury is not limited to the leg, is not a schedule injury under subdivision (3) of section 48-121, R. S. Supp., 1976. Jeffers v. Pappas Trucking, Inc. 379
33. Under section 48-185, R. S. Supp., 1976, a judgment, order, or award of the Workmen's Compensation Court may be modified, reversed, or set aside by this court when there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or when the findings of fact by the court do not support the order, judgment, or award. Jeffers v. Pappas Trucking, Inc. 379
34. We interpret section 42-364, R. S. Supp., 1976, to authorize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce. Perkins v. Perkins 401
35. The phrase "punishable by imprisonment for more than one year" as used in the statute permitting interception of communications when such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year, modifies only the catch-all category of "all other crimes"; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized; the statute was not simply aimed at major crimes. State v. Kolosseus 404

36. The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety. State v. Starks 433
37. A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional. Haller v. State ex rel. State Real Estate Commission 437
38. In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Haller v. State ex rel. State Real Estate Commission 437
39. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. A.H. 444
State v. Briner 766
40. The nature and extent of the title or right taken in the exercise of eminent domain depends on the statute conferring the power. The statute will be strictly construed; where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. Carter v. State 519
41. In the absence of a controlling statute a conveyance of land bounded by a highway, in which the grantor has the underlying fee, carries the fee to the center of the highway. The rule is not absolute, but one of construction, and doubts or ambiguities favor the grantee. Carter v. State 519
42. The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public. Labenz v. Labenz 548
43. The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. State v. Hawkman 578
44. Under the Nebraska Workmen's Compensation Act, the term "injury" and "personal injuries" do not include disability or death due to natural causes but occurring

while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Hyatt v. Kay Windsor, Inc. 580

45. Under section 76-705, R. R. S. 1943, if any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined. Krambeck v. City of Gretna 608

46. Section 25-206, R. R. S. 1943, provides that an action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within 4 years. Krambeck v. City of Gretna 608

47. Section 25-202, R. R. S. 1943, provides that an action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within 10 years after the cause of action shall have accrued. Krambeck v. City of Gretna 608

48. Where the issues before the Public Service Commission are issues of fact, and the order contains a statement of the basic or underlying facts together with the ultimate facts and the findings of the commission, the requirement of section 75-134, R. R. S. 1943, that the order contain a statement of the "reasoning" of the commission is satisfied. Hugelman v. A & A Trucking, Inc. 628

49. A blood sample secured pursuant to an implied consent statute is not information within the purposes of a physician-patient privileged statute because the sample is taken only for blood alcohol tests and not for diagnosis or treatment of the patient. Branch v. Wilkinson 649

50. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. Branch v. Wilkinson 649

51. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Communication Workers of America, AFL-CIO v. City of Hastings 668

52. Section 48-813, R. S. Supp., 1976, is the controlling stat-

ute in regard to service of process in cases where the jurisdiction of the Court of Industrial Relations is invoked. Communication Workers of America, AFL-CIO v. City of Hastings 668
53. A city attorney is not a "principal officer" within the meaning of that phrase as used in section 48-813, R. S. Supp., 1976. Communication Workers of America, AFL-CIO v. City of Hastings 668
54. The requirements of section 39-670 (1), R. R. S. 1943, do not apply to disabled vehicles, if the driver thereof observes such requirement so far as he is able and so far as weather conditions permit. Vrba v. Kelly 723
55. The words "slight" and "gross" as used in section 25-1151, R. R. S. 1943, are comparative terms, and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence. C. C. Natvig's Sons, Inc. v. Summers 741
56. In making the comparisons required by section 25-1151, R. R. S. 1943, the process of comparison should measure the disparity between the quantum of the total negligence of a defendant and the quantum of the total negligence of a plaintiff. The determination of questions of negligence and contributory negligence, and the comparative measuring of them, are basically factual issues which are generally for determination by the jury. C. C. Natvig's Sons, Inc. v. Summers 741
57. Police reports, affidavits, and other information may be considered by the trial judge in sentencing and such information is properly included in a presentence investigation report compiled pursuant to section 29-2261, R. R. S. 1943. State v. Robinson 785
58. Sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of public school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances. Anderson v. Board of Educational Lands & Funds 793
59. Sections 25-1143 and 29-2103, R. R. S. 1943, are constitutional. State v. Kelley 805

Stop and Check.

1. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. State v. Benson 14
2. Under section 60-435, R. R. S. 1943, a law enforcement

officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law. State v. Benson 14

3. A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943. State v. Colgrove 319

4. A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Colgrove 319

5. An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove 319

Streets and Alleys.

It is the general rule and weight of authority that where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party. Fischer v. Grinsbergs 329

Subrogation.

1. Upon payment of the obligation of the principal, a surety is subrogated to the rights of the creditor against the principal. Barnes v. Hampton 151

2. A surety, which is subrogated to the rights of the principal against a third person, takes the rights subject to all defenses which the third person had as against the principal. Barnes v. Hampton 151

3. The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest or right of the one making the payment. Subrogation is never awarded to one

who is merely a volunteer in paying the debt of one person to another. Cagle, Inc. v. Sammons 595

Summary Judgments.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. Juergens & Anderson v. Redding 289
2. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Juergens & Anderson v. Redding 289
3. Where the ultimate inferences to be drawn from the facts are not clear, the inferences are not conclusively established, and it cannot be determined whether a party is entitled to judgment as a matter of law. Juergens & Anderson v. Redding 289
4. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact and not how that issue should be determined. Juergens & Anderson v. Redding 289
5. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Juergens & Anderson v. Redding 289
6. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. C. C. Natvig's Sons, Inc. v. Summers 741

Sureties.

A performance bond guarantees that the contractor will perform the contract, and a labor and material payment bond guarantees that all bills for labor and materials contracted for and used by the contractor will be paid by the surety if the contractor defaults. Cagle, Inc. v. Sammons 595

Time.

1. The 30-day period specified in section 48-1008, R. R. S. 1943, of the Act Prohibiting Unjust Discrimination in Employment Because of Age, is not a period limiting the right of action of the Equal Opportunity Commission, but the elapse of the 30-day period is a condition precedent to the ripening of the individual cause of action of the aggrieved employee. Equal Opportunity Commission v. Weyerhaeuser Co. 104
2. In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances. Davco Realty Co. v. Picnic Foods, Inc. 193
3. An appeal shall be deemed perfected and the court shall have jurisdiction of the cause when a notice of appeal has been filed and the docket fee deposited in the office of the clerk of the District Court within the time provided by statute. State v. Price 229
4. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter. State v. Price 229
5. A motion for new trial must be made within 10 days of the verdict or decision rendered, except where a person is "unavoidably prevented." That term refers to circumstances beyond the control of the party desiring to file a pleading in our courts, and signifies something that was beyond the ability of the person affected to have avoided. Sempek v. Sempek 300
6. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect, and this court will not review alleged errors occurring during trial unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Sempek v. Sempek 300
7. Questions relating to the sufficiency of the petition should be determined before the cause comes on for trial, and where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained; and any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. Contois Motor Co. v. Saltz 455
8. Where a secured party conducts a private sale of repossessed collateral security, the only notice required by section 9-504(3), Uniform Commercial Code, is rea-

sonable notification of the time and place after which any private sale is to be made. Contois Motor Co. v. Saltz 455
9. An appeal is limited to the issues presented by the motion for new trial; it may not include issues presented by a later motion overruled after the appeal is taken. Prochazka v. Prochazka 525
10. A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect. State v. Hawkman 578
11. Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677
12. An application for new trial must be made within 10 days after the verdict, report, or decision was rendered. Spanheimer Roofing & Supply Co. v. Thompson 710
13. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. Spanheimer Roofing & Supply Co. v. Thompson 710

Torts.

1. In an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will ordinarily be applied, and that law governs not only the amount of recovery but also the right to recover. Crossley v. Pacific Employers Ins. Co. 26
2. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. Crossley v. Pacific Employers Ins. Co. 26
3. The liability of a political subdivision under the Political Subdivisions Tort Claims Act consists of such liability as would exist in a private person or corporation without that immunity. Koepf v. County of York 67
4. The decisions of a county welfare department for the maintenance, care, or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such decisions do not achieve the level of basic policy decisions and do not fall within the discretionary-function exception as stated in section

23-2409, R. R. S. 1943, of the Political Subdivisions Tort Claims Act. Koepf v. County of York 67
5. Under the Political Subdivisions Tort Claims Act, the findings of the District Court will not be disturbed on appeal unless they are clearly wrong. Koepf v. County of York 67
6. On an appeal of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Steel Containers, Inc. v. Omaha P.P. Dist. 81
7. An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned. Peitz v. Hausman 344
8. Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned. § 25-409, R. R. S. 1943. Peitz v. Hausman 344
9. A tort-feasor whose negligence has caused injury to another is also liable for any injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. Watkins v. Hand 451
10. 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. Heck v. American Community Stores 619
11. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence. Heck v. American Community Stores 619
12. The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, specifically excludes from its provisions any claim arising in respect to the detention of goods or merchandise by any law enforcement officer. Such an exception does not and was not intended to bar actions based upon the negligent de-

struction, injury, or loss of goods in the possession of a political subdivision. Nash v. City of North Platte 623

Trial.

1. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Nebco, Inc. v. Speedlin 34
2. The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, knowingly, and intelligently, after the required Miranda warnings have been given. State v. Thompson 48
3. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Thompson 48
4. 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 on appeal if there is sufficient competent evidence to support it; and the verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it. State v. Thompson 48
5. Under the Political Subdivisions Tort Claims Act, the findings of the District Court will not be disturbed on appeal unless they are clearly wrong. Koepf v. County of York 67
6. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can be reasonably deduced from it. Koepf v. County of York 67
7. On an appeal of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Steel Containers, Inc. v. Omaha P.P. Dist. 81
8. Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. Steel Containers, Inc. v. Omaha P.P. Dist. 81
9. Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the

court to decide the question as a matter of law rather than submit it to the jury. Hrabik v. Gottsch 86
10. No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused. State v. Kohout 90
11. A conviction may rest upon circumstantial evidence if it is substantial. State v. Dent & Bodeman 110
12. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the ground for withdrawal is established by clear and convincing evidence. State v. Kluge 115
13. When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Kluge 115
14. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Jensen v. Shadegg 139
15. 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. Jensen v. Shadegg 139
16. 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. Jensen v. Shadegg 139
17. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. Burgess v. Curly Olney's, Inc. 153
18. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Burgess v. Curly Olney's, Inc. 153
19. It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant,

unless one of the parties request it. § 25-1127, R. R. S. 1943. Burgess v. Curly Olney's, Inc. 153

20. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Burgess v. Curly Olney's, Inc. 153

21. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Burgess v. Curly Olney's, Inc. 153

22. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically. Burgess v. Curly Olney's, Inc. 153

23. It is error to instruct on a theory not raised by the pleadings, over the objection of the opponent, not having afforded the opponent the opportunity to plead to that theory or present evidence thereon. Montgomery v. Quantum Labs, Inc. 160

24. The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence. Lincoln Fire Fighters Assn. v. City of Lincoln 174

25. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. McDowell Road Associates v. Barnes 207

26. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. McDowell Road Associates v. Barnes 207
Dial Realty, Inc. v. Cudahy Co. 641

27. A motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Hosford v. Doherty 211

28. 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 the plaintiff's injury or a cause which proximately contributed to it. Hosford v. Doherty 211

29. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. Hosford v. Doherty 211

30. The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies. Hosford v. Doherty 211

31. A motion for new trial under section 25-1143, R. R. S. 1943, is required in cases involving constructive contempts committed outside the presence of the court. Sempek v. Sempek 300

32. A motion for new trial must be made within 10 days of the verdict or decision rendered, except where a person is "unavoidably prevented." That term refers to circumstances beyond the control of the party desiring to file a pleading in our courts, and signifies something that was beyond the ability of the person affected to have avoided. Sempek v. Sempek 300

33. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect, and this court will not review alleged errors occurring during trial unless a motion for a new trial was made in the trial court and a ruling obtained thereon. Sempek v. Sempek 300

34. Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading. Sempek v. Sempek 300

35. Although affidavits not included in the bill of exceptions will not be considered as evidence by this court, an affidavit charging contempt may be considered by this court, even if not offered and received in evidence, for the limited purpose of determining whether the pleadings support the judgment. Sempek v. Sempek 300

36. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective. Sempek v. Sempek 300

37. Rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. Cromer v. Farmland Service Coop, Inc. 355

38. It is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case-in-chief or should have been introduced at that time. Cromer v. Farmland Service Coop, Inc. 355

39. The general rule is that an accused has a right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings. State v. Bear Runner 368

40. The defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge. State v. Bear Runner 368

41. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. State v. Bear Runner 368

42. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Bear Runner 368

43. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Bear Runner 368

44. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Durrett v. Baxter Chrysler-Plymouth, Inc. 392

45. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Perkins v. Perkins 401

46. The rule is that where the evidence as to what occurred immediately prior to and at the time of making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper induce-

ments or threats, the confession is voluntary and may be received in evidence. State v. Keesecker 426

47. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Keesecker 426

48. A demurrer ore tenus is recognized by this court as a permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Contois Motor Co. v. Saltz 455

49. Failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation, and an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is proper, and if the petition is totally defective, the objection should be sustained. Contois Motor Co. v. Saltz 455

50. Questions relating to the sufficiency of the petition should be determined before the cause comes on for trial, and where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained; and any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. Contois Motor Co. v. Saltz 455

51. An expert may testify by opinion "or otherwise." This includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues. Shover v. General Motors Corp. 470

52. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; an apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly. Shover v. General Motors Corp. 470

53. It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient. Shover v. General Motors Corp. 470

54. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Shover v. General Motors Corp. 470

55. Expert testimony is admissible if scientific, technical,

or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. Shover v. General Motors Corp. 470

56. The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. Shover v. General Motors Corp. 470

57. It is error to give the jury instructions which place the burden of proof on the wrong party, or contain inconsistent and conflicting paragraphs relating to the burden of proof. Hersch Buildings, Inc. v. Steinbrecher 486

58. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. State v. Worrell 507

59. An appeal from a finding and judgment of the District Court involving dependent or neglected children under Chapter 43, article 2, R. R. S. 1943, is disposed of in this court by trial de novo on the record. State v. Worrell 507

60. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonaly drawn therefrom. C I T Financial Services of Kansas v. Egging Co. 514

61. Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. C I T Financial Services of Kansas v. Egging Co. 514

62. Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to show. State v. Record 530

63. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Don Nelsen Constr. Co. v. Landen 533

64. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542

65. An assignment of error in a motion for a new trial to the effect that the trial court erred in refusing to give a group of tendered instructions does not require a consideration of such assignment further than to ascertain that any one of the tendered instructions was properly

refused. Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227 542
66. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue. Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian. State v. Bobo 551
67. Where there is no evidence presented as to the effect of intoxicants on the part of the party involved, it is not proper to submit that issue directly to the jury. Branch v. Wilkinson 649
68. The retention or rejection of a juror is a matter of discretion for the trial court. State v. Robinson 785
69. If the trial court is informed of matters during trial which might reasonably constitute grounds for a challenge for cause of one or more jurors, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guarantee of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system. State v. Robinson 785
70. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Martin ... 811
71. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Davis 823

Trusts.

1. Where a vendor retains the legal title to real estate under a land contract until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677
2. The state holds the public school lands, including the income therefrom, as trustee. It is the duty of the trustee to obtain the maximum return to the trust estate

from the trust properties under its control. Anderson v. Board of Educational Lands & Funds 793

3. The Constitution of Nebraska requires that the trust property be dealt with in a manner consistent with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the Board of Educational Lands and Funds the duty of obtaining the highest price possible for all trust property that it may sell. Anderson v. Board of Educational Lands & Funds 793

Undue Influence.

Evidence insufficient to establish the exercise of undue influence upon a party to a property settlement agreement does not justify granting a motion for new trial. Prochazka v. Prochazka 525

Uniform Commercial Code.

1. Under the provisions of section 2-713, U. C. C., the measure of damages for nondelivery or repudiation by the seller is the difference between the market price and the contract price at the place of tender at the time the buyer learned of the breach. Burgess v. Curly Olney's, Inc. 153

2. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. § 2-715(2), U. C. C. Burgess v. Curly Olney's, Inc. 153

3. Where a secured party conducts a private sale of repossessed collateral security, the only notice required by section 9-504(3), Uniform Commercial Code, is reasonable notification of the time and place after which any private sale is to be made. Contois Motor Co. v. Saltz 455

Usury.

Contracts which are valid where made do not offend the public policy of a forum, although they provide for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such contract, if made in the law of the forum. Grady v. Denbeck 31

Vendor and Purchaser.

1. Where a vendor retains the legal title to real estate under a land contract until the purchase money or some

part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The vendee is the equitable owner of the real estate. Beren Corp. v. Spader 677

2. The vendee under a land contract may assign the interest he acquires under the contract in whole or part, and the effect of such an assignment is to convey the vendee's equitable interest in the land to the assignee. The vendee may properly reserve or except rights in the land in such conveyance. Beren Corp. v. Spader 677

3. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same. Beren Corp. v. Spader 677

Venue.

1. An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned. Peitz v. Hausman 344

2. Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned. § 25-409, R. R. S. 1943. Peitz v. Hausman 344

3. Venue in a transitory action is a matter which may be waived by failure to make timely objection. Peitz v. Hausman 344

4. The matter of improper venue in a transitory action must be raised in the answer, or earlier, or it is waived. Peitz v. Hausman 344

Verdicts.

1. 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 on appeal if there is sufficient competent evidence to support it; and the verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it. State v. Thompson 48
2. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Jensen v. Shadegg 139
3. A motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Hosford v. Doherty 211
4. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter. State v. Price 229
5. In criminal cases, where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong. State v. Record 530
   State v. Davis 823
6. In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. State v. Allen 755
7. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Allen 755
8. A conviction may rest upon circumstantial evidence if it is substantial. State v. Davis 823

Wages.

1. The establishment of a pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract. Lincoln Fire Fighters Assn. v. City of Lincoln 174

2. Prevalent wage rates for firemen must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. Lincoln Fire Fighters Assn. v. City of Lincoln 174
3. In selecting cities in reasonably similar labor markets, for the purposes 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 to make comparisons appropriate. Lincoln Fire Fighters Assn. v. City of Lincoln 174
4. A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. Lincoln Fire Fighters Assn. v. City of Lincoln 174
5. In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates. Lincoln Fire Fighters Assn. v. City of Lincoln 174
6. 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. Lincoln Fire Fighters Assn. v. City of Lincoln 174

Waiver.

1. A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Kluge 115
2. A journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect. State v. Addison 166
3. In a criminal case one has the right to represent himself after knowingly and intelligently waiving the assistance of counsel. State v. Addison 166
4. Venue in a transitory action is a matter which may be waived by failure to make timely objection. Peitz v. Hausman 344
5. The matter of improper venue in a transitory action must be raised in the answer, or earlier, or it is waived. Peitz v. Hausman 344
6. A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of

a known right, claim, or privilege. Branch v. Wilkinson 649
7. A contractual provision providing for an award of liquidated damages for delay in performance of a contract may be waived. Wiebe Constr. Co. v. School Dist. of Millard 730
8. Where a defendant is advised by the trial court of information on which the court is relying at the time of sentencing, but does not object thereto, a contention by the defendant on appeal that the information was untrue will not be upheld. State v. Bevins 761

Warehousemen.
1. A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver. Associated Bean Growers v. Chester B. Brown Co. 775
2. A warehouseman's right to compensation, generally secured by a warehouseman's lien on the property, survives a loss of the lien. Associated Bean Growers v. Chester B. Brown Co. 775

Warranties.
In order to sustain an action on an express or implied warranty the plaintiff must prove, among other things, that the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the product or goods. Durrett v. Baxter Chrysler-Plymouth, Inc. 392

Waters.
Even though a landowner does not come under the protection of section 31-201, R. R. S. 1943, he may drain off his impounded waters so long as he does not damage or threaten others. Arkfeld v. Volk 77

Wills.
1. The cardinal rule in construing a will is to ascertain and effectuate the intention of the testatrix, if such intention is not contrary to law. Overbeck v. Estate of Bock 121
2. An option to purchase property of an estate, whether it be at an appraised value, or at a price named or agreed upon, may be created by will. Overbeck v. Estate of Bock 121
3. Under a will providing that a son of the testatrix who, also, was designated as executor of her estate be granted an option to purchase certain real estate at its

fair market value to be fixed by an appraiser named in the will, the fair market value fixed by the appraiser named in the will is controlling in the absence of bad faith or fraud. Overbeck v. Estate of Bock 121

Wiretaps.

1. Any aggrieved person may move to suppress the contents of any intercepted wire or oral communication, or the evidence derived therefrom, on the grounds the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order. State v. Kohout 90
2. The statutory provision concerning progress reports is permissive and whether such reports shall be required is within the discretion of the judge authorizing the wiretap. State v. Kohout 90
3. The phrase "punishable by imprisonment for more than one year" as used in the statute permitting interception of communications when such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year, modifies only the catch-all category of "all other crimes"; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized; the statute was not simply aimed at major crimes. State v. Kolosseus 404
4. A prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met. State v. Kolosseus 404
5. The statutes require suppression of the contents of any wiretap interception and any evidence derived therefrom if the communication was unlawfully intercepted. State v. Kolosseus 404
6. In a wiretap application, allegations under subsection (1)(c) of section 2518, Title 18 U.S.C.A., play a "substantial role" in judicial authorization and if the allegations are insufficient to meet these statutory requirements, the interception is unlawful. State v. Kolosseus 404
7. Congress did not attempt to require "specific" or "all possible" investigative techniques be tried before orders for wiretaps could be issued. State v. Kolosseus 404
8. Wiretap procedures cannot be routinely employed as an initial step in criminal investigation, but neither is

government required to use a wiretap only as a last resort. State v. Kolosseus 404

Witnesses.

1. Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case. State v. Thompson 48
2. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. McDowell Road Associates v. Barnes 207
3. An expert may testify by opinion "or otherwise." This includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues. Shover v. General Motors Corp. 470
4. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; an apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly. Shover v. General Motors Corp. 470
5. The physician-patient privilege protects not only statements made by the patient to the physician, but also facts obtained by the physician by observation or examination. Branch v. Wilkinson 649
6. The party seeking to exclude evidence on the ground of privilege has the burden of proof to show that the information was obtained by the physician in his professional capacity during his relationship with the patient. Branch v. Wilkinson 649
7. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. State v. Briner 766
8. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. State v. Martin 811

Words and Phrases.

1. As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials. Pelzer v. City of Bellevue 19
2. The language in section 5-108, R. R. S. 1943, "the most

recent federal census," refers to the most recent federal census available to the particular locality, either the regular decennial one or a special census. Pelzer v. City of Bellevue 19

3. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means. Dangberg v. Sears, Roebuck & Co. 234
4. False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go may constitute false imprisonment. Dangberg v. Sears, Roebuck & Co. 234
5. The phrase "punishable by imprisonment for more than one year" as used in the statute permitting interception of communications when such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year, modifies only the catch-all category of "all other crimes"; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized; the statute was not simply aimed at major crimes. State v. Kolosseus 404
6. In a wiretap application, allegations under subsection (1)(c) of section 2518, Title 18 U.S.C.A., play a "substantial role" in judicial authorization and if the allegations are insufficient to meet these statutory requirements, the interception is unlawful. State v. Kolosseus 404
7. The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. State v. Hawkman 578
8. Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Hyatt v. Kay Windsor, Inc. 580
9. The term "sale" ordinarily means a transmutation of property from one man to another in consideration of some price or recompense in value. Dial Realty, Inc. v. Cudahy Co. 641
10. A waiver, according to the generally accepted defini-

tion, is the voluntary and intentional relinquishment of a known right, claim, or privilege. Branch v. Wilkinson 649

11. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Negligence that is purely momentary in nature generally does not constitute gross negligence. Branch v. Wilkinson 649
12. Words and phrases shall be construed and understood according to the common and approved usage of the language. Communication Workers of America, AFL-CIO v. City of Hastings 668
13. A city attorney is not a "principal officer" within the meaning of that phrase as used in section 48-813, R. S. Supp., 1976. Communication Workers of America, AFL-CIO v. City of Hastings 668
14. The words "slight" and "gross" as used in section 25-1151, R. R. S. 1943, are comparative terms, and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence. C. C. Natvig's Sons, Inc. v. Summers 741
15. Words technical or ambiguous on their face, or peculiar to particular trades, professions, occupations, or localities, are explainable where they are employed in written instruments by parol evidence of usage. Associated Bean Growers v. Chester B. Brown Co. 775

Workmen's Compensation.

1. If attorney's fees should be, but are not, allowed by the Workmen's Compensation Court, and the issue is properly preserved on appeal, the District Court has the power to remedy the error of the compensation court and award such fees. Harrington v. State 4
2. Where the employer appeals to the District Court from the award of the Workmen's Compensation Court and fails to obtain any reduction in the amount of the award, the District Court ordinarily should allow the employee a reasonable attorney's fee. Harrington v. State 4
3. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as

a jury verdict in a civil case. Buck v. Iowa Beef Processors, Inc. 125
4. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Buck v. Iowa Beef Processors, Inc. 125
Hyatt v. Kay Windsor, Inc. 580
5. As to employees having fixed hours and place of work, injuries occurring on the premises of the employer while the employee is going to and coming from work before or after working hours or at lunchtime are compensable. Buck v. Iowa Beef Processors, Inc. 125
6. An accidental injury sustained by an employee on the premises where she is employed during her lunch period while going to or coming from work is an injury arising out of and in the course of her employment. Buck v. Iowa Beef Processors, Inc. 125
7. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. S. Supp., 1976, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Jeffers v. Pappas Trucking, Inc. 379
8. Where an injury falls under either subdivision (1) or (2) of section 48-121, R. S. Supp., 1976, a determination must be made as to the employee's loss of employability or earning capacity; and loss of bodily function is not at issue. Jeffers v. Pappas Trucking, Inc. 379
9. An injury to the ball and socket of the hip joint, where the residual impairment of the injury is not limited to the leg, is not a schedule injury under subdivision (3) of section 48-121, R. S. Supp., 1976. Jeffers v. Pappas Trucking, Inc. 379
10. Under section 48-185, R. S. Supp., 1976, a judgment, order, or award of the Workmen's Compensation Court may be modified, reversed, or set aside by this court when there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or when the findings of fact by the court do not support the order, judgment, or award. Jeffers v. Pappas Trucking, Inc. 379
11. The Workmen's Compensation Act is to be liberally construed so that its beneficent purposes may not be thwarted by technical refinements of interpretation. Jeffers v. Pappas Trucking, Inc. 379

12. Evidence that an employee had drunk intoxicating liquor prior to an injury and that a subsequent blood alcohol test showed a content of .175 percent, shown by expert testimony to indicate intoxication, with impairment of reflexes, depth perception, coordination, and other motor activities, is sufficient to support a finding by the Workmen's Compensation Court that the employee was injured by reason of being in a state of intoxication. Sandage v. Adolf's Roofing, Inc. 539
13. Evidence that the employer knew of an employee drinking on several prior occasions over a long period, but had no knowledge of his drinking at or about the time of injury, is not sufficient to establish consent, knowledge, or acquiescence in any intoxication at the time of injury. Sandage v. Adolf's Roofing, Inc. 539
14. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Hyatt v. Kay Windsor, Inc. 580
15. Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. Hyatt v. Kay Windsor, Inc. 580
16. In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case. Hyatt v. Kay Windsor, Inc. 580
17. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Hyatt v. Kay Windsor, Inc. 580
18. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Hyatt v. Kay Windsor, Inc. 580