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STEWART H. EVANS, APPELLANT, V. ROBERT V. EVANS, JR., ET AL., APPELLEES.

259 N. W. 2d 925

Filed November 30, 1977. No. 41069.

1. **Attorneys at Law: Fees.** Ordinarily, the division of attorneys' fees rests in the sound judicial discretion of the trial court.
2. **Partition: Fees: Appeal and Error.** An order fixing fees in a partition action is a final, appealable order.
3. **Motions, Rules, and Orders: Appeal and Error.** An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order.
4. _____: _____. An order is final when the substantial rights of the parties to the action are determined even though the cause is retained for the determination of matters incidental thereto.

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

Jess C. Nielsen of Crosby & Nielsen, for appellant.

Milton C. Murphy of Murphy, Pederson & Piccolo, LeRoy Anderson, and Donald H. Kelley of Kelley & Wallace, for appellees.

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

SPENCER, J.

This action was originally commenced as one in partition. Partition in kind was confirmed. Subsequently, a petition for damages, cross-petitions, and a petition for an injunction were filed. These were tried in 11 different sessions, over a 2-year period. Plaintiff appeals from orders of the trial court dividing the attorneys' fees on partition; denying several of his claims for damages; and allowing damages to the defendants-appellees on their cross-petitions. We affirm.

The principal parties are four brothers: Stewart, Robert, Donald, and Fredrick. Eloise H. Evans, their mother, died intestate on March 18, 1973, seized

of extensive farm and ranch lands in Lincoln and Perkins Counties as well as a home and substantial personal property in Lancaster County. Administration of the estate was commenced in Lancaster County. The estate, the value of which was estimated between 1 and 2 million dollars, needed cash funding of a substantial amount for taxes. A decree of heirship was entered April 17, 1973. The heirs-at-law, the four sons, took immediate possession of all real estate subject to any claims of the estate.

Certain of the ranch land had been occupied for many years by Fredrick. The balance of the land, including 1,029 acres of dry land, 298 acres of irrigated land, and 1,154 acres of grazing land, were occupied by Stewart. Immediately following the death of their mother, three of the brothers, Stewart and Robert, who were coadministrators of the estate, and Donald conferred with counsel for the estate regarding the need for arrangements to operate the lands pending the payment of the estate taxes. It was orally agreed that Stewart would continue to operate the land he had been using. The exact terms of this agreement is one of the major points of contention herein.

Stewart essentially contends he was to carry on operations as before with the brothers personally putting up the necessary cash to fund the operation, as had been done by his mother. The other brothers contend the agreement provided Stewart was to continue to operate the lands he operated before, on a landlord-tenant relationship. The division was to be one-third to the landlord, and two-thirds to the tenant. It was their further contention that any cash needed for the landlord's share of the operation was to be paid from the estate account.

Stewart paid certain of the 1973 farming expenses from the estate account. Subsequently, on his own initiative, he decided to terminate the use of estate funds. He then made demand upon his brothers for

funds for the operation of the land, telling them he was converting his possession from that of a tenant to an owner in common. The record is undisputed the estate was fully solvent and capable of paying any bills incurred.

Much of Stewart's case is premised on his contention that no definite agreement was ever reached. He denies that a landlord and tenant relationship was ever created. It is his position the brothers were tenants in common, and the laws of cotenancy, not landlord and tenant, govern their relationship.

Stewart filed the petition in partition April 11, 1974. Donald filed an answer, alleging that an order had been entered barring claims in the estate of Eloise H. Evans. Donald further alleged that all claims, taxes, and expenses of administration had been paid or provided for, and that ample cash, securities, or proceeds were in the hands of the administrators or available to them for the payment of any obligations of the estate. He joined in the prayer for partition. By way of cross-petition, Donald prayed for an accounting from Stewart and Fredrick, covering their operations of the real estate managed by them.

Subsequently, Donald filed a petition for the appointment of a receiver. Attached to that petition is a copy of a release, signed by the four heirs, listing liabilities, debts, taxes, and costs of administration as of May 7, 1974. This instrument authorizes the administrator to continue to hold the listed securities in the estate. It authorizes them to use the net proceeds from the sale of real estate made, and to be made, to pay the debts and expenses of the estate. This instrument releases and discharges the administrators and the surety on their bond from any and all liability, claims, and demands for the past, present, or future use of the proceeds of real estate sales to pay estate debts and expenses.

Fredrick filed an answer in the partition action. He alleged the petition failed to set out the necessary

facts to constitute a cause of action, and prayed that it be dismissed. By way of cross-petition he prayed for partition.

On July 29, 1974, after hearing, the court appointed a receiver; named him also as referee; and directed him to proceed with partition. The court further determined Stewart, Robert, Fredrick, and Donald were owners in fee simple of the real estate to be partitioned.

On December 3, 1974, the court entered an order confirming the report of the receiver and referee. It confirmed the referee's report and allotted to each of the four heirs the share of the property assigned to him in that report. It further directed the referee to convey to the heirs the real estate allotted to them.

On March 24, 1975, Robert and Donald filed a petition for an injunction to prevent Stewart from removing fences and well equipment from the land assigned to them. A temporary injunction was granted. Stewart cross-petitioned for a return of the property. On July 30, 1975, the temporary injunction was made permanent, and Stewart's cross-petition was dismissed.

On April 9, 1975, Stewart filed a pleading entitled "Claims and Supplemental Petition." He set out 10 causes of action, synopsized as follows:

(I) Reimbursement for out-of-pocket expenses incurred in managing the land prior to partition, including attorney's fees, abstracting fees, and other expenses relating to the negotiation and transfer of an easement to NPPD; expenses for repairs made to the property; fertilizer expenses; and traveling expenses.

(II) Payment of a claim for improvements made to the property prior to the death of decedent, which claim plaintiff did not present to the estate pursuant to an agreement with defendants.

(III) Reimbursement for expenses for summerfallow work performed in 1974.

(IV) Reimbursement for expenses for harvesting wheat in 1974.

(V) Return of warehouse receipts for the 1974 wheat crop which plaintiff had previously been ordered to give to the receiver.

(VI) Damages for lost profits on the 1974 wheat crop caused by the refusal of defendants to advance working capital.

(VII) Damages for lost profits on the 1973 corn crop caused by the refusal of defendants to advance working capital.

(VIII) Damages for lost profits on the 1974 corn crop caused by the appointment of a receiver.

(IX) Damages for lost profits on the 1974 corn crop caused by the refusal of defendants to allow plaintiff to remove and use irrigation equipment.

(X) Attorneys' fees for services performed in the partition action.

The three other brothers filed answers and cross-petitions to the supplemental petition. In the cross-petitions they sought to recover for lost profits on the various crops which plaintiff abandoned because of his claim they violated their agreement by failing to advance working capital.

On June 17, 1975, all the claims and causes of action of Stewart except cause X were heard. Cause X was reserved for further hearing by agreement of the parties. The court dismissed causes II through IX with prejudice, at plaintiff's cost. Trial on cause I was continued until further order of the court. Plaintiff filed a motion for a new trial June 23, 1975, covering causes II through IX.

On July 29 and 30, 1975, trial was had on causes I and X. In a judgment entered on March 23, 1976, plaintiff was allowed a partial recovery on cause I, and the defendants were awarded damages on their cross-petitions in the amount of $15,265.23 each. This amount was reduced after a hearing on the motion

for new trial by an order entered August 16, 1976, to the amount of $14,379.52.

Stewart filed objections to the receiver's reports on June 15, 1976. On July 22, 1976, the court considered the objections. It dismissed some of them and continued the hearing as to others. On that date, it also set fees for the referee, the receiver, and the attorneys for services incident to the partition of the real estate and the receivership. No motion for new trial was filed on the order for fees, which Stewart is attacking in this appeal. The trial court divided the attorneys' fees pursuant to section 25-21,108, R. R. S. 1943, on the theory that plaintiff had not pleaded the facts fully and accurately in his petition. Ordinarily, the division of attorneys' fees rests in the sound judicial discretion of the trial court. Stoddard v. Montgomery, 169 Neb. 252, 98 N. W. 2d 875 (1959).

The final hearing herein was held August 26, 1976. At that time the remaining objections to the receiver's report were dismissed. The plaintiff's motion for a new trial, filed on June 23, 1975, with respect to the dismissal of his causes of action II through IX, was overruled as of July 29, 1975, nunc pro tunc. Stewart filed a motion for a new trial August 31, 1976, which was overruled September 1, 1976. Notice of appeal was filed on September 14, 1976.

The piecemeal trial of the issues herein has created many problems, including the problem of the finality of some of the orders entered. The action started as one in partition, with the appointment of a receiver, who was also appointed as referee, to handle the property pending the partition. Partition in kind was effected, and the shares of the heirs-at-law confirmed. The action was then continued on the report of the receiver and on a petition for an injunction covering the removal of property from some of the lands assigned. Thereafter, a pleading

denominated "Claims and Supplemental Petition" was filed. These were the matters which were subsequently tried.

We agree with the defendants, an order fixing fees in a partition action is a final, appealable order. § 25-21,108, R. R. S. 1943. Nothing remained to be done by the referee in the partition but to see that the fees were paid and proper receipts obtained. While not exactly in point, the case of Lewis v. Gallemore, 173 Neb. 441, 113 N. W. 2d 595 (1962), in which we said: "An order confirming a sale by a receiver is a final order from which an appeal can be taken" is analogous.

With the exception of the order on attorneys' fees, we do not consider any of the orders prior to the order of August 26, 1976, to be final orders. Section 25-1902, R. R. S. 1943, defines a final order as: "An order affecting a substantial right in an action, where such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter." An order is final when the substantial rights of the parties to the action are determined even though the cause is retained for the determination of matters incidental thereto. Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32 (1963). Here, however, the various claims of the parties, which were intermeshed, were tried in part at various times. Until the various claims were finally heard there was no determination of the substantial rights of the parties. All matters raised by the plaintiff except the matter of attorneys' fees on the partition are properly before us.

No useful purpose will be served by detailing the respective claims of the parties. The deceased died before the effective date of the new probate code. As we said in J. H. Melville Lumber Co. v. Maroney,

145 Neb. 374, 16 N. W. 2d 527 (1944): "Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title." And, "If the title passes to and vests in the heirs, the possessory right goes with it, *except to the extent it is placed by law in the administrator,* which is not exclusively or absolutely, but optionally with him, and for purposes indicated by statute and for none other." (Italics supplied.) We consider this case in the context of the agreement made by the administrators and the heirs.

The trial court was required to determine the exact nature of the agreement made by the parties as to the operation of the land farmed by Stewart. This was a fact question. The court found plaintiff occupied the common lands of the parties as a tenant and that a landlord and tenant relationship existed between the plaintiff and the defendants at all times germane to this cause.

The court further found the terms of the agreement between the parties were common in the neighborhood insofar as division of the crops and hay were concerned. Plaintiff, as tenant, was entitled to two-thirds of all wheat, corn, and hay produced, with the landlord's share of one-third to be shared equally by all four of the parties. The landlords were to pay one-third of the cost of all fertilizer, herbicides, and pesticides, and one-third of all costs of electricity for irrigation used on said crops. Pasture rent was $2.25 per acre for 1973, and $2.50 per acre for 1974. Plaintiff was to keep the fences, wells, and other improvements in repair.

After the agreement was made, Stewart planted crops at various times and abandoned them at various stages. He contended the agreement between the parties called upon all of them as landlords to advance working capital. The trial court found plaintiff failed to meet his burden of proof in this re-

spect. We cannot say he erred in doing so. We observe such agreement would not be the ordinary one.

Defendants denied there ever was any agreement to advance working capital. They testified the agreement made provided for plaintiff to draw any needed landlord expenses from the estate in which the parties were the sole heirs-at-law, in equal degree. The trial court also found that even if there had been an agreement as alleged by plaintiff to advance capital, plaintiff as one of the coowners was liable for one-fourth thereof as landlord, and at the very least he should have saved one-fourth of the crop. The court further noted that the plaintiff owed for pasture rent and could have used that amount as a setoff for any of the landlord's expenses he advanced.

Stewart attempted to show that it was not possible for him to borrow sufficient funds to continue the farm operations, and for that reason he abandoned the 1973 crop. The trial court observed it was hard for him to comprehend why plaintiff could not have borrowed on the strength of his sizeable inheritance; how he could have abandoned the 1973 crop but then replant in 1974; and how he could have let the entire crop go when by the simple expedient of drawing on the estate, of which he was a coadministrator, he could have saved it. The trial court further stated it seemed incredible to him that plaintiff ran out of capital the day of the hearing for the appointment of a receiver. It was on the basis of these findings the trial court determined plaintiff had deliberately abandoned the growing crops. The court held Stewart liable for abandoning the crops and permitted the cross-petitioners, the other three brothers, to recover three-fourths of the damages. We cannot say the trial court was in error in doing so.

The judgment is affirmed.

AFFIRMED.

ALLIANCE TRACTOR & IMPLEMENT COMPANY, A CORPORATION DOING BUSINESS AS CROWN MANUFACTURING COMPANY, APPELLANT, V. LUKENS TOOL & DIE COMPANY, A CORPORATION, APPELLEE.

260 N. W. 2d 193

Filed November 30, 1977. No. 41148.

1. **New Trial.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
2. **New Trial: Courts.** The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion.
3. **New Trial: Appeal and Error.** Whether the decision was to grant a new trial or deny one, the issues in the Supreme Court are whether the alleged error or errors appear in the record and were called to the attention of the trial court by the motion; and whether they constitute prejudicial error to the party complaining.
4. **Instructions: Damages.** It is the duty of the trial court to instruct the jury on the proper basis and measure of damages.

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

Wright & Simmons, for appellant.

Nichols, Meister & Winner, for appellee.

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

MCCOWN, J.

This appeal involves an action for damages for breach of warranties contained in a contract to manufacture, sell, and deliver a machine for the manufacture of hayrake teeth. The jury returned a verdict for the plaintiff-buyer in the sum of $34,831.32. The District Court granted defendant's motion for new trial and the plaintiff has appealed.

This is the second appearance of this case in this court. The factual background is set out in Alliance Tractor & Implement Co. v. Lukens Tool & Die Co., 194 Neb. 473, 233 N. W. 2d 299. Originally the action was for specific performance of the contract but was

amended at trial to an action for damages for breach of contract based on breach of warranties. The initial case was tried to the court without a jury. The trial court found that the defendant had substantially performed the contract, and that there was no breach of warranty, and entered judgment against the plaintiff and in favor of the defendant for the balance due on the contract, including modifications. The plaintiff appealed that judgment to this court. This court determined that the defendant had not substantially performed the contract and that, instead, the evidence established a breach of the warranties of the contract as to quality of teeth produced and rate of production. This court also held that the plaintiff had not accepted the machine as being in compliance with the warranties and that plaintiff had not waived the strict conditions of the warranties. This court then reversed the judgment and remanded the cause for a new trial.

Upon remand, on motion of the plaintiff for summary judgment, the District Court entered a partial summary judgment against the defendant on the issue of liability for breach of the warranties in the contract and set the case for trial on the issue of damages. The issue of damages was tried to a jury and the jury returned a verdict for the plaintiff in the sum of $34,831.32. Defendant filed a motion for new trial. The grounds for the motion included error as to the proper measure of damages, errors in admission of evidence as to improper matters of damage, and errors in instructions as to the proper measure of damages. The court granted the defendant's motion for new trial without stating specific grounds for that action. This appeal followed.

Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. The ruling of the District Court on a motion for new trial is subject to review in this court. Whether the decision was to grant a new trial

or deny one, the questions before this court are: Did the alleged error or errors appear in the record; were they called to the attention of the trial court by the motion; and do they constitute prejudicial error to the party complaining? The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion. Roush v. Nebraska P. P. Dist., 189 Neb. 785, 205 N. W. 2d 519.

This case is governed by the provisions of the Uniform Commercial Code. Section 2-601, U. C. C., provides that if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may either reject or accept the goods.

Section 2-602, U. C. C., provides that rejection of goods must be within a reasonable time after their delivery or tender, unless the buyer effectively and seasonably notifies the seller. After rejection, any exercise of ownership by the buyer is wrongful as against the seller.

Section 2-606, U. C. C., provides in part that after a reasonable opportunity to inspect the goods, acceptance of the goods occurs when the buyer signifies to the seller that the goods are conforming, or that he will take or retain them in spite of their nonconformity, or fails to make an effective rejection.

Section 2-607, U. C. C., provides that acceptance of goods by the buyer precludes rejection of the goods accepted, and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured, but acceptance does not of itself impair any other remedy of the buyer for nonconformity.

Section 2-714, U. C. C., provides that the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, un-

less special circumstances show proximate damages of a different amount. That section also provides that in a proper case incidental and consequential damages may also be recovered.

The evidence in this case establishes that from the time the machine was delivered and installed in April 1972, the plaintiff asserted its right to ownership, possession, and control of the machine. Although initial retention of the machine was on the assumption that any nonconformity with the warranties would be seasonably cured, it is clear that the plaintiff took and retained the machine in spite of its nonconformity at some time before the date of the first trial in May 1974. The plaintiff filed a replevin action and recovered possession of some of the equipment from the defendant in October 1973. By November 1973, plaintiff's pleading in this case establishes that it had taken and held possession of the machine; that it was still nonconforming; and that plaintiff had not made or attempted to make an effective rejection of the nonconforming machine. There was an acceptance of the machine in spite of its nonconformity, and that acceptance occurred at some point prior to the first trial in May 1974, but the jury was not instructed to determine any date or fact as to acceptance of nonconforming goods. The jury was not instructed as to what constituted acceptance of nonconforming goods, nor that the measure of damages for breach of warranty is the difference *at the time and place of acceptance* between the value of the goods accepted and the value they would have had if they had been as warranted. Instead, the jury was instructed that the difference in market value of the equipment should be determined based upon the contract delivery date of December 1, 1971, or the date to which that delivery date was waived.

The jury was also instructed that only expenses and damages incurred after the delivery date could be recovered by plaintiff. Plaintiff's evidence of

damage extended from December 1, 1971, to April 15, 1974, the approximate time of the first trial, and the jury apparently accepted it. After acceptance of nonconforming goods, the measure of damages is not altered by a delay in filing suit or a delay of trial. The measure of damages for breach of warranty depends on the date of acceptance of the nonconforming goods and not upon the date of trial.

The plaintiff introduced evidence that the reasonable rental value of the building space set aside for the installation and operation of the machine was $237.50 per month. That amount was claimed for a period of 29 months from December 1, 1971, to April 30, 1975. The space required for the operation of the machine was approximately half of the space in the building. The building was leased to the plaintiff under a long-term lease, and plaintiff paid rent of $75 per month for the entire building. The jury was not instructed as to the proper measure of damage on those facts. It is, of course, the duty of the trial court to instruct the jury on the proper basis and measure of damages. Main v. Sorgenfrei, 174 Neb. 523, 118 N. W. 2d 648; Duplex Manuf. Co. v. Atlas Leasing Corp., 180 Neb. 851, 146 N. W. 2d 205. Under the circumstances present here there were sufficient grounds to support the action of the District Court in granting a new trial and the court did not abuse its discretion in doing so.

The defendant also complains that plaintiff's counsel repeatedly referred to the former opinion of this court in the presence of the jury and that such action was prejudicial to the defendant. Hopefully it will not be necessary for counsel on either side to refer to either the former or the present opinion of this court in the presence of the jury upon any retrial of the case.

The action of the District Court is granting the motion for new trial was correct and is affirmed.

AFFIRMED.

DON J. MCMURRAY CO., A CORPORATION, APPELLANT, V. BENJAMIN D. WIESMAN, ALSO KNOWN AS B. D. WIESMAN, APPELLEE.

260 N. W. 2d 196

Filed November 30, 1977. No. 41198.

1. **Contracts: Evidence.** The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence, or on a choice among reasonable inferences from extrinsic evidence.
2. **Contracts: Intent.** When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties to it are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.
3. **Contracts: Brokers.** The liability of a proposed borrower to a mortgage broker for securing a loan commitment in the absence of a special agreement to the contrary depends upon his production of a customer who is able, ready, and willing to make the desired loan upon terms satisfactory to the principal.
4. **Contracts: Fees.** In the absence of an express stipulation to the contrary, the right to a commission is not dependent on the consummation of a loan.
5. **Contracts: Brokers: Fees.** The unjustified failure or refusal of the principal to complete a transaction does not ordinarily defeat the right of the broker to his commission as called for by the contract.
6. **Contracts: Evidence.** If an integrated contract is clear and unambiguous there is no need, nor is it permissible, to consider extrinsic evidence for the purpose of contradicting or varying the terms of a written contract.
7. **Contracts: Brokers: Fees.** If the actual closing of the loan is a contractual condition of the broker's right to a fee, then the failure to close forecloses the right to a fee.

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

Carl F. Nielsen of Morsman, Fike, Davis & Polack, for appellant.

James F. Kasher of Brady, Kasher & Pavel, for appellee.

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

CLINTON, J.

This is an action by plaintiff Don J. McMurray Co., a mortgage broker, upon a written contract to recover from the defendant, Benjamin D. Wiesman, a brokerage fee claimed to have been earned by having secured, on behalf of W-F Leasing, Inc., a commitment from Travelers Insurance Company for a long-term loan to finance a real estate development known as the Roman Plaza project, then in the process of construction. The contract in question was executed by W-F Leasing, Inc., by Benjamin D. Wiesman, president. A principal issue in the trial court was whether the fee had been earned and this issue involved interpretation of the contract. The plaintiff sought recovery from Wiesman personally on the theories that it was the intention of the parties that defendant be personally obligated, and, alternately, that W-F Leasing, Inc., was defendant's alter ego and that the corporate veil should be pierced.

A jury was waived and the matter tried before the District Judge who rendered judgment for the defendant. The plaintiff appeals to this court, making several assignments of error which may be consolidated in the following form: (1) The trial judge erred in interpreting the written contract between the parties to require plaintiff to do something more than just secure the loan commitment. (2) The trial judge erred in finding that the defendant was not personally liable on the contract and that the corporate veil should not be pierced.

The contract in question was contained in a letter agreement prepared by the plaintiff and addressed to the defendant individually. The letter agreement, in addition to setting forth the terms and conditions of a proposed loan to W-F Leasing, Inc., contained the following:

"5. The loan would be made to W-F Leasing, Inc., a Nebraska Corporation. There would be no personal guaranty required. . . .

"14. A 2% Good Faith Fee in the amount of $18,000.00 payable to Don J. McMurray Co. is enclosed with the application. If a commitment is issued based substantially in accordance with the terms and conditions outlined in this application, this check would be cashed by the Don J. McMurray Co. and you would be given full credit for this amount at the time of final loan closing as the 2% fee which is our charge for the handling of the loan. If a commitment is not issued based substantially in accordance with the above terms and conditions, then this check would be returned to you and there would be no fee due or payable to Don J. McMurray Co. However, if a commitment is issued on terms and conditions different than set forth in this application, but still acceptable by you, then a fee in the amount of 2% of the loan amount would be due and payable to the Don J. McMurray Co. on the same basis as outlined above." It contained the following form of acceptance, prepared by plaintiff, which defendant executed by affixing the date and signing as president so that the completed acceptance was as follows:

"W-F LEASING, INC.

Date: 11-20-74 Accepted: /s/ Benjamin F. Wiesman, President

B. D. Wiesman President"

The evidence shows that, subsequent to the execution of the contract, the plaintiff secured a loan commitment from Travelers Insurance Company which, although containing some conditions different from that in the brokerage contract, was nonetheless accepted by W-F Leasing, Inc., by Benjamin F. Wiesman, president. The loan, however, was never consummated because the period of the commitment expired without W-F Leasing, Inc., having secured execution of a lease by the Goodyear company covering one of the properties involved in the development, this being one of the terms of the commitment. Defendant later secured a commitment and loan from another lender for the same project. The

fee deposit called for by the contract had not been made. Plaintiff demanded payment from defendant for the brokerage fee. Defendant refused to pay and this action was begun.

The trial court interpreted paragraph 14 to require that something more than the securing of a loan commitment was required by the terms of the agreement and that, apparently because the loan was not consummated, the contract had not been fully performed, therefore the fee had not been earned. It also held that the corporate veil should not be pierced and the defendant should not be personally liable. It further found that the evidence would not support a finding that it was the intention of the parties to the contract that the defendant be held personally liable for the brokerage fee. The court said in part: "There is no basis in the evidence to support a finding that it was the intention of plaintiff and defendant that defendant would be personally liable for the fee. The language of the contract indicates just the opposite. All parties concerned with the negotiation of the contract were aware that the proposed interest rate would be usurious if it were required to be paid by an individual. If the parties had intended to provide that this defendant was to be individually liable for the fee, it would have been simple to say so in writing.

"The involvement of a corporate obligor was a benefit to plaintiff - a sine qua non to the execution of the contract. In such a situation there is no justification for 'piercing the corporate veil.' "

Our first inquiry must be, what are the applicable standards by which this court reviews the judgment of the District Court. They are as follows: The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. Anderson v. Blondo Plaza, Inc., 186 Neb.

682, 186 N. W. 2d 114; Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562; Knight Bros., Inc. v. State, 189 Neb. 64, 199 N. W. 2d 720. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. Nebraska Im-Pruv-All, Inc. v. Sass, 197 Neb. 261, 247 N. W. 2d 924; Grantham v. General Tel. Co., 191 Neb. 21, 213 N. W. 2d 439. If, therefore, the interpretation of the agreement properly depended upon the consideration of extrinsic evidence, we are bound by the trial judge's determination unless it was clearly wrong. On the other hand, if no factual issue is involved we are free to determine as a matter of law the meaning of the contractual provision in question.

In general it may be said that liability of a proposed borrower to a mortgage broker for securing a loan commitment is governed by the same principles which apply in determining the liability of a seller to a real estate agent for the commission earned by having produced a buyer ready, willing, and able to purchase the listed property, i.e., in the absence of a special agreement to the contrary, the right of a broker to a commission, where the deal he is authorized to negotiate is not consummated, depends upon his production of a customer who is able, ready, and willing to make the desired loan upon terms satisfactory to the principal. 12 C. J. S., Brokers, § 85a, p. 187; 12 Am. Jur. 2d, Brokers, § 194, p. 936; Peet v. Sherwood, 43 Minn. 447, 45 N. W. 859. An implied condition of the contract of employment is (there being no express stipulation concerning the matter) that the borrower has the ability and will tender good title to the security for the loan. Peet v. Sherwood, *supra*. In the absence of an express stipulation to the contrary the right to the commission is not dependent upon the consummation of the loan. 12 C. J. S., Brokers, § 85a, p. 187; Peet v. Sherwood,

supra. A broker does not, in the absence of a contractual provision providing otherwise, lose his right to an earned commission because the loan is not consummated on account of the unjustified failure or refusal of the principal to complete the transaction. 12 C. J. S., Brokers, § 95, p. 221; Wisnieski v. Coufal, 188 Neb. 200, 195 N. W. 2d 750.

The plaintiff's position is most easily explained by quoting from its brief: "The above paragraph [14] provides for three separate contingencies. The first contingency concerns the situation where a commitment is issued substantially in accordance with the terms and conditions of the application. The second contingency is when a commitment is not issued based substantially in accordance with the terms and conditions of the application. The third concerns a situation where a commitment is issued on terms and conditions different than provided for in the application but still acceptable to the defendant.

"The first contingency without question provides that the check which was to accompany the loan application was to be cashed when the commitment was issued to pay the plaintiff's fee for securing the commitment and that a credit for the fee would be given at the time of loan closing. The second contingency goes on to provide that the check would be returned to the borrower if a commitment were not issued in substantial accordance with the terms and provisions of the application. It is important to note that the latter provision makes no requirement for the return of the check other than the failure of the issuance of a commitment in accordance with the original terms of the application. There is no mention of any return of the check or reimbursement of proceeds in the event that a loan is not consummated. The third contingency simply provides that if a commitment is issued containing terms different from those contained in the application, but still acceptable to the defendant, a 2% fee is due and pay-

able on the same basis as provided under contingency No. 1 (i.e.) for the plaintiff's fee for obtaining the commitment and the payment of which fee would be given as a credit at the closing of the loan.

"The above paragraph as well as the entire application, is complete and unambiguous. It provides for the circumstances under which a fee is to be assessed, the circumstances when a fee is not to be assessed, the specific dollar amount of the fee in the event that a commitment was issued substantially in accordance with the application, the percentage amount of the fee if a commitment were issued on other terms than specified in the application but still accepted by the defendant, the time that the fee is due and payable, and a provision for crediting of the payment at the time of loan closing. The addition of any other requirement or condition of an actual loan closing for the plaintiff to be entitled to its fee is simply an erroneous and uncalled for construction of the clear language and intent of the parties. There are no conditions or requirements for the earning of plaintiff's fee, other than the issuance of a commitment substantially in accordance with the terms and provisions of the application, or the issuance of a commitment having other terms, but still accepted by the defendant. The fact that a credit was to be given at the closing only indicates more fully that the fee was to be earned at the time of acceptance of the commitment and not upon the closing or consummation of the loan. If there were a requirement for an actual closing of the loan before the plaintiff's fee was to be due and payable, there would certainly not be any necessity of having separate provisions for the three contingencies referred to above."

The above argument is a cogent one. If, as the plaintiff contends, paragraph 14 is clear and unambiguous, there is no need, nor is it permissible, to consider extrinsic evidence for the purpose of contradicting or varying the terms of the contract.

Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132; Traudt v. Nebraska P. P. Dist., 197 Neb. 765, 251 N. W. 2d 148. We believe there exists an ambiguity in the contract. The agreement recites, "you would be given full credit for this amount at the time of the final loan closing *as the 2% fee which is our charge for the handling of the loan.*" (Emphasis supplied.) If the words "securing the commitment" were substituted for the words "handling of the loan," no possible question could be raised as to the meaning of the contract. The plaintiff would clearly have earned its commission when Traveler's commitment was accepted by W-F Leasing, Inc. It is apparent, however, that no "loan" is made unless the transaction is consummated. It can be argued, of course, that the language mentioned is simply a recital of what the parties contemplate, assuming a loan commitment is made and accepted, i.e., that the loan will in fact be made and the broker will assist in the closing. This is, of course, what is ordinarily contemplated in the usual real estate sales transaction under a listing agreement. Yet if the transaction is not consummated because of some unjustified failure or refusal of the seller to perform, the broker has nonetheless earned his commission. On the other hand, if the actual closing of the transaction is a condition of the broker's right to the fee, then the failure to consummate forecloses the right to a fee. See Cornett v. Nathan, 196 Neb. 277, 242 N. W. 2d 855.

Both parties introduced extrinsic evidence in this case. Much of it relates to the question of whether it was intended that defendant be personally liable for the broker's fee and the question of whether the facts and circumstances require that (assuming the fee was earned) defendant be held personally liable for the corporate debt. Some of the evidence, however, does relate to the question of whether the

parties intended that payment of the fee was contingent upon the closing of the loan.

The extrinsic evidence, received without objection, clearly shows that before the contract was entered into the plaintiff knew that legal title to the real estate, then being developed, was not held by W-F Leasing, Inc., but by defendant; and that in the proposed lease with Goodyear defendant was named as lessor. It may be inferred that when the contract was made, plaintiff knew there was a possibility that even if the commitment was secured the loan transaction might never be consummated. It may be further inferred that it knew W-F Leasing, Inc., had no assets and had been established only for the purpose of later taking title to the project when the permanent financing contemplated by the commitment was finally obtained. The very terms of paragraph 14 show that the plaintiff knew that any commitment finally made and accepted might contain conditions different from those contained in the letter contract. Such, in fact, turned out to be the case. There is the additional fact that the plaintiff waived the fee deposit called for by paragraph 14. Despite this knowledge, the plaintiff nonetheless accepted in form the obligation of W-F Leasing, Inc., to pay the fee, when it might easily have required the personal promise of defendant to pay. All this tends to shed light on the meaning of the term "our charge for the handling of the loan." The language of an ambiguous contract prepared by one party is generally to be given such consideration as the other party would be fairly justified in giving it. Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295.

The extrinsic evidence, together with the terms of the contract, justified the trial judge's interpretation of paragraph 14. We cannot say on the record that his interpretation is clearly wrong.

One other matter merits discussion. If the extrin-

sic evidence required a finding that W-F Leasing, Inc., or defendant, was acting in bad faith and caused a delay in the execution of the lease with Goodyear in order that the Travelers' commitment would expire so that defendant or his corporation could obtain another commitment upon perhaps more favorable terms, then failure of performance could be attributed to him or it and he might nonetheless (assuming the corporate entity should be disregarded) be liable because the failure of performance was caused by the principal. Wisnieski v. Coufal, *supra*. However, the evidence does not require such a finding of bad faith, but on the other hand supports a finding that the delay was caused only by good faith efforts in negotiation of certain terms of the Goodyear lease.

The evidence, which we do not recite, fully justifies the finding of the court that the parties did not, subsequent to the execution of the written agreement, orally modify the contract to make defendant personally responsible.

Since the trial court's interpretation of the contract was justified from the contractual terms and the inferences from the extrinsic evidence, it is unnecessary for us to consider whether the circumstances would justify disregarding the corporate entity.

AFFIRMED.

BOSLAUGH, J., dissenting.

In my opinion the agreement was not ambiguous and the plaintiff's fee was earned when the commitment was accepted.

SPENCER, J., joins in this dissent.

ERVAIN J. FRIEHE, APPELLEE, V. STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT.

260 N. W. 2d 188

Filed November 30, 1977. No. 41222.

1. **School Lands and Funds: Crops.** A lessee of school land may recover the value of fall-seeded grain crops as of the date of the expiration of the lease. In determining the value of such crops, the appraisers should consider all the factors which would normally enter into the determination of the value of a growing crop and are not limited to the cost of putting in the crop and fertilizing it.
2. **Judgments: Interest.** Prejudgment interest may be allowed only on claims where the amount to be recovered may be computed without reliance upon opinion or discretion.

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

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

Ronald D. Mousel of Mousel & Burger and Jill B. Nagy, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding to determine the value of the interest of the lessee in 203.3 acres of growing wheat on a school land lease. The appraisers appointed by the county judge fixed the value of the wheat at $21,133.03. Upon appeal to the District Court the jury fixed the value of the wheat at $16,223. To this amount the District Court added interest at the rate of 6 percent per annum from December 31, 1973, the date of expiration of the lease.

The defendant, State of Nebraska, Board of Educational Lands and Funds, has appealed and contends the trial court erred in permitting the jury to consider factors other than seed-bed preparation, fertilization, seed, and seeding in determining the

value of the wheat and in allowing interest from the date of the expiration of the lease.

The State relies on section 72-240.18 (2), R. R. S. 1943, which provides: "In the case of growing crops the appraisers shall assess the value of the crop as of the date of expiration of the lease. The appraisers shall consider in the case of fall-seeded grain crops the cost of seed-bed preparation, fertilization, seed and seeding." The State argues that in determining the value of fall-seeded grain crops, such as the wheat involved here, only the cost of seed-bed preparation, fertilization, seed, and seeding may be considered.

The State argues that the statute should be interpreted strictly because it is in derogation of the common law and that the legislative history indicates the recovery should be limited to the items mentioned in section 72-240.18 (2), R. R. S. 1943. L. B. 704, Laws 1967, c. 467, p. 1452, when introduced, did provide that the appraisers might consider the value of the potential yield of growing crops as shown by past records of growing crops discounted by the time to maturity, risks of destruction and deterioration, and the costs of harvesting and caring for the crops. This language was stricken when the committee substituted an entirely new bill, of which section 9 became section 72-240.18, R. R. S. 1943.

We do not find the State's arguments persuasive. The argument ignores the first sentence of the subsection which says that the appraisers shall determine the "value" of the growing crop. The argument would amount to substituting "cost" instead of value as the measure of the lessee's interest. The statute does not say that the appraisers shall consider only the cost of putting in the crop and fertilizing it.

In Banks v. State, 181 Neb. 106, 147 N. W. 2d 132, we noted there had been an uninterrupted legislative policy for almost 50 years to compensate lessees at

the expiration of their lease for the improvements on school lands. We also noted that the Legislature had encouraged good husbandry and continuity in farming operations. The statute involved in this case, which was enacted the following year, did not change that policy.

The lease involved here had been on a year-to-year basis since December 31, 1969. In the Banks case we noted that in the case of fall-seeded grain crops, a calendar year unit serves no functional purpose in a lease unless the former tenant retains an interest in the growing crop. Under the present statute the lessee has the right to elect to harvest any fall-seeded growing grain crops in lieu of compensation for them. § 72-240.13, R. R. S. 1943. Instead of restricting the rights of the lessee the statute now allows the lessee to elect to take the value of the growing crops as of the date of the expiration of the lease or the entire value of the crops by harvesting them.

The State's second assignment of error relates to prejudgment interest which the trial court allowed from the date of the expiration of the lease. Prejudgment interest may be allowed only on claims where the amount to be recovered may be computed without reliance upon opinion or discretion. Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204.

The value of the growing crops in this case could not be determined except from opinion testimony by expert witnesses. The claim was unliquidated and the plaintiff was not entitled to recover prejudgment interest.

The judgment of the District Court is modified by deleting the provision for interest at the rate of 6 percent per annum from December 31, 1973. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

RETIRED CITY CIVILIAN EMPLOYEES CLUB OF THE CITY OF OMAHA, A VOLUNTARY ASSOCIATION, ET AL., APPELLANTS, V. THE CITY OF OMAHA EMPLOYEES RETIREMENT SYSTEM ET AL., APPELLEES.

260 N. W. 2d 472

Filed December 7, 1977. No. 41110.

1. **Statutes: Intent.** A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
2. **Public Officers and Employees: Pensions.** Where a pension forms an inducement to an individual to enter and remain in the service, the pension is a part of the compensation paid for those services. If no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state.
3. **Constitutional Law: Municipal Corporations.** Under the provisions of Article XI, section 2, Constitution of Nebraska, a home rule charter must be consistent with and subject to the Constitution and laws of this state.

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

David A. Jacobson, Bernard E. Vinardi, Christine Smith, and Gary R. Batenhorst, for appellants.

Herbert M. Fitle, Thomas J. Young, and Patrick W. Kennison, for appellees.

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

SPENCER, J.

This is a declaratory judgment action brought by Retired City Civilian Employees Club of the City of Omaha, and Catherine Thompson as plaintiffs, against The City of Omaha Employees Retirement System, its board of trustees, the City of Omaha, its mayor, and the members of the city council of the City of Omaha. It seeks to have section 7.24.129 of the Omaha municipal code interpreted to apply retroactively to surviving spouses of retired civilian employees. The District Court sustained a demurrer

to plaintiffs' second amended petition and dismissed the action. We affirm.

On June 20, 1972, the city council of the City of Omaha passed ordinance No. 26389, amending Title 7, chapter 24 of the Omaha municipal code. This was done by section 15 of the amending ordinance, which is as follows:

"Section 15. That Title 7 of the Omaha Municipal Code be amended by adding thereto a new Section numbered 7.24.129, entitled 'WIDOW'S, WIDOWER'S, AND CHILDREN'S PENSIONS', reading as follows:

" '7.24.129 *Widow's, Widower's and Children's Pensions.* Upon the death of a member who has retired under the provisions of this Chapter, the surviving spouse to whom the member has been married for at least one year immediately prior to and at the date of death, shall be entitled to receive a monthly pension benefit in an amount equal to fifty per cent (50%) of the deceased member's monthly pension. Such monthly pension benefit shall continue until the death or remarriage of the surviving spouse, whichever event occurs first.

" 'If a member who has retired under the provisions of this Chapter, dies leaving no surviving spouse, or upon the subsequent death of the surviving spouse, or where the surviving spouse is not entitled to pension benefits under the provisions of this Section, said deceased member's natural or legally adopted child or children shall be entitled to receive a monthly pension benefit in an amount equal to fifty per cent (50%) of the deceased member's monthly pension until attainment of age 18 or marriage, whichever event occurs first. Such monthly pension benefit, in the case of more than one child, shall be apportioned equally among said children.

" 'If a member dies after attaining five (5) years of membership service credit, the surviving spouse to whom the member has been married for at least

one (1) year immediately prior to and at date of death, shall be entitled to receive a monthly pension benefit in an amount equal to fifty per cent (50%) of the deceased member's pension credits earned to date of death. Such monthly pension benefits shall continue until death or remarriage, whichever event occurs first.

" 'If a member dies after attaining five (5) years of membership service credit and leaves no surviving spouse, or upon the subsequent death of the surviving spouse, or where the surviving spouse is not entitled to benefits under the provisions of this Section, the deceased member's natural or legally adopted child or children shall be entitled to receive a monthly pension benefit until age 18 or marriage, whichever event occurs first, in an amount equal to fifty per cent (50%) of the deceased member's pension credits earned to date of death. Such monthly pension benefit, in the case of more than one child, shall be apportioned equally among said children.' "

Section 20 of the amending ordinance provided as follows: "This ordinance shall take effect and be in full force on and after July 1, 1972."

Prior to the passage of ordinance No. 26389 no pension benefits were available to widows, widowers, and children of retired civilian employees. The ordinance created a new benefit which was theretofore nonexistent. Plaintiffs seek a declaration that the surviving spouses of civilian employees who retired prior to July 1, 1972, are entitled to pension benefits under the ordinance. Catherine Thompson is the surviving spouse of a retired civilian employee who retired previous to July 1, 1972. Defendants refuse to apply the act retroactively.

The trial court sustained defendants' demurrer to plaintiffs' second amended petition. This is premised first on the grounds the petition does not state facts sufficient to constitute a cause of action against the defendants, and second, the relief sought

amounts to a gratuity and is forbidden by Article III, section 19, and Article XIII, section 3, of the Constitution of Nebraska.

Plaintiffs, appellants herein, argue that the wording of section 7.24.129 "A member who has retired under the provisions of this chapter," applies to all civilian employees regardless of whether the employees retired before or after July 1, 1972. Appellants' spouses all retired prior to the time section 7.24.129 became a part of the chapter. For appellants to prevail, section 7.24.129 must relate back to the time of the retirement of their spouses, which in each instance would be before July 1, 1972.

Our law is well settled. An amendment to a legislative act does not act retroactively unless that intent is clearly expressed. As we said in Brown v. Sullivan, 195 Neb. 729, 240 N. W. 2d 51 (1976): "A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." That intent is not clearly disclosed in section 7.24.129. Even if we were to hold otherwise there could be no recovery herein.

The retired employees rendered the city no service after the passage of the amendment. In State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196 (1911), a pension case involving the City of Lincoln, we find the following language: "In applying these limitations to the instant case, it may be conceded that the pension forms an inducement to the individual to enter and remain in the service of the fire department, and that the pension in a sense is part of the compensation paid for those services. * * * In this aspect of the case, if no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state."

In Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723 (1956), in interpreting a legislative act involving ju-

dicial retirement we stated as follows: "If the services are rendered and terminated before the grant is made the benefits awarded are not compensation but are a gratuity." Also, "It could hardly be made clearer or more positive that retirement benefits are either earned compensation for services rendered after the grant of them and that they are therefore valid or that they are a gratuity and not a part of compensation and therefore invalid."

Article III, section 19, Constitution of Nebraska, states in part: "The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered * * *." Appellants argue that the City of Omaha operates under a home rule charter, and that it possesses powers in strictly local affairs that are not subject to state interference.

In Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, the court stated: "The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises."

Appellants overlook the fact, however, that under the provisions of Article XI, section 2, Constitution of Nebraska, a home rule charter must be consistent

with and subject to the Constitution and laws of this state. City of Millard v. City of Omaha, 185 Neb. 617, 177 N. W. 2d 576 (1970).

Appellants, by inference, contend that the prohibition contained in Article III, section 19, Constitution of Nebraska, applies only to the state as an entity and has no application to a political subdivision thereof. We do not agree. A similar contention was raised in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269 (1957). While that case involved Article XIII, section 3, of the Constitution of Nebraska, covering loaning the credit of the state, what was said is equally pertinent to Article III, section 19. We there said: "Political subdivisions of the State exist at the will of the State exercised through the Legislature. For us to say that the State may not loan its credit to an individual, association, or corporation, but that it might create a political subdivision and authorize it to do that which the State itself is prohibited from doing would be, to say the least, a very anomalous situation. It would permit the State to do by indirection the very thing it could not directly do, a theory which has been consistently condemned by this court."

We hold the prohibition contained in Article III, section 19, Constitution of Nebraska, applies to the state and to all political subdivisions thereof.

Appellants cite cases from other jurisdictions which hold that an increase in benefits to persons occupying a pensionable status is not to be treated as a payment of extra compensation or allowance as those terms are used in their law. It is not necessary for us to comment on those cases because the issue before this court is not whether retired employees have achieved a pensionable status, nor is the issue whether the employee or his spouse is entitled to an increase in pension benefits. The issue is whether a spouse of a civilian employee, which spouse had no pensionable status, is entitled to a

new benefit enacted and granted after the employee retired from his employment. The cases cited by the appellants are not in point on the exact issue presented herein.

While we concede retired civilian employees have a pensionable status, that is not true as to the spouse of those civilian employees who retired before July 1, 1972. This is the classification which applies to the appellants. They are seeking a new benefit which was not in existence before July 1, 1972. We agree with the trial court. Plaintiffs' second amended petition did not state a cause of action. The demurrer was properly sustained. The judgment is affirmed.

AFFIRMED.

AUGUST ROSS, APPELLANT, V. THE GOVERNORS OF THE KNIGHTS OF AK-SAR-BEN ET AL., APPELLEES.

260 N. W. 2d 202

Filed December 7, 1977. No. 41252.

1. **Courts: Judgments: Appeal and Error.** A judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the District Court may be reversed, vacated, or modified by the District Court. § 25-1901, R. R. S. 1943.
2. **Courts: Taxation: Appeal and Error.** Appeals may be taken from the action of the county board of equalization to the District Court in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. § 77-1510, R. R. S. 1943.
3. **Taxation: Statutes: Appeal and Error.** Sections 77-1510 and 77-1511, R. R. S. 1943, are no longer applicable to the appeal from the granting of exemptions from taxation by a county board of equalization. The only person entitled to appeal from a decision of the county board of equalization on a tax exemption determination is the applicant for the exemption.
4. **Appeal and Error: Records.** A petition in error is limited to a review of the transcript and the evidence below as may be contained in the bill of exceptions.
5. **Words and Phrases: Taxation: Appeal and Error.** A resident

taxpayer of a city and county where property is declared exempt by the county board of equalization is a sufficiently aggrieved party to file a petition in error.

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

Bruce G. Mason and August Ross, for appellant.

R. A. Skochdopole, C. E. Heaney, Jr., and Jon A. Elliott of Kennedy, Holland, DeLacy & Svoboda, Donald L. Knowles, and Rockford G. Meyer, for appellees.

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

WHITE, C. THOMAS, J.

The Governors of the Knights of Ak-Sar-Ben and Ak-Sar-Ben Exposition applied for exemption from property tax. On the recommendation of the county assessor, the board of equalization of Douglas County granted the exemption. The appellant, a citizen and taxpayer of Douglas County, filed a petition in error in the District Court alleging that the commercial uses of the real estate for profit disallowed an exemption. We note here that there is no bill of exceptions. We have before us the transcript showing the proceedings had before the board of equalization of Douglas County consisting of the applications for exemption, the record of the roll calls, the recommendations of the assessor, and the action of the county board of equalization in granting the exemptions. The District Court dismissed the petition in error finding that the plaintiff below "is not within those who have been given a statutory right of appeal under Sections 77-202.04, 77-202.06 or 77-202.07 (R. R. S., 1943), and is not a person who has a direct interest in or was adversely affected by the acts of the Board of Equalization of Douglas County, Nebraska, and does not have a constitutional right to review by Petition in Error." We affirm the order

of dismissal for reasons that will hereafter be set out.

Section 25-1901, R. R. S. 1943, provides a judgment rendered, or final order made, by any tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the District Court, may be reversed, vacated, or modified by the District Court. Prior to 1903, the sole method of review of the action of the board of equalization in the assessment of property was by petition in error. See Sioux City & Pacific R. R. v. Washington County, 3 Neb. 30. In that case the taxpayer railroad filed two separate actions, one purporting to appeal from the action of the board of equalization of Washington County, the second, a petition in error. The court held that in the absence of statutory authority for an appeal, none existed; the remedy was by way of petition in error. The court reversed the action of the board of equalization and voided the increased assessment for failure of the county board of equalization to give notice to the taxpayer of the proposed raise in valuation.

Chapter 77, article 1, section 124, of the Compiled Statutes of 1903, contained, in part, the identical language of the present section 77-1510, R. R. S. 1943: "Appeals may be taken from the action of the County Board of Equalization, to the district court within twenty days (now 45 days) after its adjournment, in the same manner as appeals are now taken from the action of the County Board in the allowance or disallowance of claims against the county."

In State ex rel. Mickey v. Drexel, 75 Neb. 751, 107 N. W. 110, the relator, a citizen and taxpayer of the state, applied to the court for a writ of mandamus to compel the respondent, the county clerk of Douglas County, "to insert in and extend upon the tax roll and list of Douglas County, Nebraska, for taxation the assessed value of the personal properties consisting of the reserve funds of the Sovereign Camp of

the Woodmen of the World, a fraternal-beneficiary association, commonly known as the 'Woodmen of the World.' " It was contended that the funds of the Woodmen of the World were exempt from taxation. The court held that: "There is no doubt of the right of one taxpayer to appeal from the assessment of another"; that the remedy of the relator was by appeal and not by mandamus since mandamus would not properly lie where there is adequate remedy by way of appeal; and that "* * * it is the duty of the county board of equalization to determine when property which has been omitted is taxable, and if it is found to be taxable to place it upon the rolls for that purpose, and to assess it as the assessor should have done. Any taxpayer, the amount of whose taxes may be affected by the action of the county board, may appeal from its decision as to the liability of the property of another to taxation, and upon such appeal the court must determine whether the property in question is liable to assessment." The court then found that there was a sufficient interest under the terms of the statute to permit an appeal by a taxpayer complaining about the exemption from taxation granted to another by the board of equalization.

However, this court held in Bemis v. Board of Equalization of Douglas County, 197 Neb. 175, 247 N. W. 2d 447, that the appeal provisions of sections 77-1510 and 77-1511, R. R. S. 1943, are no longer applicable to the appeal from the granting of exemptions from taxation by a county board of equalization, citing sections 77-202.01 through 77-202.07, R. R. S. 1943. The only person entitled to appeal from a decision of the county board of equalization on a tax exemption determination is the applicant for the exemption. However, the Tax Commissioner "has the power to review and reverse the determination made by a county board of equalization. The remedy of the assessor if he feels aggrieved is not to prosecute an ap-

peal but rather to call the ruling to the attention of the Tax Commissioner who may or may not act, depending upon his independent judgment." The passage of the special statute could and did remove the right of appeal in exemption cases from the citizen taxpayer.

The appellees urge that not only does the taxpayer not have standing to appeal but lacks standing to bring a petition in error from a determination of the county board of equalization granting a tax exemption to another. The appellees do not point out any part of sections 77-202.01 et seq., R. R. S. 1943, or any legislative history that buttresses this assertion but cite numerous cases not within the factual context now being considered. The appellant asserts the language previously quoted in State ex rel. Mickey v. Drexel, *supra*: "Any taxpayer, the amount of whose taxes may be affected by the action of the county board, may appeal from its decision as to the liability of the property of another to taxation," states an aggrieved interest that gives standing to the appellant to file a petition in error.

The purpose of the appeal provision was obviously to provide a more complete remedy. A petition in error is limited to review of the transcript and the evidence below, such as may be contained in a bill of exceptions. The District Court on appeal "shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury, *and determine anew all questions raised before the county board of equalization* which relate to the liability of the property to assessment, or to the amount thereof." (Emphasis supplied.) § 77-1511, R. R. S. 1943. No question exists as to the right of the Legislature to disallow appeals by taxpayers in such cases but we are not convinced that it could or did remove the taxpayers' preexisting right to a petition in error. We hold that a resident taxpayer of a city and county where property is declared exempt by the county

board of equalization is a sufficiently aggrieved party to file a petition in error. We disagree with the conclusion of the trial court that petition in error was not available.

However, all that was before the District Court and is now before us is a transcript. The errors assigned in the petition in error would require the review of evidence that is not now before us in the absence of a bill of exceptions. Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N. W. 2d 387. In the absence of a bill of exceptions, this court may only determine whether the pleadings below in the transcript support the judgment entered by the District Court. We have reviewed the petitions, and the recommendations of the assessor, and find that they support the action taken by the board of equalization. We, therefore, on consideration of the matter, determine that the orders of the board of equalization must be affirmed. The parties did not brief and we do not pass upon what, if any, conditions the provisions of sections 77-202.01 et seq., R. R. S. 1943, might attach to the filing of a petition in error in view of the statutorily declared purpose of providing a preferred remedy for the review of determination of exemption applications before county boards of equalization. We specifically express no opinion as to whether such a transcript must show that a request for a review was first made on the state Tax Commissioner as a condition precedent to the filing of a petition in error in the District Court.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

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

260 N. W. 2d 296

Filed December 7, 1977. No. 41291.

1. **Criminal Law: Evidence: Verdicts.** In determining whether the evidence is sufficient to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury, and the verdict of the jury must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Sexual Assault: Rape: Evidence.** Evidence of prior sexual activity between a sexual assault victim and any person other than the defendant may be admitted in evidence under section 28-408.05, R. R. S. 1943, when consent by the victim is at issue, and where it is established that such activity shows a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.
3. **Prosecuting Attorneys: Appeal and Error.** Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
4. **Criminal Law: Venue: Jurisdiction.** If an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of which the victim may have been brought in the prosecution of the offense or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense.
5. **Criminal Law: Right to Counsel: Waiver.** Where a defendant has voluntarily waived his right to counsel at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

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

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

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

BRODKEY, J.

Robert W. Tiff, defendant and appellant herein, was charged in the District Court for Lancaster County with sexual assault in the first degree under section 28-408.03, R. R. S. 1943; and with being an habitual criminal under section 29-2221, R. R. S. 1943. Defendant filed a plea in abatement and moved to dismiss the charges on the ground that the District Court for Lancaster County had no jurisdiction because the alleged sexual assault allegedly took place in Gage, rather than Lancaster, County. The motion was overruled. Defendant pled not guilty, and trial was had before a jury, which found the defendant guilty of sexual assault in the first degree. Defendant's motions to dismiss on the grounds of insufficient evidence and improper venue were overruled. A separate hearing was held pursuant to section 29-2221, R. R. S. 1943, on the habitual criminal charge, and thereafter the defendant was found guilty of being an habitual criminal. Defendant has now appealed to this court, contending that his convictions were not sustained by sufficient, admissible evidence; that the trial court lacked jurisdiction over the defendant; and that certain venue statutes relevant to criminal proceedings are unconstitutional, particularly as applied to the defendant in this case.

The facts relevant to this appeal are as follows. At approximately 8 p.m. on May 2, 1976, the prosecutrix and her roommate, Christi Leader, went to a tavern in Emerald, Nebraska, which is a short distance west of Lincoln. The two women shared an apartment in Lincoln, and Leader drove her automobile to Emerald since the prosecutrix, who was al-

most 20 years old at the time, had never learned to operate a motor vehicle. The tavern was crowded, and the defendant and one Dan Swiler, neither of whom the prosecutrix had previously met, offered to let the two women sit at their table. Leader accepted the invitation, but the prosecutrix only left her purse and jacket at the table, and went to seek out friends and dance. Although there was a dispute at trial as to how often the prosecutrix returned to the table during the course of the evening, the record reflects that any contact she had with the defendant was minimal, and that she spent most of the evening away from the table. There was also a dispute as to whether the prosecutrix was consuming alcoholic beverages or soft drinks, but in any event it does not appear that she was intoxicated, even if it is assumed that the defendant was correct when he stated that he saw the prosecutrix consuming beer. Swiler testified that the defendant had 15 to 16 cans of beer during the evening, but the defendant stated that he had only 7 or 8 cans.

At closing time, about 1 a.m. on May 3, 1976, the prosecutrix returned to the table and told Leader that she wished to go home. The prosecutrix went ahead to Leader's automobile, and shortly thereafter the defendant came with Leader's car keys and told her that he was to drive her home because Leader was going to ride with Swiler. Leader and Swiler drove by and told the defendant to follow them to Leader's and the prosecutrix' apartment in Lincoln. The defendant followed the Swiler car briefly, but lost it, and eventually turned on to a gravel road and drove south.

After traveling for a disputed amount of time, the defendant stopped the car and attempted to kiss the prosecutrix. She stated that she was scared, resisted defendant's advances, asked him to take her home, and attempted to get out of the car three different times, but was prevented from doing so by the

defendant. The defendant acknowledged that the prosecutrix was not accepting any of his advances at the time of the first stop. The defendant then drove farther to the south on country roads, again for a disputed amount of time, and stopped the car for a second time. Although the prosecutrix exhibited confusion when locating the place of the second stop on a map at trial, she placed the car well within the borders of Lancaster County at all times. The defendant testified that the location was near Beatrice, in Gage, rather than Lancaster, County.

The defendant once more attempted to kiss the prosecutrix, and she stated that she resisted and again attempted to get out of the car three times. She testified that the defendant grabbed her left arm at the elbow and said that she "better not try to get out again or else." The prosecutrix acknowledged that the defendant had no weapon, and that he did not specifically threaten to kill her, but stated that she was scared and decided to submit to the defendant because she was afraid of what he would do if she refused. She testified that the defendant removed her clothing and engaged in intercourse, against her will. The defendant admitted that the act of intercourse had taken place, but stated that the prosecutrix consented and willingly assisted in completing the act. He denied that the prosecutrix had attempted to get out of the car or that he had threatened her.

The defendant then drove toward Lincoln, and went through Roca, Nebraska, where the prosecutrix formerly resided. The prosecutrix stated that she attempted to jump out of the car in Roca because she was afraid of what the defendant might do, and she thought that this might be her only chance to escape. The defendant attributed her attempt to leave the car in Roca as being due to her anger over his refusal to drive on highways, as opposed to gravel roads, because of his fear that he

would be picked up for driving while intoxicated. The defendant grabbed the prosecutrix as she attempted to leave the car, but she succeeded in leaving the vehicle, and ran to the residence of people she knew who lived at Roca. One of these people described the prosecutrix as being hysterical and shaken, and she told them that she had been raped. The prosecutrix called her former boyfriend, who came to get her and took her home. Shortly thereafter the alleged rape was reported to the police. Meanwhile, the defendant drove back to Lincoln, left Leader's automobile in a parking lot, stayed with a friend the next day, and then went to Iowa, allegedly to look for work. He stated that he could not and did not return the Leader car because he did not know where Leader lived and did not know her last name, and his attempts to contact Swiler were unsuccessful.

Police officers testified that the prosecutrix was shaken, was crying, and was extremely upset when they responded to the report of the alleged crime. Bruises and scratches were found on the prosecutrix' leg and left arm. One witness stated that she was upset for at least 2 days after the incident.

Defendant sought to impeach the prosecutrix' testimony regarding lack of consent by evidence regarding her sexual experiences prior to the alleged rape in this case. Prior to trial, the prosecutrix stated at the taking of a deposition that she had engaged in sexual intercourse with six men prior to May 3, 1976, although she could not remember the names of three of these men. At the in camera hearing held in this case pursuant to section 28-408.05, R. R. S. 1943, to determine the relevance of evidence of the prosecutrix' past sexual conduct, the proxecutrix stated that she had had relations with three men prior to May 3, 1976. She stated that she had dated each of these three men at least 1 month before having relations with them, and one of them

was a boyfriend whom she had dated for nearly a year. She stated that her testimony at the deposition in regard to six men was inaccurate, and that she had been confused at the time of the deposition. After the in camera hearing, the trial court determined that the previous voluntary sexual activity of the prosecutrix was relevant to the issue of consent. At trial, the prosecutrix reiterated the testimony she had given at the in camera hearing with respect to prior sexual activity with three men. The defendant brought to the attention of the jury the prosecutrix' prior inconsistent statement regarding six men through cross-examination.

The defendant also presented one Hubert Countryman as a witness, who testified that he had dated the prosecutrix and had sexual relations with her, and that on one occasion both he and another man had had a sexual encounter with the prosecutrix at the same time. He also stated that he was known as "Russ" to the prosecutrix. The prosecutrix testified that she had once dated a "Russ," but that she did not have relations with him, and that she never had a sexual encounter with two men at the same time.

The defendant also sought to impeach the prosecutrix by showing that she had given prior inconsistent statements with respect to the last time she had engaged in intercourse prior to the alleged rape. The prosecutrix attributed the inconsistent statements to her confusion at the time she made them. Finally, the defendant sought to impeach the prosecutrix by showing that her testimony there was a full moon on the night of the alleged rape was false. An astronomer testified that the moon on the night in question was nearly a new moon in a crescent shape, and not a full moon.

As previously stated, the jury found the defendant guilty of sexual assault in the first degree, and defendant's motions for a directed verdict and to dismiss were overruled.

At the hearing on the habitual criminal charge, the State introduced in evidence court and prison records showing that the defendant had been twice convicted of a crime, sentenced, and committed to prison for terms of not less than 1 year for each crime. The defendant objected to the admission in evidence of one of these records on the grounds that the record did not show that his guilty plea in the former case was voluntary and that he had effectively waived his right to counsel. A verbatim record of the arraignment at which the guilty plea was accepted in the former case was received in evidence, and the trial court found that the defendant had effectively waived his rights in pleading guilty. The court overruled defendant's objections, and found the defendant to be an habitual criminal.

Defendant first contends that his conviction of sexual assault in the first degree must be reversed because the evidence was insufficient and because the State used perjured testimony to secure that conviction. Defendant argues in his brief that the credibility of the prosecutrix was so severely impeached that his conviction cannot stand "in light of her contradictory, misleading, false and perjured testimony. For the jury to have given any credence to her testimony, it would have had to necessarily disregard the court's instruction on the credibility of witnesses." The defendant also argues that the State was fully aware that the prosecutrix was going to give perjured testimony. The testimony to which defendant refers is primarily that concerning the prosecutrix' prior sexual behavior.

There can be no doubt that the prosecutrix made inconsistent statements at various stages of the proceedings below with respect to her past sexual conduct. It is also true that her testimony that there was a full moon on the night in question was questioned by defendant's expert witness, an astronomer, who stated that there was no full moon on that

night. The inconsistent testimony of the prosecutrix, however, was not necessarily tantamount to perjury. The record in this case does not reflect that there was a knowing use of perjured testimony by the prosecutor, as was the situation in the case on which defendant relies. See United States ex rel. Washington v. Vincent, 525 F. 2d 262 (2d Cir., 1975). The prior inconsistent statements of the prosecutrix and some of her testimony at trial certainly raised an issue as to her credibility, which was presented to the jury, but it is not the province of this court to pass on the credibility of witnesses on appeal. See, State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387 (1977); State v. Ferguson, 188 Neb. 330, 196 N. W. 2d 374 (1972); State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977). Defendant's contention on this issue is without merit.

It is also apparent that the evidence was sufficient to sustain the conviction. 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, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of the jury must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Partee, *supra*. Although, as indicated above, the testimony of the prosecutrix was impeached in certain respects, it cannot be said that it was so implausible or so discredited that a verdict should have been directed in favor of the defendant. The testimony of the prosecutrix was corroborated as to the material facts and circumstances which tend to support it. See State v. Thompson, *supra*. She, for example, reported the incident promptly, there were scratches on her arm and a bruise on her leg, and she was visibly distraught afterwards. The evidence does not establish that she even exhibited an interest in the defendant

at the tavern, and it was not her suggestion that he drive her home. The credibility of the prosecutrix was an issue for the jury, and the evidence was sufficient to present a jury question as to whether the defendant was guilty as charged. State v. Thompson, *supra;* State v. Ferguson, *supra.*

Defendant focuses on the evidence that the prosecutrix was a "promiscuous" woman who had engaged in sexual intercourse approximately 100 times with different men prior to the alleged rape. He contends that the jury should have been instructed that the evidence of the prosecutrix' prior sexual conduct implied the "probability of consent" on her part in this case. See Frank v. State, 150 Neb. 745, 35 N. W. 2d 816 (1949).

Section 28-408.05, R. R. S. 1943, enacted after Frank v. State, *supra,* provides that specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted in evidence in sexual assault cases "unless consent by the victim is at issue, when such evidence may be admitted if it is first established to the court at an in camera hearing that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent." In the present case such evidence was admitted. The trial court instructed the jury that this evidence should be considered "solely for the purposes of determining whether consent was given, and determining the credibility of her testimony relating to force, coercion, or deception used by Defendant in accomplishing his purpose and her claimed resistance thereto."

With the enactment of section 28-408.05, R. R. S. 1943, the Legislature has adopted a stricter rule than was formerly the case regarding the admissibility of evidence of a sexual assault victim's past sexual conduct, and regarding the purpose for which such

evidence may be introduced. That section does not provide that prior sexual activity implies consent on the part of the prosecutrix. Although Frank v. State, *supra,* indicates that evidence of the prosecutrix' prior sexual conduct may be admitted for "the purpose of inferring the probability of consent," it does not hold that the jury should be instructed that such evidence in fact implies consent on the part of the prosecutrix. The jury in this case was instructed in accordance with section 28-408.05, R. R. S. 1943, and was advised that the evidence was admitted for the purposes of determining whether consent was given and whether the prosecutrix' testimony regarding consent was credible. The instruction was adequate, and defendant's contention to the contrary is without merit.

Defendant next contends that various actions on the part of the prosecutor denied him a fair trial. In his closing argument, the prosecutor referred to the defendant as a "drunken, thirty-six year-old man." During the trial, the prosecutor told the prosecutrix he was sorry that she had been placed on trial. The trial court ordered the jury to disregard this remark. Finally, the prosecutor asked the defendant on cross-examination if he had had much time to think about the alleged rape, and the prosecutor stated that "I would think about it if I was in your situation."

Insofar as the prosecutor's remarks during closing argument are concerned, they do not appear to constitute reversible error. This court recently considered analogous remarks in State v. Costello, *ante* p. 43, 256 N. W. 2d 97 (1977), where in an insufficient fund check case the prosecutor referred to the defendant as a "bad check artist" and a "paper hanger." Although this court disapproved such statements, it found that they were neither so inflammatory nor so misleading as to require a mistrial, particularly since there was ample evidence

that the defendant had written an insufficient fund check. The same conclusion is appropriate in the present case. The evidence clearly supported the view that the defendant was very intoxicated on the night in question, and although the prosecutor's reference to the defendant as a drunken man should have been avoided, it was not so prejudicial that a new trial is required. State v. Costello, *supra.*

The other remarks of the prosecutor during the trial also do not warrant a reversal of defendant's conviction. The one remark was stricken from the record, and the other does not appear to have inflamed the jury against the defendant. Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant. See, State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274 (1975); State v. Davis, 185 Neb. 433, 176 N. W. 2d 657 (1970). Under the circumstances of this case, a new trial is not required. State v. Costello, *supra.*

Defendant's contention that the District Court for Lancaster County did not have jurisdiction in this case because the sexual assault allegedly occurred in Gage, rather than Lancaster, County is clearly without merit. Although section 29-1301, R. R. S. 1943, sets forth the general rule that all criminal cases shall be tried in the county where the offense was committed, section 29-1301.01, R. R. S. 1943, provides that if an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of which the victim may have been brought in the prosecution of the offense, or in which an act is done by the accused in promoting or aiding in the commission of the offense. In addition, section 29-1301.02, R. R. S. 1943, provides that when the offense is committed in an automobile, the accused may be tried in any county through which the car

passes in the course of its trip, or in the county in which the trip terminates. The trial court instructed the jury in accordance with the above statutes, and defendant did not object to that instruction.

It is undisputed that the automobile trip in the present case originated and concluded in Lancaster County, and therefore venue was proper under the above statutory provisions, regardless of where the actual sexual assault occurred. See State v. Garza, 191 Neb. 118, 214 N. W. 2d 30 (1974). Defendant's failure to object to the instruction concerning venue prohibits him from now contending the instruction was erroneous. See, State v. Cinema 16, Inc., 197 Neb. 675, 250 N. W. 2d 633 (1977); State v. Lynch, 196 Neb. 372, 243 N. W. 2d 62 (1976). Finally, contrary to defendant's contention, the venue statutes referred to above are not unconstitutionally vague on the ground that they permit a criminal trial of an accused in a different county than the county in which the actual offense was committed. Defendant cites no authority to support this assertion, and there appears to be no precedent supporting the proposition that venue statutes such as those in Nebraska are unconstitutional.

Defendant's final contention is that the evidence was insufficient to sustain his conviction of being an habitual criminal because his plea of guilty resulting in a prior conviction, relied on by the State in the habitual criminal proceedings, was not constitutionally valid. It is undisputed that, in addition to a conviction and sentence for robbery, court and prison records show that the defendant was convicted of the offense of motorcycle theft in 1971 after entering a guilty plea. Defendant contends that the plea was not valid because he did not voluntarily waive his right to counsel, and because he was not advised of all the rights he was waiving by pleading guilty.

The State contends on appeal that the defendant may not collaterally attack a former plea in an ha-

bitual criminal proceeding where he has not attacked it on direct appeal or in a post conviction proceeding. See People v. Hendrick, 52 Mich. App. 201, 217 N. W. 2d 112 (1974). The defendant contends that he may; and that if his plea of guilty in the former case was not voluntary, the conviction entered thereon may not be used against him in an habitual criminal proceeding. See, State v. Harig, 192 Neb. 49, 218 N. W. 2d 884 (1974); Losieau v. Sigler, 406 F. 2d 795 (8th Cir., 1969), cert. den., 396 U. S. 988, 90 S. Ct. 475, 24 L. Ed. 2d 452 (1969). We need not, however, resolve that issue in the present case because a verbatim record of the arraignment at which defendant's plea of guilty was accepted in the prior case was received in evidence at the hearing in this case, and that record conclusively shows that defendant was advised of his rights and that he would be waiving certain rights by pleading guilty. The defendant was specifically advised that he could have a lawyer appointed and that the county would pay for the cost, but he waived his right to an attorney. The information was read in its entirety to the defendant, and he stated that he understood the charges against him, and that he had in fact stolen a motorcycle. A review of the arraignment indicates that the defendant was fully advised of his rights, understood them, and voluntarily waived them, and then pled guilty. The plea in the former case was knowing, voluntary, and intelligent under the standards set forth in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971).

Defendant contends that the prior conviction was invalid because there is no record indicating that at the time of sentencing the trial court renewed its offer of assistance of counsel at the State's expense. In State v. Harig, *supra,* the defendant made the same contention and this court held that if a defendant has voluntarily waived his right to counsel at the arraignment at which a plea of guilty was entered,

the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. Therefore, defendant's contention is without merit. State v. Harig, *supra*.

We have carefully reviewed the record and find no errors. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACINTO OROSCO, APPELLANT.

260 N. W. 2d 303

Filed December 7, 1977. No. 41375.

1. **Motor Vehicles: Statutes: Evidence.** The operation or actual physical control of a motor vehicle, under the provisions of section 39-669.07, R. R. S. 1943, may be established by circumstantial evidence.
2. **Motor Vehicles: Arrest: Blood, Urine, and Breath Tests.** The offering of a preliminary test of the breath under section 39-669.08(3), R. R. S. 1943, is not a condition precedent to the making of a valid arrest "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943.
3. **Motor Vehicles: Arrest: Blood, Urine, and Breath Tests: Statutes.** The authority of an officer to make arrests "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor," § 39-669.08 (2), R. R. S. 1943, depends not upon the terms of the implied consent statute, but exists by virtue of the common law as codified in the statutes of the State of Nebraska, to wit, sections 29-401 and 29-404.02, R. R. S. 1943.
4. **Judgments: Statutes.** A judgment of conviction may be proved by a certified copy therefor. §§ 27-902, 27-1005, R. R. S. 1943.
5. **Judgments: Burden of Proof.** When a defendant collaterally at-

tacks a judgment of conviction, the burden is upon him to show the grounds of the claimed invalidity if it does not show upon the face of the record.

6. **Judgments: Pleas: Sentences.** A conviction founded upon a plea of nolo contendere may be used to support an enhanced sentence.
7. **Statutes: Motor Vehicles: Intoxicating Liquors.** In order that a defendant may be punished as a third offender under section 39-669.07 (3), R. R. S. 1943, it is necessary only that he be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor and it is not necessary that he previously have been charged and punished as a second offender under the provisions of section 39-669.07 (2), R. R. S. 1943.

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 J. Kirk Brown, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury of operating or being in the actual physical control of a motor vehicle while under the influence of alcoholic liquor in violation of the provisions of section 39-669.07, R. R. S. 1943, and of refusing to submit to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his body fluid in violation of the provisions of section 39-669.08 (4), R. R. S. 1943. The conviction under section 39-669.07, R. R. S. 1943, was in the information charged to be a third such offense and following the jury verdict the court found that it was a third offense. The defendant was fined $100, his operator's license was revoked, and he was sentenced to consecutive terms of 60 days confinement in the county jail for violation of section 39-669.08, R. R. S. 1943, and 1 to 3 years imprisonment in the Nebraska Penal and Correc-

tional Complex for violation of section 39-669.07, R. R. S. 1943.

On this appeal he argues four assignments of error: (1) The evidence is insufficient to support a conviction of operating or being in the actual physical control of a vehicle while under the influence of intoxicating liquor. (2) The evidence is insufficient to sustain the conviction for refusal to submit to the chemical test of his body fluids because the defendant was never offered the opportunity to take a preliminary breath test and the offering of such a test, if equipment is available, is a condition precedent to a valid arrest, and since there was no valid arrest there can be no conviction for refusal. (3) The evidence to support the conviction for a third offense of driving while intoxicated is insufficient because (a) the two prior convictions were constitutionally invalid for the reason that the pleas of guilty and nolo contendere entered therein are not shown to have been voluntarily and intelligently made, (b) a conviction founded upon a plea of nolo contendere cannot be used to support an enhanced penalty, and (c) a conviction for the offense of driving while intoxicated, third offense, cannot be supported unless there is shown to have been an earlier charge and conviction specifically for a second offense under the provisions of section 39-669.07 (2), R. R. S. 1943. (4) The District Court abused its discretion in not placing the defendant on probation and in imposing consecutive sentences.

The evidence in the record was sufficient to have permitted the jury to have found the following. On the eve of the offense charged, the defendant, at about the hour of 8 or 8:30 p.m., entered a bar in the City of Gothenburg where he remained until closing time at 12 midnight. During that period of time he consumed 6 to 12 "beers" [his own admission was 6, 7, or 8]. At the hour of about 12:30 a.m. he was found alone in the driver's seat of his automobile at

a point about 6 miles west of Gothenburg, Nebraska, slumped over the steering wheel. At that time the automobile was parked in the westbound lane of traffic, the key was in the ignition, the motor was running, the gear disengaged, and the lights were on. A police officer, who had been dispatched to the scene, stopped and parked his automobile behind that of the defendant. He then attempted to arouse the defendant by speaking to him through the open window and shaking him, but was unable to arouse him. The officer then opened the door of the automobile and shoved the defendant onto the passenger's side of the seat. When he did so an open can of beer, apparently held between the defendant's legs, was spilled. The officer then drove the car onto the shoulder of the highway. At that time the defendant was aroused and a short time later he got out of the automobile. At about that time another officer arrived. The defendant asked why he was being hassled and stated that he was on his way home. The defendant was uncooperative and refused to take a requested physical coordination test to check his sobriety. He was then placed under arrest and when asked to remove his wristwatch, which impeded the use of handcuffs, he removed it and threw it against the windshield of the car of one of the officers. Both officers detected alcoholic liquor upon the breath of the defendant. Each officer at trial, after appropriate foundation, expressed his opinion that the defendant was under the influence of alcoholic liquor.

The defendant denied that he had driven the automobile from the bar to the location where it was found. His story was that he left the bar with an acquaintance and a "hitchhiker" who was in the bar and had requested a ride westward. He stated that the hitchhiker drove the car, that they took the acquaintance to his home in Gothenburg, and then were proceeding westward on U. S. Highway No. 30

toward the defendant's place of residence when the driver stopped the car in order to leave it to urinate. Defendant testified that he was awake at all times. The officers arrived shortly after the driver departed the car. He did not return. The defendant's testimony that the hitchhiker was driving when they left the tavern parking lot was supported by the testimony of the acquaintance, the bar owner, and the bartender. The acquaintance also testified that the hitchhiker was still driving when the acquaintance was let out at his home in Gothenburg. The bartender, the bar owner, and the acquaintance testified that the hitchhiker left his canvas knapsack in the bar and that the bartender, noting this, took it to him before the car left the lot. This was verified by the testimony of the acquaintance. The arresting officer, who locked the car at the place where it was found and who later inventoried the car's contents after it was hauled to North Platte, testified that there was no knapsack in the car.

It is not for this court to weigh the evidence or determine the credibility of the witnesses. That was a matter for the jury. The operation or actual physical control of an automobile, under the provisions of section 39-669.07, R. R. S. 1943, may be established by circumstantial evidence. State v. Eckert, 186 Neb. 134, 181 N. W. 2d 264; State v. Webb, 78 Ariz. 8, 274 P. 2d 338. The evidence was circumstantially sufficient to support the jury finding of guilty.

We now examine the second assignment. The evidence, denied by the defendant, indicated that shortly after his arrest and while in custody in North Platte he was informed of the provisions of the implied consent statutes and was requested to give a blood or urine sample for testing. He refused. The State concedes and its testimony shows that no preliminary breath test was offered before the arrest although the officer had in his possession the necessary equipment.

The implied consent statute provides that any person who operates or has in his actual physical control a motor vehicle upon a public highway is deemed to have given his consent to a chemical test of his blood, breath, or urine for the purposes of determining the alcoholic content of his body fluid. § 39-669.08 (1), R. R. S. 1943. Subsection (2) of the statute allows any officer, who has authority to make arrest for traffic laws or ordinances, to require a person arrested "for any offense 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" to submit to a chemical test of blood, breath, or urine for the purpose mentioned above when the officer has reasonable grounds to believe the person was driving, etc., while under the influence of alcoholic liquor. Subsection (3) of the foregoing statute provides that the law enforcement officer may require the operator "to submit to a preliminary test of his breath for alcoholic content if the officer has reasonable grounds to believe that the person has alcohol in his body, or has committed a moving traffic violation, or has been involved in a traffic accident." If the preliminary test indicates one-tenth of 1 percent alcohol content, then the statutes requires that the person be placed under arrest by the officer. Penalty for refusal to take the preliminary test is a fine. Subsection (4) of the statute prescribes the penalty for the refusal to submit to the chemical test of blood, breath, or urine required by subsection (2) of the above statute.

Section 39-669.14, R. S. Supp., 1976, provides in part as follows. "Any person arrested for any offense involving the operation or actual physical control of a motor vehicle while under the influence of alcoholic liquor shall be required to submit to a chemical test of his blood, breath, or urine as provided in section 39-669.08 *without the preliminary*

breath test if the arresting officer does not have available the necessary equipment for administering a breath test or if the person is unconscious or is otherwise in a condition rendering him incapable of testing by a preliminary breath test." (Emphasis supplied.)

The defendant argues that where equipment for a "preliminary" breath test is available at the scene, the offering of an opportunity for the preliminary test is a condition precedent to any arrest whatever and that no arrest is authorized without such offer. This contention is founded primarily upon the position that section 39-669.08 (3), R. R. S. 1943, is the only statute which authorizes arrest. He concludes therefore that the defendant's arrest was invalid and therefore the conviction for refusal to give a body fluid sample is not supported by the evidence.

It is clear that subsection (2) of section 39-669.08, R. R. S. 1943, requires that a person be placed under arrest before submission to the chemical test may be demanded. The effect of section 39-669.08 (3), R. R. S. 1943, is that the officer, without having placed a person under arrest, "may require" the operator to submit to a "preliminary test of his breath for alcohol content," and authorizes an arrest if the test discloses one-tenth of 1 percent of alcohol. It cannot be denied that the recital in section 39-669.14, R. S. Supp., 1976, earlier quoted, to wit, "without the preliminary breath test if the arresting officer does not have available the necessary equipment," seems to imply that somewhere in the earlier sections a preliminary breath test is mandated, otherwise there is no need for an "exception." The defendant argues that since, under the canons of construction, effect must be given to every part of a statute, the recital may not be disregarded, and the statute must be read as making the offering of a preliminary breath test mandatory. He cites Belgum v. City of Kim-

ball, 163 Neb. 774, 81 N. W. 2d 205, in support of this canon of construction.

It is clear enough that section 39-669.08, R. R. S. 1943, makes no requirement that a preliminary breath test be offered as a condition precedent to arrest. Taken by itself, section 39-669.08, R. R. S. 1943, is perfectly clear. An ambiguity or conflict arises only because of the implication from the recital contained in section 39-669.14, R. S. Supp., 1976. In such circumstances it becomes the obligation of this court to construe the statute and the principal objective in such case is to determine the legislative intention. Belgum v. City of Kimball, *supra;* Equal Opportunity Commission v. Weyerhaeuser Co., 198 Neb. 104, 251 N. W. 2d 730. In the latter case we said: "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."

There is no way the conflict in the statutes can be reconciled. If effect is to be given to the recital in section 39-669.14, R. S. Supp., 1976, then we must rewrite section 39-669.08, R. R. S. 1943, to make the giving of the preliminary breath test a condition precedent to arrest for any offense committed while driving an automobile while under the influence of intoxicating liquor. If we are not to rewrite that section then we must disregard the recital. The legislative history of section 39-669.08 (3), R. R. S. 1943, is helpful. In discussions on the floor of the Legislature, the test was always referred to in permissive terms such as "could" or "can." It also seems equally clear that the purpose of subsection (3) authorizing the preliminary test is to give the officer an optional tool to use in determining whether to make an arrest for the violations referred to in sub-

section (2). We hold that the offering of a preliminary test of the breath under section 39-669.08 (3), R. R. S. 1943, is not a condition precedent to an arrest "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943.

The defendant's contention that, since the only specific direction contained in the implied consent statute is for refusal to take the preliminary test, there exist no other grounds for arrest is patently without basis. The arrest is made for violation of other criminal statutes, that is, "any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943. The authority of the officer to make such arrest depends not upon the implied consent statute, but exists by virtue of the common law as codified in our statutes, to wit, sections 29-401 and 29-404.02, R. R. S. 1943. The defendant's position was explicitly rejected by this court in Stevenson v. Sullivan, 190 Neb. 295, 207 N. W. 2d 680.

At the hearing to determine whether the violation of section 39-669.07, R. R. S. 1943, was a third offense, the State offered certified copies of two previous convictions of the defendant for driving while intoxicated. Objection was made to the offers on the ground, among others, that the records did not show that the pleas entered on those occasions, to wit, guilty and nolo contendere, respectively, were voluntarily and intelligently made because they contain no statement indicating that the defendant was at that time informed of the penalty for the offenses to which he pled, nor that he was informed of his various constitutional rights. The judgments do show that the defendant was repre-

sented by counsel on both occasions. The objections were overruled.

A judgment of conviction may be proved by a certified copy thereof. §§ 27-902, 27-1005, R. R. S. 1943. The certified copies of the judgments were therefore clearly admissible under the rules of evidence. No affirmative allegation, written or oral, was made, nor is it asserted affirmatively in the brief that the pleas were not intelligently and voluntarily made. The whole basis of the objection is the claimed insufficiency of the record of conviction. The defendant's objections on the above grounds is the equivalent of a collateral attack upon these judgments. It is conceded that the convictions were not appealed and that the judgments did become final. It is not asserted or claimed that said judgments have been set aside in any collateral proceeding. The defendant did not himself take the stand to testify as to the pleas under which the convictions were found. No other witness was called for the purpose, nor were any offers of proof made by the defendant.

The defendant relies upon Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274; Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319; and United States v. Tucker, 404 U. S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592. In Boykin v. Alabama, *supra,* which was a direct appeal from the conviction, it was held that the voluntariness of a plea could not be determined from a silent record and the conviction was reversed. On a direct appeal presumably the entire record is before the court. In Burgett v. Texas, *supra,* the judgments of conviction used to support an enhanced sentence under the recidivist statute showed on their face that the defendant had not been represented by counsel and the court held that there was therefore a presumption that the judgments were void under Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799. United States v. Tucker, *supra,* was a proceeding to set

aside a sentence. Defendant Tucker in that case maintained his burden of proof by showing that two of the prior convictions relied upon in determining the sentence in the case before the court had been set aside in collateral attacks.

In the case before us, the judgments do not show on their face anything from which a presumption might arise that the pleas were involuntarily made. In one of the cases, certified copies of the docket entries were received. No such presumption arises from the contents of that exhibit.

When a defendant collaterally attacks a judgment, the burden of proof is upon him to show the grounds of the claimed invalidity. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61; State v. McClelland, 194 Neb. 535, 233 N. W. 2d 786; State v. Halsey, 195 Neb. 432, 238 N. W. 2d 249; Burnside v. State, 346 F. 2d 88; Poindexter v. Wolff, 403 F. Supp. 723; Fugate v. Gaffney, 453 F. 2d 362.

We hold that where a defendant collaterally attacks the validity of a judgment of conviction by objection to receipt into evidence of a properly certified copy of that judgment which is not on its face invalid, he bears the same burden of pleading and proof that he bears when he seeks to attack that same judgment in either post conviction or habeas corpus proceedings. We can perceive no reason why he should be able to avoid that burden of proof merely by an objection to a record which is admissible under the applicable rules of evidence.

We assume, for purposes of this opinion, without expressly so deciding, that the defendant would be entitled to collaterally attack the judgment in this fashion. Some courts have held otherwise. See People v. Hendrick, 52 Mich. App. 201, 217 N. W. 2d 112.

The defendant made other objections to the judgments and his contentions with reference thereto

may be answered briefly. The defendant asserts that a conviction founded upon a plea of nolo contendere may not be used in another proceeding to support an enhanced sentence. He relies upon State v. Stone, 245 N. C. 42, 95 S. E. 2d 77. We decline to follow that precedent. Prior judgments are convictions even if founded upon pleas of nolo contendere. State v. Staples, 100 N. H. 283, 124 A. 2d 187. See, also, the cases cited in the annotation at 89 A. L. R. 2d, § 47, p. 610.

The two prior convictions were each charged as first offenses. The defendant contends that, before a third offense charge can be made, the defendant must first have been charged, convicted, and punished as a second offender under section 39-669.07 (2), R. R. S. 1943. He cites no authority for this proposition. We do not so read the statute. We hold that to be punished as a third offender, it is necessary only that the defendant be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor.

We find in the record no basis for the claim that the court abused its discretion when it denied probation and imposed consecutive sentences. The defendant has numerous previous misdemeanor convictions, some involving violence and drunkenness.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS MARLENEE, APPELLANT.

259 N. W. 2d 923

Filed December 7, 1977. No. 41387.

Criminal Law: Records. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

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

Thomas M. Kenney and Lynn R. Carey, 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.

WHITE, C. J.

Defendant was convicted in the municipal court of the City of Omaha, Nebraska, of operating a motor vehicle during a period of suspension or revocation, second offense, and sentenced to a term of 6 months imprisonment in the county jail and his license suspended for a period of 2 years. Defendant appealed to the District Court which, on April 6, 1977, affirmed the judgment and sentence of the lower court. Defendant appeals to this court. We affirm the judgment and sentence of the District Court.

Defendant's first contention on appeal is that the Omaha municipal court committed error when it denied his motion for a continuance. Defendant argues that he was thereby denied effective assistance of counsel.

The record shows that counsel for the defendant was appointed on February 8, 1977. Trial on the matter was held on February 23, 1977. Defendant had ample opportunity to consult with counsel. "A motion for a continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." State v. Davis, *ante* p. 165, 256 N. W. 2d 678 (1977). We find no abuse of discretion by the municipal court in denying defendant's motion for a continuance. There is no merit to this contention.

Defendant next contends that the municipal court

erred in finding him guilty of a second offense for the reason that the trial evidence was insufficient as a matter of law to establish a prior offense.

"An authenticated record, certifying the suspension of an operator's driving privileges is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence." State v. Applegarth, 196 Neb. 773, 246 N. W. 2d 216 (1976). In State v. Roan Eagle, 182 Neb. 535, 156 N. W. 2d 131 (1968), we stated: "An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity * * * and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto."

The State introduced two exhibits into evidence for the purpose of establishing the fact that this was defendant's second offense. Exhibit 1 consisted of certified copies of the driving records of Dennis L. Marlenee on file at the Department of Motor Vehicles. Exhibit 2 was a certified copy of a prior conviction for driving during a period of suspension of Dennis L. Marlenee in municipal court on December 21, 1976. Defendant made no objections to the introduction of these records. The driving records give a date of birth of July 13, 1956. At the trial, in response to a question by the judge, defendant stated that his age was 26.

Defendant contends that the disparity between the age shown on the records and his stated age at trial is sufficient to rebut the State's prima facie case of a prior conviction. Defendant did not deny that he was the same person as the prior offender. Defendant's name is fairly unusual, and no evidence was introduced suggesting anyone else with the same name who could have committed the prior offense. State v. Roan Eagle, *supra*.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SAM FRANDSEN, APPELLANT.

260 N. W. 2d 206

Filed December 7, 1977. No. 41400.

1. **Judgments: Criminal Law: Evidence.** A conviction may rest upon circumstantial evidence if it is substantial.
2. **Criminal Law: Larceny: Instructions.** In a larceny case the jury should be instructed to ascertain and declare in its verdict the value of the property stolen.
3. _____: _____: _____. An instruction that a material element of the crime of petit larceny is that the defendant stole property of value is not erroneous.
4. **Courts: Restitution: Statutes.** The trier of fact must make a specific finding as to the value of the property stolen, before an order of restitution can be made under section 28-512, R. R. S. 1943.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed as modified.

Herbert M. Sampson, III, 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 convicted in the county court of petit larceny, sentenced to 30 days imprisonment in the county jail, and ordered to make restitution in the amount of $200. Upon appeal to the District Court the judgment was affirmed. The defendant has now appealed to this court. The assignments of error relate to the sufficiency of the evidence to support the judgment, the overruling of the defendant's

motion for a mistrial, the instructions to the jury, and the alleged excessiveness of the sentence.

On February 19, 1976, the defendant was employed as a safety patrolman and was stationed at a traffic check point 1 mile north of Rushville, Nebraska. Pedro Hernandez was stopped by the defendant and arrested for failure to have a driver's license. Hernandez was then taken back to Rushville by the defendant and placed in the county jail. The truck Hernandez had been driving was owned by Emerson Stone, the employer of Hernandez. The truck was towed to Rushville and held there until the next day. When Stone reclaimed the truck, a rifle owned by Hernandez was missing. On February 22, 1976, the rifle was discovered on the hood of an automobile just outside the sheriff's office in Rushville. The rifle was wrapped in a blanket that was traced to the defendant.

Several days after the rifle had disappeared from the truck, James Besaw, another state patrolman, saw the missing gun at the defendant's home. The defendant had locked the truck when he and Hernandez left the scene of the arrest. The defendant denied that there was a rifle in the truck at that time and produced another rifle which he claimed Besaw had seen at his home.

The evidence was in conflict and to some extent circumstantial. The evidence of the State, however, was substantial and sufficient if believed to sustain a finding of guilty beyond a reasonable doubt. The defendant's contention to the contrary is without merit.

During the cross-examination of Stone the following occurred: "Q. Now, on Monday, February 26, 1976 — or, it was on February 23rd, pardon me. Did you come to Rushville, Nebraska? A. If that's the date that Pete was supposed to take his polygraph test, I — MR. SAMPSON: Moved from this trial, Your Honor. I object. THE COURT: Overruled. Objection sustained. Jury is directed to disregard

that last comment from the witness. Go ahead." The reference to the polygraph test to be taken by Hernandez was volunteered by the witness and was not responsive to the question asked. The trial court properly sustained the defendant's objection and ordered the jury to disregard the comment of the witness. There was no misconduct on the part of the county attorney and such incidents happen occasionally in the most carefully conducted trials. We find no error in the ruling of the county judge.

The defendant requested that the jury be instructed concerning the authority of a law enforcement officer to arrest and detain a traffic violator. The requested instruction did not relate to any issue in the case and was properly refused by the county judge.

The jury was instructed that a material element of the offense was that the defendant stole "property of value." This was a correct statement of the law so far as the offense of petit larceny was concerned but did not comply with section 29-2026.01, R. R. S. 1943, which provides that in a larceny case the jury "shall ascertain and declare in its verdict the value of the property stolen." The error was harmless so far as the finding of guilty was concerned. See State v. Schumacher, 184 Neb. 653, 171 N. W. 2d 181.

Upon appeal the District Court attempted to cure the error by finding that the property stolen had a value of $100. The review in the District Court, however, is limited to a consideration of errors in the record and is not a trial de novo. See State v. Smith, *ante* p. 368, 259 N. W. 2d 16.

A specific finding of value in a petit larceny case is important only so far as restitution is concerned. The order directing the defendant to make restitution in the amount of $200 is therefore vacated.

With regard to the sentence imposed in this case we find it was not excessive under the circumstances. The defendant's status as a law enforcement officer at the time of the offense was an aggra-

vating circumstance. It was within the discretion of the trial court to determine that a lesser sentence would have tendered to depreciate the seriousness of the offense.

The order that the defendant make restitution in the amount of $200 is vacated. The judgment of the District Court in all other respects is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. BENSON, APPELLANT.

260 N. W. 2d 208

Filed December 7, 1977. No. 41426.

1. **Criminal Law: Pleas.** A plea of guilty or nolo contendere must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea knowingly and voluntarily.
2. **Courts: Records: Appeal and Error.** Under section 29-611, R. R. S. 1943, when notice of appeal has been given and proper bond filed by the defendant as required by the statute, it is the duty of the county court or the municipal court to prepare, certify, and file the transcript, bill of exceptions, and other required documents in the District Court.
3. **Courts: Jurisdiction: Records: Appeal and Error.** Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions.

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

John J. DiMari and William R. Gores of Respeliers & DiMari, for appellant.

Paul L. Douglas, Attorney General, Gary P. Bucchino, Richard M. Jones, and James E. Schaefer, for appellee.

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

MCCOWN, J.

The defendant was convicted of the offense of operating a motor vehicle during a period of license suspension, second offense. The mandatory sentence of 180 days in jail and suspension of driver's license for 2 years was imposed by the municipal court. On appeal to the District Court the judgment and sentence were affirmed. This appeal followed.

On May 14, 1975, complaint was filed in the municipal court of Omaha charging the defendant with driving a motor vehicle during a period of license suspension, second offense. The reverse side of the complaint shows that the defendant was arraigned and pleaded not guilty on May 14th. Beneath that entry on the copy of the complaint, which constitutes a part of the transcript here, appear some illegible markings which the parties apparently assume indicate that the defendant changed his plea to no contest on July 14, 1975. Beneath that notation there is an indication that the defendant was sentenced to 180 days in jail and costs. Alongside these notations, apparently made on June 12, 1975, is the notation "P. D. apptd to represent defendant." There is also a notation that on June 12, 1975, "by def for good cause shown this case is continued to 7-14-75 9 a.m. Stipulated that def was operating." Below these notations appears the notation "Appeal bond $300 cont." The back of the complaint also shows an apparent suspension of driver's license for 2 years on January 6, 1977, and a commitment for sentence on the same date. The judge's docket sheet also shows that on January 6, 1977, the defendant was arraigned, pleaded not guilty, was adjudged guilty, and sentenced to 180 days in jail and driver's license suspended for a period of 2 years. The complaint and docket sheet were certified as the complete transcript of the proceedings in the municipal court.

The bill of exceptions from the municipal court to the District Court covers only the sentencing hearing conducted on January 6, 1977. The bill of exceptions shows that the defendant asserted that he did not recall having pleaded no contest and his counsel asked for permission to withdraw the plea. The municipal court denied permission to withdraw the plea and proceeded to sentence the defendant as indicated. The bill of exceptions contains a note from the court transcriber stating: "Our records show that the defendant in this case was arraigned and pled no contest on July 14, 1975, and was referred to probation officer Hayes for pre-sentence investigation. However, the recording of that hearing has been erased since it was over a year old. The following is a transcription of the sentencing held on January 6, 1977."

The defendant contends that the record fails to show that his plea of no contest was knowingly and voluntarily entered. The position of the defendant is that without a proper bill of exceptions there is no record of the arraignment and plea, and the prosecution has failed to affirmatively establish that the plea was knowingly and voluntarily made. The prosecution, on the other hand, contends that it is the duty of the defendant to prosecute the appeal in this case and to present the record, including a bill of exceptions, to the District Court; and that if the bill of exceptions is deficient, it was the defendant's duty to remedy it. The District Court apparently accepted the prosecution's view and affirmed the judgment and sentence.

In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, we held that a plea of guilty must not only be intelligent and voluntary to be valid but that the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In that case we also stated that the Standards Relating to Pleas of Guilty and Nolo Contendere promulgated

by the American Bar Association should be the minimum procedure in the taking of such pleas. Standard 1.4 requires the court to advise the defendant of certain specified facts; Standard 1.5 requires the court to determine that the plea is voluntary; and Standard 1.7 provides: "A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include (i) the court's advice to the defendant (as required in section 1.4), (ii) the inquiry into the voluntariness of the plea (as required in section 1.5), and (iii) the inquiry into the accuracy of the plea (as required in section 1.6)."

Obviously the record of the proceedings which took place on July 14, 1975, are incomplete and make it impossible to determine whether the defendant entered the plea of no contest understandingly and voluntarily. That issue cannot be determined in the absence of the record and the determination of who has the duty to produce the bill of exceptions becomes critical.

Section 29-611, R. R. S. 1943, provides for the appeal of criminal misdemeanor cases and minor offenses from the municipal or county court to the District Court. The first sentence of that section 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, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings upon such judgment." The section then provides that the appellant shall file, within 10 days after the rendition of the judgment, a recognizance or cash bond as specified in the section. The section then provides: "The court from whose judgment the appeal is taken shall forthwith make return of the proceedings had before it, and shall certify the complaint, transcript,

bill of exceptions, and the warrant together with all such recognizances to the district court, * * *."

The record here shows the defendant filed an appropriate appeal bond, which was accepted and approved by the municipal court on January 6, 1977, and had fully complied with the requirements of section 29-611, R. R. S. 1943.

In State v. Norwood, 174 Neb. 255, 117 N. W. 2d 373, this court held that under the provisions of section 29-611, R. R. S. 1943, there are no exceptions to the right of appeal where the appeal is taken within the time and in the manner and form required by the statute.

In Anderson v. State, 163 Neb. 826, 81 N. W. 2d 219, in commenting on section 29-611, R. R. S. 1943, this court said: "It will be noted that the duty to prepare and file the transcript is with the county judge after he has been notified of the intent to appeal and proper bond, conditioned as provided by this statute, has been given to, accepted, and approved by him." This court also said: "* * * it was the duty of the county judge, placed on him by statute, to prepare the transcript and file it in the office of the clerk of the district court. In such instances the party appealing does not lose his rights because the judge either fails to perform his duty properly or out of time, provided the failure is not because of any act or fault of the party seeking to appeal or his counsel." We held: "Where a party has, within due time, done all that he is legally required to do to perfect an appeal and no act or fault is shown on his part, or that of his counsel, which prevented the county judge from properly performing his duty in regard thereto, then the district court will not lose jurisdiction of the appeal merely by reason of the fact that the county judge filed an incomplete transcript." In that case we specifically approved the action of the District Court in directing the county judge to prepare and submit a proper transcript.

These cases clearly dictate the result in the case at bar. Rule 7 d 2 of the Revised Rules of the Supreme Court, 1974, confirms that result and the procedure. That rule provides: "If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the Clerk of the District Court." Rule 7 g makes that rule applicable to all appeals where specific provision is not made by law for a bill of exceptions. In this case there was no attempt to comply with such a procedure.

We hold that under section 29-611, R. R. S. 1943, when notice of appeal has been given and proper bond filed by the defendant as required by the statute, it is the duty of the county court or the municipal court to prepare, certify, and file the transcript, bill of exceptions, and other required documents in the District Court.

Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions. To the extent they are in conflict with these holdings, the cases of State v. Clark, 194 Neb. 487, 233 N. W. 2d 898, and State v. Allen, 198 Neb. 755, 255 N. W. 2d 278, are overruled. It remains the duty of the appellant to offer the bill of exceptions in evidence in the District Court.

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to direct the municipal court to prepare a bill of exceptions in this cause under Rule 7 d 2 of the Revised Rules of the Supreme Court, 1974, and, if necessary, to hold an evidentiary hearing to deter-

mine whether the plea of nolo contendere entered at the arraignment on July 14, 1975, was knowingly and voluntarily made and entered in accordance with the requirements of State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. In the event the municipal court is unable to determine whether the plea of nolo contendere was knowingly and voluntarily made and entered under the standards of State v. Turner, *supra*, then and in that event the conviction and sentence herein are set aside and the municipal court is directed to rearraign the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

CLEMENS MOBILE HOMES, INC., APPELLANT, V. GUERDON INDUSTRIES, INC., ET AL., APPELLEES.

260 N. W. 2d 310

Filed December 14, 1977. No. 41059.

1. **Summary Judgments.** 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.
2. _____. 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.
3. _____. In considering a motion for summary judgment the court should take that view of the evidence most favorable to the party against whom the motion is directed, and any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for further proceedings.

James R. Hancock, for appellant.

Robert P. Chaloupka of VanSteenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

McCOWN, J.

This is an action by Clemens Mobile Homes, Inc., against the defendants Guerdon Industries, Inc., and Nebraska Mobile Homes Mfg. Corp., for damages for breach and termination of a contract under which plaintiff was to be a dealer for the sale of trailers and motor homes manufactured by defendants. The District Court granted defendants' motion for summary judgment and dismissed plaintiff's petition. Plaintiff has appealed.

The evidence considered by the court on the motion for summary judgment consisted of two depositions, one by Jerald E. Clemens, the president and principal owner of plaintiff; and the other by Tom Wilson, the general manager of defendants. These two individuals, one acting for the plaintiff and the other for the defendants, entered into the 1971 oral agreement which forms the general basis for this action.

Clemens, who had been previously employed by an automobile dealer, decided to go into business for himself, and thereafter formed the plaintiff corporation whose stock was owned by him and his wife. In March or April of 1971, after negotiations with several different manufacturers of mobile homes, the plaintiff entered into an oral agreement with the defendants to be the exclusive dealer for defendants' product line in the Scottsbluff-Gering, Nebraska, area. Plaintiff was to use its best efforts to advertise, promote, and sell the defendants' products. There is a conflict in the evidence as to the extent of the plaintiff's territory, and as to whether or not plaintiff was entitled to sell competing product lines of other manufacturers. Plaintiff's testimony was that its exclusive sales territory area was Western Nebraska and Eastern Wyoming, and that there was no limitation upon plaintiff's right to buy and sell mobile homes of other manufacturers. Defendants' evidence was that plaintiff's territory was limited to

the Scottsbluff-Gering, Nebraska, area, and that plaintiff was to handle defendants' products exclusively and was not entitled to handle competing product lines of other mobile home manufacturers. Defendants' evidence also was that in 1972 and 1973 plaintiff sold and dealt in mobile homes of other manufacturers and from that time on the plaintiff was no longer an exclusive designated dealer, and that after 1973 defendants sold to other dealers as well as to the plaintiff in the plaintiff's former exclusive sales area. The plaintiff's evidence was that when it discovered that defendants were selling to other dealers in its area it advised defendants that plaintiff considered it a violation of the agreement and that the defendants then agreed to stop the practice but did not. The parties agree that the contract was not for any definite term but was to be in effect for the period of their working relationship.

In January 1975, to induce plaintiff to purchase three of defendants' modular homes, defendants agreed to put three other modular homes on plaintiff's lot for display purposes. There were to be factory rebates on final sale of the three modular homes which plaintiff itself purchased, and customer rebates on certain other homes on the lot. Defendants deny any binding agreement in connection with these units.

On April 21, 1975, the defendants wrote a letter to plaintiff stating that since plaintiff had indicated previously that it no longer wanted to do business with defendants, plaintiff would no longer be considered defendants' dealer, and that if plaintiff had any sold orders, defendants would honor those orders for 30 days. Plaintiff contends that the agreement was terminated by the letter. Defendants contend that the plaintiff had orally terminated the agreement at an earlier date. In May 1975, defendants removed the three modular homes from plaintiff's lot and there were no further transactions be-

tween the parties. Thereafter this action was filed by plaintiff.

Plaintiff's amended petition alleges four separate causes of action. The first cause of action seeks damages for the termination of the dealer agreement without just cause or sufficient notice. The second cause of action seeks damages arising from defendants' removal of the three modular homes from plaintiff's lot and its termination of the rebate agreement. Plaintiff's third cause of action seeks an accounting and damages for defendants' breach of the dealer agreement in making sales to other dealers within plaintiff's exclusive territory in violation of the agreement. The fourth cause of action alleges that defendants failed to honor warranties on mobile homes manufactured by defendants and sold by plaintiff, and seeks recovery for funds reasonably expended by the plaintiff in making repairs and fulfilling warranties for which the defendants were primarily liable. Defendants' evidence was that it had never failed to repair any warranted products but admitted there had been disputes with plaintiff over what was or was not covered by warranties.

The District Court found that no dispute exists as to any material issue of fact and granted summary judgment against the plaintiff and dismissed its petition.

Defendant's position that summary judgment was proper here is not based on the argument that there was no factual dispute in the evidence but instead is based on the argument that even if plaintiff's evidence be accepted there was no mutuality of obligation where the plaintiff was not bound to buy defendants' products exclusively but defendants were bound to sell exclusively to plaintiff. Defendants therefore contend that there was no enforceable contractual relationship and that whatever the agreement was, it was terminable at will by either party, with or without cause. Whatever the validity of the

argument, its resolution depends upon the determination of facts.

This court has previously answered defendants' contentions in similar cases involving oral agreements for exclusive sales agency contracts which had no specific duration. We have held that mutuality of obligation is not essential in such agreements where there is any other consideration for the contract. We have also held that a person in the position of the plaintiff under such an agreement ought to have a reasonable time and notice of cancellation of the contract "in order that he might have a reasonable opportunity to put his house in order." What constitutes a reasonable time must be determined from the general nature and circumstances of each case. See, Elson & Co. v. Beselin & Son, 116 Neb. 729, 218 N. W. 753; Ansbacher-Siegle Corp. v. Miller Chemical Co., 137 Neb. 142, 288 N. W. 538.

Plaintiff's first and third causes of action were directly based upon the agreement of 1971. The terms of that agreement, and the presence or absence of consideration for it, were clearly in dispute. There was no evidence whatever with respect to whether 30 days was a reasonable time for termination and there was also a dispute as to who terminated the agreement, whatever it was. The second and fourth causes of action do not rise or fall with the first and third causes of action. The second cause of action is based upon an agreement in 1975 rather than 1971, and the subject matter deals with three modular homes purchased by the plaintiff and three modular homes placed on plaintiff's lot by defendants. The nature and extent of that agreement are in dispute, as well as the right to terminate it. The fourth cause of action dealt with warranties. The rights and liabilities of the parties under those warranties rested upon factual issues entirely different than the rights and liabilities of the parties under the 1971

agreement, whatever that agreement might have been.

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. 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. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508.

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. In considering a motion for summary judgment the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. Juergens v. Redding, 198 Neb. 289, 252 N. W. 2d 291.

Plaintiff also contends that the provisions of the Nebraska Motor Vehicle Industry Licensing Act, sections 60-1401.01, et seq., R. R. S. 1943, govern the termination of the 1971 agreement. Without deciding whether that agreement is within the ambit of the act, it is only necessary to note that the act provides its own procedures and penalties. No express right to a civil cause of action for failure to comply with the act is included, nor is any measure of damages established for failure to comply. When a statute creates a new right and provides the remedy for its violation, the mode prescribed by the statute must ordinarily be followed to secure the benefits of the statute. See Simpson v. City of Grand Island, 166 Neb. 393, 89 N. W. 2d 117. If plaintiff desires to invoke the protections and benefits of the act its

remedy is under the procedures provided by the act and not in this action for breach of contract.

On the basis of the record here substantial material facts are in dispute. The record fails to establish defendants' right to judgment as a matter of law and material facts and inferences are not subject to determination on a motion for summary judgment. The judgment is reversed and the cause remanded to the District Court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE V. MCKINLEY GODBOLDT, JR., APPELLANT.

260 N. W. 2d 314

Filed December 14, 1977. No. 41141.

1. **Trial: Pleadings: Judgments.** The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.
2. **Trial: Prosecuting Attorneys.** The law does not permit defendant or his counsel, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such misconduct a ground for new trial without regard to guilt although proved beyond a reasonable doubt.

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

Alfredo G. Parrish, 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.

Defendant, who was convicted of robbery and use of a firearm during the commission of a felony, appeals. He contends the trial court erred in overrul-

ing his motion for mistrial based on prosecutorial misconduct. We affirm.

During the course of final arguments, defendant's attorney argued the dangers of plea bargaining and made the statement that two of the State's witnesses had entered into plea bargain agreements with the State. The prosecuting attorney during rebuttal made the statement that plea bargaining was something everybody did. He mentioned that defendant's attorney had plea bargained with him many times; and that he was always in his office trying to make deals.

In final argument the prosecuting attorney also told the jury that defense counsel had been unethical in taking a certain statement from a witness. To this latter statement the defense counsel objected. He argued the statement was proper and his objection to the prosecutor's statement was sustained.

Immediately after the jury retired, defense counsel made an oral motion for an order declaring a mistrial for each of the actions described above. The motion for mistrial was overruled.

Defendant does not contest his conviction. The only error assigned is the overruling of his motion for a mistrial based on prosecutorial misconduct. Section 25-853, R. R. S. 1943, provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Defendant was charged with three crimes. Notwithstanding the prosecutor's closing argument, the jury found him guilty of only two of them. The evidence of guilt on those two is clear, and defendant does not contest its sufficiency in this appeal.

We can not condone the fact that the prosecuting attorney suggested to the jury the defense counsel was unethical in a statement he took from one of the

witnesses. It was improper conduct on the part of the prosecutor, and we censure him for it. However, an objection to this statement was sustained. This told the jury the prosecuting attorney was in error. If it affected the jury in any way, we would assume it to be adverse to the State.

While the prosecutor's comments as to plea bargaining were responsive to defense counsel's argument, we do not condone it. While the record is not clear that defense counsel's argument was improper, the law does not permit defendant or his counsel, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such misconduct a ground for new trial without regard to guilt although proved beyond a reasonable doubt. However, a prosecuting attorney should not respond by resorting to like tactics. If the statements are improper, other remedies are available. They often provide even more effective relief.

The fact the jury acquitted the defendant on one of the crimes charged would tend to indicate he was not prejudiced by the statements of the prosecutor. He does not contest the finding of guilt on the charges involved herein. While the conduct of the prosecutor was improper, it was not prejudicial in this case. We determine the denial of a mistrial was within the discretion of the trial court, and affirm the judgment.

The judgment is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., concurs in the result.

JOSEPH WANG, APPELLANT, V. BOARD OF EDUCATION OF THE CHASE COUNTY HIGH SCHOOL DISTRICT, IN THE COUNTY OF CHASE, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

260 N. W. 2d 475

Filed December 14, 1977. No. 41163.

1. **Statutes: Legislature.** Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes.
2. _____: _____. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine legislative intent.
3. _____: _____. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers.
4. _____: _____. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation.
5. **Statutes.** A court should avoid a statutory construction which leads to absurd, unjust, or unconscionable results.

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

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

Frank E. Piccolo of Murphy, Pederson & Piccolo and LeRoy Anderson, for appellee.

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

WHITE, C. J.

The plaintiff, Joseph Wang, a certificated teacher, was employed for the 1975-76 contract year by the defendant board of education. On March 22, 1976, the defendant voted to terminate Wang's teaching employment at the close of the 1975-76 contract year. Wang timely filed a petition-in-error with the District Court seeking an order reversing the school board's determination to dismiss him on grounds that its action: (1) Exceeded the statutory author-

ity of the board of education; (2) was made upon unlawful procedures; (3) was not supported by competent, material, and substantial evidence contained in the record; and (4) was arbitrary and capricious. The defendant filed a motion to dismiss Wang's petition alleging that Wang was a probationary teacher whose contract could be terminated without a showing of just cause. On November 9, 1976, the District Court sustained the defendant's motion. The plaintiff filed a motion for a new trial which was overruled and appeals from that ruling. We affirm the judgment of the District Court.

The sole question on appeal is a determination of the applicability of section 79-1254, R. R. S. 1943, to the plaintiff. The plaintiff was first employed by the defendant on May 12, 1974, for the 1974-75 school year. On May 6, 1975, he entered into his second teaching contract with the defendant for the 1975-76 school year. The defendant's position is that the plaintiff, not having been employed for 2 years by the school district, was on probation at the time of his dismissal and that he could, in full accordance with section 79-1254, R. R. S. 1943, be dismissed without just cause. The plaintiff's position is that having been employed by the defendant prior to February 26, 1975, the effective date of the amended version of section 79-1254, R. R. S. 1943, he could not be dismissed by the defendant without a showing of just cause, despite the fact that he had been employed less than 2 years by the defendant.

Prior to February 26, 1975, section 79-1254, R. R. S. 1943, as then written, did not require a showing of just cause before the employment of a teacher could be terminated. Schultz v. School Dist. of Dorchester, 192 Neb. 492, 222 N. W. 2d 578 (1974). In response to our decision in Schultz v. School Dist. of Dorchester, *supra*, the 1975 Nebraska Legislature amended section 79-1254, R. R. S. 1943, so as to read in its present form. L. B. 82, the amending legisla-

tion, made three changes in the statute. It (1) required and defined just cause for dismissal; (2) separated the statutory provisions applicable to teachers and superintendents; and (3) created a 2-year probationary period during which newly hired teachers could be dismissed without a showing of just cause.

Section 79-1254, R. R. S. 1943, as amended, and as is important to this appeal, provides: "Except for the first two years of employment under any contract entered into after February 26, 1975, any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year in a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated without just cause."

In two recent cases the United States District Court for the District of Nebraska ruled that a teacher employed for more than 2 years prior to the effective date of the amended version of section 79-1254, R. R. S. 1943, was entitled to its protections, and could be dismissed only upon a showing of just cause. See, Walter v. Roubal, CV 75-L-109 (Neb., March 12, 1975); Klein v. Boehmer, CV 75-L-70 (Neb., March 12, 1975). The question for us to decide is whether the protections of the amended version of section 79-1254, R. R. S. 1943, requiring a finding of "just cause" before dismissal, were meant by the Legislature to be applicable to one in the plaintiff's position, who had been hired prior to, but less than 2 years before, the effective date of the amended version.

It is unclear from a reading of the statute itself whether the probationary period provided therein

was meant to apply to a person, such as Wang, who had been hired prior to, but less than 2 years before, the effective date of the amended version of section 79-1254, R. R. S. 1943, or whether the probationary period was meant to apply only to those persons employed after February 26, 1975, thus giving all teachers employed as of that date the protection of the act.

Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. United States v. Brown, 334 F. Supp. 536 (Neb., 1971). Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine legislative intent. Equal Opportunity Commission v. Weyerhaeuser Co., 198 Neb. 104, 251 N. W. 2d 730 (1977). Legislative intent is the cardinal rule in the construction of statutes. Brown v. Sullivan, 195 Neb. 729, 240 N. W. 2d 51 (1976). A fundamental principal of statutory construction is to ascertain the legislative intent and to give it effect. United States of America v. Edmunds, 186 Neb. 271, 182 N. W. 2d 829 (1971). The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. State v. Jennings, 195 Neb. 434, 238 N. W. 2d 477 (1976).

To ascertain the intent of the Legislature we examine the legislative history of the act in question. "The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation." Norden Laboratories, Inc. v. County Board of Equalization, 189 Neb. 437, 203 N. W. 2d 152 (1973). "In construing a legislative act, resort may be had to the history of its passage." School Dist. of Omaha v. State Board of Education, 187 Neb. 76, 187 N. W. 2d 592 (1971). See, also, Pettigrew v. Home Ins. Co., 191 Neb. 312, 214 N. W. 2d 920 (1974).

L. B. 82 was introduced into the 1975 session of the

Nebraska Legislature by Senator Simpson. As first introduced, the bill contained no probationary period. The bill was reported out of the Education Committee with an amendment which added reduction in force as a justifiable reason for terminating employment.

The bill was first debated at length on the floor of the Legislature on January 31, 1975. At that time the concept of a probationary period was first discussed. Senators Dworak and Mills submitted an amendment which added a 2-year probationary period to the statute. During the debate on that amendment, the following exchange took place regarding the effect of the amendment.

Senator Lewis: "The amendment they now have offered says that this is a two year period. Does that mean that everyone who has already taught for two years is beyond that stage or everyone who is currently teaching throughout the state is subject to that provision of probation * * *."

Senator Mills: "Senator Lewis, from this time forward. I would not believe it would be retroactive."

The broad concept of providing for a probational hearing before the "just cause" protections of the act would become effective was indicated by the Legislature at that time.

The precise language was worked out later. On February 5, 1975, Senator Mills offered an amendment to the Enrollment and Review Committee's amendment to L. B. 82 which, when it was adopted, gave section 79-1254, R. R. S. 1943, its current phraseology. During the discussion of the Mills' amendment, the following statements were made:

Senator Mills: "Mr. President, and members of the body, this is strictly clarification in wording from Emory Burnett and it will read, 'except for the first two years of employment under any contract entered into after the effective date of this act.' "

Senator Simpson: "Well, Mr. President, and members of the Legislature, I would only say that this is my bill and this is a very minor clarifying amendment to show the intent of Senator Mills original amendment and it only clearly shows that they are talking on the probationary period of people who are hired after the effective date of this act and it *does not go back retroactive and pick people up the past two years and put them in jeopardy who would have time beyond that length* * * *." (Emphasis supplied.) Floor Debate, 1975 Legislature, pp. 458, 459 (remarks of Senator Mills and Senator Simpson).

We find the remarks of Senator Simpson, the introducer of L. B. 82, significant in determining the legislative intent on the issue presented by this appeal. It seems clear to us that Senator Simpson's understanding of the effect of the amendment to his bill was that those employed on the effective date of the act, who had served at least 2 years prior to the effective date of the act, would escape the probationary period language of the act and thus not be placed in jeopardy. The inference is clear that the protection offered by the act, requiring a finding of just cause prior to any dismissal, was not intended by the Legislature to be available to those who had not yet, as of the effective date of the act's passage, been employed for 2 years. The legislative history of the amended version of section 79-1254, R. R. S. 1943, as we interpret it, thus supports the defendant's position.

Prior to the adopting of L. B. 82, a teacher could be dismissed without a showing of just cause. The Legislature was concerned over this situation and enacted L. B. 82 to remedy the situation as it then existed by requiring a finding of just cause before a teacher could be dismissed. The very fact that a probationary period was discussed and incorporated into the act during its passage indicates that the Legislature also intended that a teacher had to

prove his worth before becoming entitled to the protection it was providing.

Under the plaintiff's interpretation of section 79-1254, R. R. S. 1943, which we reject, a teacher hired on February 25, 1975, could not be dismissed without a finding of just cause being first made, whereas a teacher hired on February 27, 1975, had to serve a 2-year probationary period during which he could at any time be summarily dismissed. The plaintiff cites no reasoning, rationale, or policy which might have led the Legislature to make such a distinction. If possible, a court will try to avoid a statutory construction which leads to absurd, unjust, or unconscionable results. State v. Nance, 197 Neb. 257, 248 N. W. 2d 339 (1976).

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

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. This court has said many times that a plain, clear, and unambiguous statute is not subject to construction by the court, but must be accepted as it reads. In this case the statute is clear and unambiguous and needs no interpretation. What the majority has done here is to use legislative floor discussion to create an ambiguity where none existed and then, in the guise of construction, rewrite the statute.

The effect of the court's "interpretation" is to strike from the statute the words "under any contract entered into after February 26, 1975." There is nothing in section 79-1254, R. R. S. 1943, with which those words conflict so as to create an ambiguity and there is nothing in any other related statute which creates any conflict or ambiguity. On what basis does the court perform the surgery? It does it on the ground that the Legislature really did not intend that the stricken words be in the statute and it does this solely on the basis of what one legislator

said about the "purpose" of the 1975 amendment to section 79-1254, R. R. S. 1943, and, as I will later show, it does this on the basis of a misreading of the legislative discussion.

The majority at no point in its opinion tells us wherein the ambiguity lies. It does not, because it cannot. There is no ambiguity. The majority opinion simply announces that there is an ambiguity, then looks to the legislative floor discussion for some peg upon which to hang its pronouncement.

As the majority opinion points out, previous to the 1975 amendment the statute contained no provision relative to a probationary period. The entire floor discussion of which the opinion makes mention pertained to the question of whether a provision for a probationary period should be made retroactive. In order that it not be retroactive, that is, in order that the probationary period not apply to contracts previously entered into, it inserted the words: "Except for the first two years of employment under any contract entered into after February 26, 1975 . . . ." The phrase, "under any contract entered into after February 26, 1975," had the plain effect of exempting contracts entered into prior to February 26, 1975. That is, under the first sentence of the portion of the statute quoted in the majority opinion, such contracts could not be terminated except upon the notice required by statute and for just cause shown. It could have no other effect or purpose, for without those words the statute would plainly mean just what the majority now says it means, that is, the probationary period of 2 years applies to all contracts entered into before or after February 26, 1975.

The legislative discussion between the three Senators as quoted in the opinion is itself unambiguous and supports the literal language of the statute. Apparently the majority siezes upon the last seven words of Senator Simpson, to wit, "who would have time beyond that length," and attributes to them

some ambiguity. Let us examine that premise. Those words cannot refer to contracts of employment where 2 years of service have already been completed. They can only refer to the contracts entered into on or before February 26, 1975, but as to which 2 years employment would not be completed until after that date. The Senator's language could not possibly apply to cases where 2 years employment was already completed. The language of the statute itself forecloses that. In short, the floor conversation between the legislators does not even support the court's conclusion as to what the legislators intended. Quite the opposite.

The first sentence quoted in the majority opinion provides for automatic renewal of the yearly contract of all contracts except those entered into after February 26, 1975, unless terminated by notice and for just cause. The next sentence quoted provides that the first 2 years "of the contract" shall be a probationary period and may be terminated without just cause. The antecedent to which the words "of the contract" in the latter sentence refer are the contracts which the preceding sentence excepts, that is, those entered into after February 26, 1975. There is no other antecedent to which it can refer. The only contracts for which there needed to be an exception were those where the first 2 years of employment overlapped February 26, 1975. The Legislature made that exception. This court wipes it out. Incredible!

The action of the majority in this case is, to my mind, the most dangerous precedent in statutory construction ever rendered by this court. If the precedent is followed in the future, any isolated phrase uttered by one legislator can be used as a scalpel to excise a provision this court deems unwise, unjust, or simply undesirable, or to change what, in this court's opinion, ought to have been done some other way.

WHITE, C. THOMAS, J., joins in this dissent.

THOMAS A. EGBERT AND JOYCE HOPE EGBERT, SPECIAL ADMINISTRATOR AND SPECIAL ADMINISTRATRIX OF THE ESTATE OF BABY GIRL EGBERT (MOTHER, JOYCE), DECEASED, APPELLANTS, V. MARCELLA WENZL, APPELLEE.

260 N. W. 2d 480

Filed December 14, 1977. No. 41208.

1. **Negligence: Wrongful Death: Decedent's Estates.** An action for the wrongful death of a stillborn fetus may not be maintained under section 30-809, R. R. S. 1943.
2. **Statutes.** Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated.

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

Charles R. H. Kluver of Holz, Kluver & Kizer, for appellants.

David A. Svoboda of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

BRODKEY, J.

The issue in this case, not one of first impression in Nebraska, is whether an action for the wrongful death of a stillborn fetus may be maintained under section 30-809, R. R. S. 1943. We conclude that it may not, and adhere to the rule set forth in Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N. W. 2d 229 (1951).

Plaintiffs, Thomas A. and Joyce Hope Egbert, acting as the special administrator and administratrix of the estate of Baby Girl Egbert, a viable fetus born dead, filed this wrongful death action against defendant Marcella Wenzl. Plaintiffs alleged that the defendant negligently drove her automobile in the path of Joyce Hope Egbert's automobile on June 19, 1974, at which time Joyce Hope Egbert was in her eighth month of pregnancy; that the negligence of the defendant proximately caused the death of the viable fetus; and that the fetus was stillborn on June

20, 1974. Plaintiffs alleged that they had suffered pecuniary loss, and loss of society, comfort, and companionship as the result of the death of the prospective child. Defendant demurred on the ground that the facts alleged in plaintiffs' petition set forth no cause of action. The trial court sustained the demurrer, plaintiffs elected to stand on their petition, and the trial court then dismissed the petition. Plaintiffs have appealed.

Section 30-809, R. R. S. 1943, provides: "Whenever the death of a *person* shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." (Emphasis supplied.) The right to maintain an action for wrongful death did not exist under the common law, and exists in Nebraka, as in other states, solely by statute. Mabe v. Gross, 167 Neb. 593, 94 N. W. 2d 12 (1959); Dow v. Legg, 120 Neb. 271, 231 N. W. 747 (1930).

Twenty-six years ago, in Drabbels v. Skelly Oil Co., *supra*, this court decided the precise question raised by the plaintiffs, and held that an action for the wrongful death of a viable fetus which is stillborn could not be maintained under section 30-809, R. R. S. 1943. The basis for that holding was that a child "born dead cannot maintain an action at common law for injuries received by it while in its mother's womb, and consequently the personal representative cannot maintain it under a wrongful death

statute limiting such actions to those which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." This court also noted that a child born dead was not considered a person insofar as the law of torts was concerned.

Plaintiffs ask us to overrule Drabbels, and advance several arguments for so doing, including the claim that Drabbels does not now represent the weight of authority; that the view a fetus is part of the mother has been discredited; that had the fetus been born alive, it would have been entitled to maintain an action for damages; and that damages due to the loss of a viable fetus are no more difficult to ascertain than the death of an infant child.

We have carefully considered plaintiff's arguments, which find varying degrees of support in decisions from other jurisdictions. See Annotation, Action for death of unborn child, 15 A. L. R. 3d 992. The arguments presented, however, are broader than the narrow question properly before us in this case. As stated by the Supreme Court of California in Justus v. Atchison, 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P. 2d 122 (1977), the "considerations advanced by plaintiffs would be relevant if we were called upon to decide whether California should adopt the proposed cause of action as a matter of judge-made law; they are not persuasive when, as here, the cause of action for wrongful death in this state is a pure creature of statute." The court noted in that case that the question was not a matter of "evolution" of the common law, but rather a question of legislative intent. The court concluded that the Legislature did not intend to include a fetus as a person under the wrongful death statute, noting that at the time wrongful death statutes were adopted, a fetus was not viewed as a person insofar as the law of torts was concerned; and that subsequently when the Legislature did intend to include a fetus within

the objects of a law, it specifically did so. The same approach was taken by courts in other jurisdictions in State ex rel. Hardin v. Sanders, 538 S. W. 2d 336 (Mo., 1976); Kilmer v. Hicks, 22 Ariz. App. 552, 529 P. 2d 706 (1974); McKillip v. Zimmerman, 191 N. W. 2d 706 (Iowa, 1971).

We believe that the rationale of Justus v. Atchison, *supra*, and State ex rel. Hardin v. Sanders, *supra*, is compelling. Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated. Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479 (1960); Kilmer v. Hicks, *supra*. In view of the common law rule that an unborn fetus was not a person insofar as the law of torts is concerned, we think that if there had been an intention to create an action for the wrongful death of a viable fetus it would have been specifically so stated by the Legislature when the wrongful death statute was enacted. In Drabbels, this court noted that such an action "may not be maintained unless and until the right to bring it is afforded by legislative enactment." In the 26 years since Drabbels was decided, the Nebraska Legislature has not acted to include a viable fetus within the definition of person under section 30-809, R. R. S. 1943. Plaintiffs have not directed our attention to any evidence of legislative intent to include recovery for the death of a viable fetus under section 30-809, R. R. S. 1943, and we have found none.

We express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense. We hold only that the Legislature did not exhibit the intention to include a viable fetus within the scope of our wrongful death statute. See McKillip v. Zimmerman, *supra*.

We, therefore, adhere to the rule of law previously established in Drabbels, in 1951, and find no action for the wrongful death of a viable fetus may be maintained in this state unless and until the right to

bring such an action is afforded by the Legislature. The trial court properly sustained the demurrer in this case.

AFFIRMED.

HENRIETTA WILLIAMS, APPELLANT, V. BEDFORD MARKET, INC., APPELLEE.

260 N. W. 2d 316

Filed December 14, 1977. No. 41221.

1. **Negligence: Inviters and Invitees.** When foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees.
2. _____: _____. When a hazardous condition on the floor of a store results from conduct of the public, a storekeeper is liable only for negligent omission on his part to remove the hazard after he knows of it, or by the exercise of reasonable care, should have known of it.
3. _____: _____. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but this does not make him an insurer against accident or of safety of customers.
4. **Summary Judgments.** Summary judgment may be rendered where there is no genuine issue as to material fact, and the moving party is entitled to judgment as a matter of law.

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

James W. Knowles of Knowles & Edmunds, for appellant.

Ray C. Simmons, for appellee.

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

WHITE, C. THOMAS, J.

The plaintiff-appellant filed an action for damages alleged to have been caused by a fall in the defendant-appellee grocery store on November 3, 1975. Plaintiff alleged in her petition that the fall was caused by the negligence of the defendant: (1) In

failing, after defendant knew or should have known of the slippery condition of the premises, to remove water from the floor; (2) in failing to warn the plaintiff of the slippery condition; (3) in maintaining the premises so as to permit water to spill and accumulate upon the floor of the shopping area of the store; and (4) in failing to keep the premises reasonably safe for persons invited to use its facilities. Defendant denied generally all the allegations contained in the plaintiff's petition and further pled assumption of risk and negligence more than slight on the part of the plaintiff. Defendant filed an amended motion for summary judgment. Depositions of the plaintiff, two employees of the defendant, and the court file, including the answer to the interrogatories by the manager of the grocery store, were received in evidence. At the conclusion of the hearing, the trial court sustained the defendant's motion for summary judgment and dismissed the action. The plaintiff appeals.

The evidence discloses the facts and inferences most favorable to the plaintiff which appear to be as follows: The plaintiff entered the defendant-grocery store on November 3, 1975. She was familiar with the store, having been a customer for 8 years, and had visited the store hundreds of times. Defendant-grocery store consists of four aisles. After picking up some other items and placing them on the check-out counter near the front of the store, the plaintiff was on her way to obtain some steak sauce and, at the first of the aisles, turned a corner, and fell. The aisle on which the steak sauce was located is also the produce aisle, in an area of that department where greens, as plaintiff described them, were kept. Plaintiff did not see anything on the floor before she fell and there was no one to block her view. The plaintiff fell striking her knees and falling on her lower back injuring herself. After the accident she saw a spot of water, a couple of inches in size, and

concluded, since there was water on her right shoe, that it was the water that caused her to slip. The water was near the middle of the aisle. There was nothing hanging over the produce counter that could have produced the water and she did not remember that the floor was freshly waxed. The area was well lighted. Plaintiff did not remember seeing anything on the floor and the floor was clean. "I know it stays nice — nice and clean most of the time." There were no eyewitnesses to the accident. Two store employees testified by deposition. One, James Whitcomb Riley, testified that he was in the store on November 3, 1975. He testified that in the produce area there is generally nothing to clean off the floor, no breakage, no leakage, and no water on the floor. There might on some occasion be some greens which had to be swept up. The witness had no recollection of the plaintiff falling at the store nor that he had cleaned any water off the floor. He said that, as he understood it, the floors at the market were cleaned nightly, swept, and mopped. In his experience, if there was any water or breakage items on the floor, they were not left there for more than 4 or 5 minutes. The other employee, Evelyn Snodgrass, testified that she had been employed by the store for 7 years; that she had no recollection of the plaintiff claiming an injury or claiming a fall. She testified that the store was routinely cleaned every evening. When she arrived in the morning for work, the floor was always clean and was kept as clean as possible during the day. She remembered no delays in cleaning things off the floor when they were observed or reported to her. She testified that Mr. Falk, the manager-owner, was all over the store during the day and that he would clean things up from the floor if he saw something spilled.

In the answers to interrogatories, Max Falk, the manager and president of defendant-Bedford Market, Inc., testified that after plaintiff had told him

that she fell, he went to the produce counter and saw no water or loose items on the floor, no markings on the floor, no streaking of water on the floor, or anything unusual. There was no sign that anyone had fallen. He took no action to clean the floor surface as there was nothing to clean. He said that he kept the floor surfaces in a very clean condition at all times. Among the theories advanced by the plaintiff in the various depositions in evidence as to the cause of the water on the floor are: That the greens were sometimes freshened by a short hose which was attached to a water faucet under the produce counter; that the produce was sometimes sprayed with water to keep it fresh or that customers used the hose on occasion to wash off a particular piece of produce; that the produce was delivered in a wet state and water might have fallen to the floor when produce was placed in the produce counter; or that a customer may somehow have caused a spot of water to be present on the floor in removing produce.

The applicable rules in Nebraska are set out in Jeffries v. Safeway Stores, Inc., 176 Neb. 347, 125 N. W. 2d 914: "Where foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. When the condition results from the conduct of the public, a storekeeper can be held subject to liability only for a negligent omission on his part to remove the hazard created after he knows of it, or, by the exercise of reasonable care, should have known of its existence. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not an insurer against accident. An owner of a store is not required to follow customers around his store to gather up debris cast away or carried into the store by customers. To place such a burden upon a storekeeper would make him an in-

surer of the safety of his customers. His duty is to use reasonable care to keep the premises in a safe condition."

The facts in the case are not disputed. There were no witnesses to the accident save the plaintiff. Accepting her version as true, the presence of a spot of water 2 inches wide, in an otherwise clean and neat aisle, does not support her contention that the defendant allowed a negligent condition to develop. Here, the evidence shows that it was the custom and habit of the owner-manager and the employees to correct immediately any condition reported to them caused by foreign substances being placed on the floor, and further, such conditions were constantly being looked for by store employees. Neither does the evidence show that the condition was caused by store employees nor that the defendant or its employees were negligent in not discovering the condition. There was no issue of fact to be tried by the jury and all reasonable inferences to be deduced therefrom amply support the trial court's judgment that the facts do not support a finding of negligence.

Summary judgment may be rendered where there is no genuine issue as to material fact, and the moving party is entitled to judgment as a matter of law. Johnson v. Evers, 195 Neb. 426, 238 N. W. 2d 474.

The judgment of the trial court dismissing the plaintiff's petition is affirmed.

AFFIRMED.

JAMES B. EDWARDS, APPELLANT, V. SHIRLEY J. EDWARDS, APPELLEE.

260 N. W. 2d 319

Filed December 14, 1977. No. 41234.

Divorce: Property. A division of property which is not patently unfair will not be disturbed by this court on appeal.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Gary L. Giese, for appellant.

Knapp, State, Yeagley & Mues, 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 dissolution of a marriage. The trial court dissolved the marriage and divided the property of the parties. The petitioner has appealed and contends the trial court erred in failing to award a larger share of the property to him.

The parties were married in 1970. The petitioner was then employed as a tax accountant in Kansas City, Missouri. The respondent was employed as a secretary by a real estate company. About 1 month after the marriage the parties moved to a 560-acre farm near Litchfield, Nebraska. The respondent's parents were purchasing the farm on contract from the respondent's grandfather. The parties were to operate the farm on a share basis.

The respondent's father died about 2 months after the parties moved on to the farm. The respondent's mother died about 1 year later. The respondent was the sole heir of her parents and inherited the farm, an 18-acre tract near Broken Bow, Nebraska, 146 head of cattle, a large amount of other personal property consisting of farm machinery, automobiles, and trucks, household goods and furniture, and approximately $13,000 in cash. The only indebtedness against the property was $17,000 due on the farm contract.

The parties lived on the farm near Litchfield until the farmhouse was destroyed by fire in 1975. During this time much of the property inherited by the respondent was liquidated and dissipated. The cattle

and most of the farm machinery were sold. A part of the tract near Broken Bow was sold and the Litchfield farm was mortgaged for $25,000. This action was filed on November 13, 1975.

The trial court found that the petitioner had contributed approximately $13,000 in money and property to the marriage and that the property should be distributed so as to compensate the petitioner for his contribution to the marriage and restore to the respondent the property she had inherited.

The trial court awarded the petitioner a 10-acre tract he had purchased since the separation, a 24-foot camper, a 1970 Cadillac automobile, a 1975 BMW motorcycle, and personal property consisting of antiques, tools, furniture, and miscellaneous property including clothing and personal effects.

The trial court awarded the respondent the Litchfield farm, subject to indebtedness of approximately $42,000, the Broken Bow land, the house in Kearney, Nebraska, subject to the $30,000 mortgage, 2 vacant lots in Arizona, a promissory note signed by Andrew J. McMullen and others, and personal property consisting of 100 shares of Mallard Corporation Stock, 10 shares of Franklin Mint Stock, a 1973 Chevrolet automobile, the furniture and equipment in the house in Kearney, and miscellaneous property including bank accounts in her name.

The property which the respondent received was either directly inherited by her or purchased with the proceeds from property which she inherited. The Litchfield farm came directly to the respondent from her parents. The house in Kearney was purchased with funds from the sale of part of the Broken Bow tract. The house was furnished in part by the insurance proceeds from the Litchfield farmhouse fire. A part of the balance of the insurance proceeds was spent for one of the Arizona lots, the motorcycle, and farming and living expenses. The McMullen note represents proceeds received from

the sale of cattle. The proceeds from the mortgage on the Litchfield farm were used to pay a $16,000 personal note of the petitioner and to buy the camper and the 1970 Cadillac.

The respondent claimed that petitioner received in excess of $60,000 during the marriage which was not accounted for. This included a part of the proceeds from the mortgage on the Litchfield farm, proceeds from the sale of cattle and farm machinery, proceeds from sale of part of the Broken Bow tract, and proceeds from the fire insurance settlement. This was a circumstance to be considered in dividing the property between the parties.

The petitioner claimed that he had made substantial improvements to the farm. The evidence is that the farm deteriorated during the time the parties lived there and that most of the work which was done was done by the respondent and her children from a prior marriage.

The division of the property which the trial court made resulted in the respondent receiving a much larger proportion of the property than the petitioner. The division was fair because the source of most of the property was the respondent's inheritance from her parents.

A division of property which is not patently unfair will not be disturbed by this court on appeal. Van Bloom v. Van Bloom, 196 Neb. 792, 246 N. W. 2d 588.

The judgment of the District Court is affirmed. The respondent is allowed the sum of $500 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. MAX W. GOETZ ET AL., APPELLEES, V. EDWARD E. LUNDAK, SUPERINTENDENT OF SCHOOLS, KNOX COUNTY, NEBRASKA, APPELLEE, SCHOOL DISTRICT NO. C-5 OF KNOX COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLANTS.

260 N. W. 2d 589

Filed December 14, 1977. No. 41239.

1. **Mandamus: Appeal and Error.** An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong.
2. **Mandamus.** To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.
3. **Mandamus: Burden of Proof.** In an action in mandamus the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act.
4. **Mandamus.** The writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent.
5. **Schools and School Districts: Eminent Domain: United States.** In order for the provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisition of land by the United States for the purposes named in the statute must have been the cause, or a substantial part of the cause, of the existence of the conditions described in the statute under which the county superintendent is directed to attach the territory of the school district affected to an adjoining district or districts.
6. **Mandamus.** Although mandamus is denominated a law action, it is largely controlled by equitable principles.
7. _____. Where the issuance of a writ of mandamus would disturb official action, or create disorder or confusion, it may be denied, and this is so even when the petitioner has a clear legal right for which mandamus would be an appropriate remedy.

Appeal from the District Court for Knox County: GEOGE W. DITTRICK, Judge. Reversed with directions to dismiss.

Arlinda Locklear, Richard B. Collins, A. James Wabaunsee, Henry G. Wright, Philip M. Martin, Jr., of Higgins, Higgins & Huber, Robert E. Otte of

Deutsch, Jewell, Otte, Gatz, Collins & Domina, and James Burbridge of Burbridge & Burbridge, for interveners-appellants.

James T. Goetz of Goetz, Hirsh, Haar & Klimisch and Max W. Goetz, for appellees State ex rel. Goetz et al.

Frank Roubicek, for appellee Lundak.

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

CLINTON, J.

This is an action in mandamus commenced September 24, 1976, by the relators, landowners in Class I School District No. C-5, Knox County, Nebraska, to require the respondent, the county superintendent of Knox County, to dissolve School District No. C-5 and attach its territory to an adjoining district or districts, pursuant to the provisions of section 79-408.02, R. R. S. 1943. The portion of that statute pertinent to the action reads as follows: "When a district is reduced in size by the purchase or appropriation of land by the United States for any defense, flood control, irrigation, or war project, so that such remaining part shall . . . (2) have an assessed value that places it in the lower twelve per cent of the school districts of the same class in the county, it shall be the duty of the county superintendent to attach such remainder to an adjoining district or districts." The respondent resisted the demand for the writ. School District No. C-5 (which we will hereafter refer to as the Santee District), Bloomfield School District No. 86-R, and School District of Niobrara were allowed to intervene and file answers which resisted the demand for the writ. The latter two districts adjoined the Santee District. The District Court, after trial, granted the peremptory writ of mandamus. The interveners have appealed. They have filed a super-

sedeas bond and the operation of the writ has been suspended.

The resolution of the assignments of error made by the interveners-appellants require us to consider only three issues, to wit, (1) the effect of the statute, (2) the legal sufficiency of the evidence to sustain the District Court's action in granting the writ, and (3) whether the trial court abused sound judicial discretion in granting relief. We reverse and direct dismissal of the petition.

The evidence received by stipulation shows that in the fiscal year 1954-55 there were 136 Class I school districts in Knox County. In that year the assessed valuation of the Santee District was $122,525 and it ranked 99th among those districts in assessed valuation. During the years 1955 and 1956 the United States, by multiple purchases and the exercise of the power of eminent domain, acquired in the Santee District, 2,833 ares of land for flood control and irrigation purposes in connection with the Gavins Point Dam Project. The exact dates of the various acquisitions are not shown in the record except to the extent that the last eminent domain proceeding was filed on September 6, 1956. Neither the assessed nor the actual value of the 2,833 acres acquired by the United States is shown anywhere in the record. In fiscal year 1955-56, the number of Class I school districts in Knox County was reduced by 1 so that the total was 135. In that year Santee District's valuation was $120,995 and it ranked 100th in assessed valuation. In fiscal 1956-57 the number of Class I districts was reduced to 129, Santee District had an assessed valuation that year of $80,155, and its rank was 113th. In fiscal 1957-58 the number of Class I districts was reduced to 128, Santee District's assessed valuation that year was $73,390, and its rank was 112th. In fiscal 1958-59 the total number of Class I districts had been reduced to 113 and, although Santee District's valuation for that year in-

creased to $84,665, its numerical rank in assessed valuation lowered to 103rd. It is evident that for the fiscal year 1958-59, Santee District was in the lower 11 districts in assessed valuation and for the first time it entered the group of Class I districts which were in the lower 12 percent in valuation rank.

No steps were taken by anyone to cause Santee District's territory to be attached to other districts until the relators made demand upon the county superintendent shortly before this action was commenced in 1976. From 1959 onward the number of Class I districts was reduced more or less regularly until in the fiscal year 1970-71 the number was 7 and finally in fiscal year 1976-77 Santee District was the only Class I district in the county.

The position of the intervener districts is that in order for the pertinent provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisitions by the federal government for irrigation and flood control purposes must be the cause or reason why the district reaches the place where its assessed valuation is "in the lower twelve per cent of the school districts of the same class in the county." § 79-408.02, R. R. S. 1943. The interveners further assert that the evidence does not establish that the federal acquisitions were the cause of Santee District's rank in the lower 12 percent. The relators, on the other hand, assert that it is a reasonable inference from the evidence that the acquisitions were the cause of Santee District's rank in the lower 12 percent and this court cannot, under the rules applicable to our review of the District Court action, overturn its findings of fact.

We have held that an action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right and that the finding of the court will not be disturbed by this court unless clearly wrong. State ex rel. Rittenhouse v. New-

man, 189 Neb. 657, 204 N. W. 2d 372; §§ 25-2164, 25-2165, R. R. S. 1943.

The Legislature has made many and varied provisions for the elimination, merger, and consolidation of school districts. Some of the methods involve voluntary action by school electors and school boards. Other statutory provisions, of which section 79-408.02, R. R. S. 1943, is an example, direct attachment of the territory of a district to another district or districts if certain conditions exist. In these latter cases the county superintendent is given a mandatory duty and he acts summarily. School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301. It is clear from the wording of section 79-408.02, R. R. S. 1943, that the duty which it imposes on the county superintendent is mandatory and not discretionary. Under those circumstances the remedy of mandamus is an available remedy where the responsible officer has refused to carry out his statutory obligation. State ex rel. Krieger v. Board of Supervisors, 171 Neb. 117, 105 N. W. 2d 721. In that case we said: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear."

An examination of section 79-408.02, R. R. S. 1943, and the various other similar statutes indicates that they were designed and enacted to apply to some particular existing circumstances which might, in all likelihood, occur only once. This is most clear from an examination of section 79-408.02, R. R. S. 1943. Disregarding the conditions not applicable here, that statute applies where the federal government acquires land in the district for irrigation or flood control purposes and the acquisition results in the reduction in the size of the district so that the district's valuation is in "the lower twelve per cent of the school districts of the same class." The stat-

ute's special and limited applications could not, e. g., apply in any of the following circumstances: (1) Where there are eight or fewer districts of the class in the county, for in that case it is mathematically impossible for any district to be in the lower 12 percent for the reason that one district is more than 12 percent of the whole number of districts. (2) A fortiori, it could have no application where there is only one district in the class because since it is the only district it could not be in the lower 12 percent or any other fractional part of the total number of districts. (3) It could not apply in the extremely unlikely circumstances that several districts of the class were all proportionally affected by the federal acquisition. Further, the percentage of 12 percent is itself apparently a figure chosen to apply to a particular situation or situations where the consequence of choosing that particular figure was already known.

In an action in mandamus the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act. State ex rel. Schoonover v. Crabill, 136 Neb. 819, 287 N. W. 669; State ex rel. Gillilan v. Home Street Ry. Co., 43 Neb. 830, 62 N. W. 225.

We now examine the evidence to determine whether the relators have proven their case within the meaning of the statute. The relators argue that although the evidence shows that Santee District did not reach the lower 12 percent category until fiscal year 1958-59, nonetheless it is to be assumed that this was the consequence merely of the failure of the results of the federal acquisition to show up in the tax rolls for a period of time. However, there is nothing at all in the record to indicate that.

As the recital of evidence given earlier in this opinion indicates, it was not until fiscal 1958-59 that the Santee District valuation placed it in the lower 12 percent of assessed valuation of the Class I districts.

The record does show that in the interim there were other occurrences which could have caused that particular placement. It is evident that if, subsequent to the acquisition, all other districts of the same class having valuations lower than Santee District were eliminated, the Santee District would then be in the lower 12 percent. But without evidence as to how the federal acquisition affected the valuation of the district, it is impossible to determine whether the result was caused by the reduction in size and consequent reduction in value, or whether it was caused by both the acquisition and the elimination of other districts, or whether it occurred only by the reason of the elimination of other districts. Between fiscal years 1955-56 and 1956-57, seven Class I school districts were eliminated in Knox County. Between fiscal 1956-57 and fiscal 1957-58, one Class I district was eliminated. Of the eight districts eliminated, the last assessed valuations of four were lower than the Santee District and the other four had higher valuations. Thus Santee District's relative placement in the valuation hierarchy was unaffected by the elimination of the districts. However, for fiscal 1957-58 it still did not rank in the lower 12 percent. It is not possible to determine from the evidence when the 2,833 acres acquired by the United States were removed from the tax rolls. It is therefore impossible to determine from the evidence whether the acquisitions resulted in the Santee District's placement, or whether it was the consequence entirely of the later reduction in the number of Class I districts. In this case the matter to be proved, that is, the effect of the acquisition of the 2,833 acres, was susceptible of exact proof. The land taken could be identified from public records, its assessed valuation could be shown from public records, and the time when the title passed to the federal government could be shown from the public records. Neither the deeds to the United States, nor the complete eminent

domain proceedings were included in the proof presented. When the United States acquires title through the exercise of the power of eminent domain, title normally passes when judgment is entered. However, it will pass before judgment if a declaration of taking is filed and the necessary deposit of security made. Title 40 U. S. C. A., § 258a. None of this appears in the record.

The writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. State ex rel. School Dist. v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421.

We hold that in order for the provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisition by the United States for the purposes named in the statute must have been the cause, or a substantial part of the cause, of the existence of the conditions described in the statute under which the county superintendent is directed to attach the territory of the school district affected to an adjoining district or districts. The relators in this case did not clearly sustain their burden of proof and the finding of the District Court was clearly wrong.

There exists another ground upon which we also place our holding. Both sides introduced evidence not directly related to proof of the cause or existence of the condition which formed the basis upon which the writ was asked, but which apparently related to the "equities" of the situation as they existed in 1976 when this action was commenced, 20 years after the acquisition of the lands by the United States.

The relators introduced evidence to show that in 1976 the assessed valuation in the Santee District was $307,013 and that the combined school district levy and the free high school levy was 157.79 mills. The school district levy was 19.55 mills and the free high school levy was 138.24 mills. In 1970 the Santee

school levy was 2.45 mills and the free high school levy was 23.84 mills. It is clear that the reason for the multifold increase in the free high school levy during that 7-year period was the reduction in the number of class districts from seven to one. The relators admit that the burden of the extremely large free high school levy is not determinative, but should be considered.

The undisputed record shows that 94 percent of the Santee District student population is American Indian; that in 1976 Santee District was educating 105 children in grades K through 8; that the school is fully accredited and is housed in a $2,200,000 school building, construction of which began in 1974 and which was opened for school in February 1976; that it was built entirely with federal funds and that Santee District has no bonded indebtedness; that because of the reservation status of the Santee District and the presence of tax exempt land in the district, 74 percent of the school operating funds of the district come from the federal government; that high school students residing in the Santee District attend Niobrara High School as tuition students, which tuition is paid from the free high school levy; that the federal government makes no payment in lieu of taxes to the free high school fund; that the Santee school building is adequate to accommodate a high school; and that the operation of a high school for that district's student population is being considered by the Santee District. We take notice of the fact that in April of 1977 the Legislature amended section 79-701, R. S. Supp., 1976, relating to the method for changing a Class I district to a Class II district which may operate a high school. That statute provides that no high school may be maintained unless the district has an enrollment of 100 pupils in grades 9 to 12. The 1977 amendment to the statute, which took effect April 27, 1977, provides that the minimum student enrollment requirement does "not apply to any

district located on an Indian reservation and substantially or totally financed by the federal government." § 79-701, R. S. Supp., 1977.

As already mentioned, the issuance of a writ of mandamus is not a matter of right. State ex rel. School Dist. v. Board of Equalization, *supra*. Although mandamus is denominated a law action, it is largely controlled by equitable principles. State ex rel. School Dist. v. Board of Equalization, *supra*. We have also said that where the issuance of the writ would disturb official action, or create disorder or confusion, it may be denied, and this is so even when the petition has a clear legal right for which mandamus would be an appropriate remedy. State ex rel. Long v. Barstler, 122 Neb. 167, 240 N. W. 273.

It seems to us that in this case where the remedy is sought 20 years after the occurrence of the conditions giving it birth and where in the meantime there has been a substantial change of conditions, and where action by the superintendent under section 79-408.02, R. R. S. 1943, would leave the status of the new school in doubt and its continued use unclear, it was a plain and clear abuse of sound judicial discretion to grant the writ.

As we have pointed out many times, the power of the Legislature in the regulation of school districts is essentially plenary. It appears in this case that the Legislature is in the best position to make determinations as to which solutions are appropriate at this time.

REVERSED WITH DIRECTIONS TO DISMISS.

VICKIE L. PEDERSEN, BY AND THROUGH OTTO PEDERSEN, HER FATHER AND NEXT FRIEND, APPELLANT, V. JOSIAH B. LAMBERT ET AL., APPELLEES.

260 N. W. 2d 483

Filed December 14, 1977. No. 41245.

1. **Appeal and Error: Records.** Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions.
2. **Appeal and Error: Records: Evidence.** Evidence which does not appear in the record cannot be considered by this court on appeal.
3. **Appeal and Error: Records: 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 Douglas County: RUDOLPH TESAR, Judge. Affirmed.

James R. Welsh and E. Terry Sibbernsen of Riedmann & Welsh, for appellant.

Joseph K. Muesey of Fraser, Stryker, Veach, Vaughn, Muesey, Olson & Boyer, for appellees.

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

WHITE, C. J.

This is an action initiated by Vickie L. Pedersen by and through Otto Pedersen, her father and next friend, against Josiah B. Lambert and Mary Ellen Lambert for personal injuries resulting from a fall by the plaintiff from a vehicle being operated by Josiah B. Lambert.

Following the initial pleadings, defendants filed a motion for summary judgment on the grounds that: (1) Plaintiff's petition did not allege gross negligence and the evidence showed that the plaintiff was a passenger in the motor vehicle being operated by the defendant Josiah B. Lambert, within the meaning of the Nebraska Guest Statute, section 39-740, R. R. S. 1943, then in effect (now § 39-6,191, R. R. S.

1943); and (2) the evidence viewed as a whole showed that as a matter of law the plaintiff assumed the risk of her injury and was contributorily negligent.

A hearing on the defendants' motion was held on December 9, 1976, and defendants' motion was sustained and plaintiff's petition dismissed. Subsequently, the plaintiff filed a motion for a new trial which was overruled and she now appeals. We affirm the judgment of the District Court.

On appeal the plaintiff contends that the District Court erred in granting defendants' motion for summary judgment. " '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. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.' " Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541 (1976). In order for this court to determine whether the District Court correctly granted defendants' motion for summary judgment it is thus necessary for us to examine the evidence before the trial court at the time of its determination.

The record indicates that no bill of exceptions was filed in this case. In Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699 (1977), we quoted the applicable rules: "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)."

In her amended petition, the plaintiff alleged that her injuries were the direct and proximate result of the negligence of the defendants. In their answer defendants alleged that the plaintiff was contributorily negligent and that she assumed the risk of her injuries. "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)." Hanson v. Hanson, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. NIELSEN, APPELLANT.

260 N. W. 2d 321

Filed December 14, 1977. No. 41339.

1. **Motor Vehicles: Intoxicating Liquors: Words and Phrases.** The word "operates" as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor refers to the actual physical handling of the controls while under the influence of intoxicating liquor.
2. **Statutes: Constitutional Law: Juries: Trial.** Section 24-536, R. R. S. 1943, provides that either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury.

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

Anthony S. Troia, for appellant.

Paul L. Douglas, Attorney General, Gary P. Buchino, Richard M. Jones, and James E. Schaefer, for appellee.

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

WHITE, C. J.

Defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor, second offense, in violation of section 39-669.07, R. R. S. 1943. Defendant's case was originally set for trial on March 23, 1976, at the request of defendant's attorney. On that date, at the request of the State, the matter was reset for trial on April 30, 1976. On April 29, 1976, defendant through his attorney, requested a new trial date. This request was granted and trial was set for June 22, 1976.

On June 8, 1976, defendant filed a motion for a trial by jury. On June 17, 1976, the municipal court, Judge Elizabeth Pittman, granted the motion. On June 21, 1976, the municipal court, Judge Robert Vondrasek, overruled the order of Judge Pittman granting defendant a jury trial.

On June 30, 1976, defendant was tried to the court, without a jury, and was found guilty of the offense he was charged with. Defendant was sentenced to a term of 90 days in the county jail, ordered to pay a fine of $300 plus court costs, and his driver's license was suspended for a period of 1 year. Defendant appealed his conviction and sentence to the District Court where it was affirmed. Defendant filed a motion for a new trial, which was overruled, and now appeals. We affirm the judgment and sentence of the District Court.

Section 39-669.07, R. R. S. 1943, provides that: "It shall be unlawful for any person *to operate or be in the actual physical control* of any motor vehicle while under the influence of alcoholic liquor * * *." (Emphasis supplied.) Defendant's first contention on

appeal is that the trial court erred in finding that he was in actual physical control and in operation of his motor vehicle at the time he was arrested.

In State v. Dubany, 184 Neb. 337, 167 N. W. 2d 556 (1969), a similar contention was raised. It was held there that the jury had properly found that the defendant was operating a motor vehicle and was in actual physical control of it where the evidence showed that the defendant was behind the wheel, the gears of the vehicle were in operation, the wheels of the vehicle were turning, and the vehicle jumping up and down, backwards, and forwards, in a ditch, but not actually going anywhere.

In Waite v. State, 169 Neb. 113, 98 N. W. 2d 688 (1959), the evidence showed that the defendant was sitting in the driver's seat, the motor was running, and the gears were in reverse position. The car was stalled with three wheels off the pavement and on a soft shoulder. Defendant's contention that he was not operating the vehicle or in actual physical control of it while intoxicated was held to be without merit.

In Uldrich v. State, 162 Neb. 746, 77 N. W. 2d 305 (1956), we stated: "In Commonwealth v. Jordan, 310 Mass. 85, 37 N. E. 2d 123, 137 A. L. R. 474, it was held that the word 'operates,' as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor, referred to the actual physical handling of the controls while under the influence of intoxicating liquor." See, also, State v. Harris, 295 Minn. 38, 202 N. W. 2d 878 (1972); People v. Chamberlain, 5 Ill. App. 3d 235, 282 N. E. 2d 784 (1972); Nicolls v. Commonwealth, 212 Va. 257, 184 S. E. 2d 9 (1971).

On January 30, 1976, officers Prokupek and Vantilburg observed a vehicle at the corner of Eighteenth and California Streets in Omaha, Nebraska. The vehicle was stopped at a stop sign. Upon approaching the vehicle the officers observed the defendant

asleep in the driver's seat. The engine was running and the car was in driving gear. The defendant had his foot on the brake and his hands on the steering wheel. When questioned at the police station following his arrest, defendant admitted driving his car. There was ample evidence for the trial court to have found that the defendant was operating or in actual physical control of a motor vehicle while intoxicated. The defendant's first contention is devoid of merit.

Defendant's next contention on appeal is that the overruling of his motion for a jury trial by municipal court Judge Vondrasek was error.

Initially we note that defendant was not entitled, as a constitutional matter, to a jury trial since the maximum penalty of imprisonment for second offense drunken driving is only 3 months. See, Codispoti v. Pennsylvania, 418 U. S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974); Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); State v. Young, 194 Neb. 544, 234 N. W. 2d 196 (1975).

Section 24-536, R. R. S. 1943, provides in relevant part that: "Either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury."

Pursuant to provisions of section 26-1,202, R. R. S. 1943, the municipal court of Omaha, Nebraska, has adopted the municipal court Rules of Practice. Rule 5 (b) (1) of these rules provides: "Parties desiring jury trials in criminal cases must request the same in writing at the time of arraignment or no later than 14 days prior to the time the case has been set for trial by the court."

Defendant's trial was originally set for March 23, 1976. At the request of the State it was reset for trial on April 30, 1976. On April 29, 1976, defendant sought

a new trial date. His request was granted and trial was set for June 22, 1976. On June 8, 1976, defendant filed a motion for a jury trial. This motion was granted on June 17, 1976, by municipal court Judge Elizabeth Pittman.

On June 21, 1976, the municipal court, Judge Robert Vondrasek, on its own motion overruled the granting of defendant's motion for a jury trial, finding that the June 17, 1976, order was "entered by mistake and inadvertence contrary to the laws of the State of Nebraska and the Rules of Practice before this Court." The court went on to explain, "That the Motion For Trial By Jury filed June 8, 1976 was not timely made, the request properly to have been made ten (10) (sic) days prior to the original setting of trial, March 23, 1976 and in no event later than ten (10) (sic) days prior to the April 30, 1976 trial setting date."

The municipal court was without question possessed of power to correct its own erroneous ruling. Defendant had no vested rights in the erroneous ruling. The ruling of the court on June 21, 1976, was correct. Failure to file a timely request for a jury trial constituted a waiver by the defendant of his statutory right to a jury trial. See, State v. Moreno, 193 Neb. 351, 227 N. W. 2d 398 (1975); Peterson v. State, 157 Neb. 618, 61 N. W. 2d 263 (1953). Defendant's contention is without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN INFANTE, APPELLANT.

260 N. W. 2d 323

Filed December 14, 1977. No. 41439.

1. **Criminal Law: Statutes: Controlled Substances.** Under section

28-4,115 (14), R. R. S. 1943, where the weight of marijuana is referred to in the Uniform Controlled Substances Act it shall mean its weight at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time.

2. **Criminal Law: Constitutional Law: Statutes.** When there is no statutory classification drawn on the basis of suspect criteria, there is no denial of equal protection if the challenged statute bears some rational relationship to legitimate state ends.
3. **Criminal Law: Evidence: Verdicts.** The verdict of a jury must be sustained, if, taking the view most favorable to the State, there is substantial evidence to support it.
4. **Trial: Witnesses: Juries.** It is not the province of this court to resolve the issue of credibility of witnesses, as such matters are for the jury.

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

James M. Tyler, 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.

BRODKEY, J.

Steven Infante, defendant and appellant herein, was charged with possessing marijuana weighing more than 1 pound under section 28-4,125 (5), R. R. S. 1943. Defendant was tried before a jury, which returned a verdict of guilty, and was placed on probation for a period of 1 year. Defendant has now appealed to this court, contending that evidence regarding the weight of the marijuana found in his possession was improperly received at trial; that the evidence presented by the State was insufficient to sustain his conviction; and that section 28-4,115 (14), R. R. S. 1943, is unconstitutional. We affirm the judgment of the District Court.

On August 2, 1976, defendant was apprehended when in possession of a bundle of freshly harvested, unprocessed marijuana plants which an investigator

for the State weighed in bulk ½ hour after their seizure, on a scale at the police station. Although the scale was not one certified for accuracy by any state agency, the investigator had previously checked the scale, and stated that it appeared to be in proper working order and was accurate when tested against known weights. The weight of the marijuana plants, including two plastic sacks in which they had been placed, a cloth binding the plants together, and bits of paper and ordinary grass was 9 pounds. The investigator removed stems and plant foliage weighing 1 pound, and sent them to the state laboratory for analysis by a chemist. The bundle of plants retained by the investigator was introduced at trial, as were the plants sent to the chemist.

By the day of trial on November 18, 1976, the plants retained by the investigator had dried and shriveled, causing a shrinkage in weight, and weighed 3 pounds, including mature stalks and wrappings. The chemist testified that the plants sent to him for analysis weighed 1 pound, 1 ounce, at the time he tested them, on August 5, 1976, but there was no evidence as to their weight on the day of trial. The investigator testified that he had stripped the leafy material from three stalks of plants, and had weighed the stalks and leaf material separately. He found that the leafy material comprised approximately 45 percent of the total weight of both the leafy material and the stalks. The State introduced this evidence to show that the weight of the plants possessed by the defendant, excluding the weight of mature stalks, was greater than 1 pound.

The defendant objected to all the evidence regarding the weight of the plants on the grounds that the scale used to weigh the plants had not been shown to be accurate, and that evidence of weight including stalks was incompetent, irrelevant, and immaterial. Defendant objected to admission in evidence of the marijuana plants because they contained stalks.

The trial court overruled these objections, and also overruled defendant's motion for a directed verdict at the close of the State's evidence. The defendant rested without presenting evidence.

The jury was instructed on both the crime charged and the lesser-included offense of possessing marijuana weighing 1 pound or less. The trial court included in its instructions to the jury relevant parts of section 28-4,115 (14), R. R. S. 1943, which provides that: "Marijuana shall mean all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; * * * but shall not include the mature stalks of such plant, * * * and where the weight of marijuana is referred to in sections 28-459 and 28-4,115 to 28-4,142 it shall mean its weight *at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time*; * * *." (Emphasis supplied.) The jury was also instructed that the word "stalk" as applied to a marijuana plant "shall mean the stem or axis thereof." The jury found the defendant guilty as charged.

It is clear that under section 28-4,115 (14), R. R. S. 1943, the mature stalk of a marijuana plant is not included in the definition of "marijuana," and the State concedes that it had the burden of proving beyond a reasonable doubt that the marijuana plants in defendant's possession, exclusive of mature stalks, weighed more than 1 pound. It is also clear that the weight of marijuana means its weight at the time it was seized, whether cured or uncured at that time.

It is appropriate to discuss first defendant's contention that section 28-4,115 (14), R. R. S. 1943, is unconstitutional as in violation of equal protection of the law. Defendant argues that it is unconstitutional to establish the weight of marijuana as its weight at the time it is seized, whether cured or uncured, be-

cause persons possessing recently harvested, "wet" marijuana are treated more harshly than those possessing cured, "dry" marijuana because the latter weighs less than the former. Although novel, we conclude this argument is without merit.

It has long been the rule that when there is no statutory classification drawn on the basis of suspect criteria such as race, there is no denial of equal protection if the challenged statute bears some rational relationship to legitimate state ends. See, Porras v. Nichol, 405 F. Supp. 1178 (Neb., 1975); Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975). The statute in question does not establish a classification of persons who are treated differently, but merely establishes a point of time at which to determine the weight of marijuana in all cases. An obvious rational purpose of establishing the time as the time of seizure is to enable the State to determine what charge should be filed against someone found in possession of marijuana. Defendant has cited no cases or authorities which suggest that such a statute is unconstitutional, and we have found none. The statute is not arbitrary, and bears some rational relationship to a legitimate state end. Therefore it is not unconstitutional.

Defendant's second contention is that there was not sufficient admissible evidence to prove that he possessed marijuana, as defined by statute, weighing more than 1 pound at the time it was seized. The rule is well-established that the verdict of a jury must be sustained, if, taking the view most favorable to the State, there is substantial evidence to support it. State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975); State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976); State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387 (1977).

Defendant's primary objections to the evidence in this case were that (1) the scale on which the marijuana was first weighed was not shown to have been

accurate and was not certified for accuracy; and (2) the weight of the plants seized, including stalks and wrappings, was not competent evidence of the weight of marijuana, as defined by statute, found in defendant's possession. Although it is true that the scale on which the marijuana was first weighed was not a certified scale, defendant cites no authority for the proposition that such a scale is required. There was testimony that the investigator had checked the scale prior to the weighing of the marijuana, and that it was in proper working order and accurate when tested against a known weight. The credibility of this testimony, and the reliability of the scale, were issues for the jury, and it is not the province of this court to resolve such issues. State v. Partee, *ante* p. 305, 258 N. W. 2d 634 (1977). The evidence was clearly sufficient to permit the jury to conclude that the scale used by the investigator was accurate and reliable.

With respect to the evidence of weight of the marijuana plants, there was evidence that the plants and wrappings weighed 9 pounds when seized, and that approximately 45 percent of the weight of the plants was attributable to marijuana as defined in section 28-4,115 (14), R. R. S. 1943. Even if it were assumed that the two plastic sacks, a piece of cloth, and several bits of paper and normal grass weighed as much as 3 or 4 pounds, the evidence was sufficient to permit the jury to conclude that the defendant was in possession of more than 1 pound of marijuana, as defined by statute. Had the State not presented evidence from which the jury could determine that the weight of the plants, excluding mature stalks, was more than 1 pound, we would agree with the defendant that the evidence could not be deemed sufficient. Although the State was somewhat careless and less than thorough in presenting its case, and should have weighed enough of the marijuana, excluding mature stalks, to obtain an exact weight, rather than

perform an experiment to ascertain the proportional weight of stalks and leafy material, there was such a large quantity of plants in this case at the time of the seizure, to wit, over 9 pounds, that it cannot be said that the evidence was insufficient. The evidence was sufficient to take the case to the jury, which was properly instructed with respect to the statutory definition of marijuana and the State's burden to prove that the defendant possessed more than 1 pound of marijuana, as defined by statute. On the particular facts of this case, we cannot say that there was not sufficient evidence to support the verdict of the jury.

The contentions of the defendant are without merit, and therefore the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

RAYMOND INTERNATIONAL, INC., APPELLANT, V. REALBANC, INC., ET AL., APPELLEES.

260 N. W. 2d 484

Filed December 21, 1977. No. 41170.

Real Property: Contracts: Mortgages: Liens. If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed.

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

Michael J. Dugan and Martin W. Pinkwitz of Costello & Dugan, for appellant.

Renne Edmunds of Knowles & Edmunds and Edward G. Garvey, for appellees.

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

SPENCER, J.

This is an action brought by a contractor to establish the priority of and to foreclose a mechanic's lien. The appellant, hereinafter referred to as Raymond, seeks to establish its mechanic's lien as prior to construction loan mortgages. If not, Raymond claims the lien is prior to advances made by the mortgagee after notice of its filing. The trial court determined the amount of the lien but subordinated it to advances made by appellees-mortgagees subsequent to notice of the Raymond lien. We affirm.

OCC, Inc., and Raymond entered into a contract pursuant to which Raymond was to construct and drive the foundational piling for the office building being erected by OCC, Inc. The proposal was made by Raymond on January 24, 1974. Pursuant to the request of OCC, Inc., Raymond completed moving its equipment onto the job site February 10, 1974. After the equipment was assembled, Raymond was informed that OCC, Inc., was having second thoughts concerning the project. Pending further developments, OCC, Inc., agreed to on-site rental plus payment of delay costs to keep the equipment available if and when OCC, Inc., was ready to proceed.

On July 19, 1974, Raymond executed an agreement which provides in part: "WHEREAS, Owner and Contractor agree it is desirable to immediately commence construction, however, Owner will not allow construction to commence unless Contractor agrees to subordinate any lien which it may have upon the Property to the lien of a construction loan to be made to Owner (or to a party designated by Owner).

"NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein

and of the benefits accruing to each party, it is agreed as follows:

"1. Contractor hereby agrees to subordinate any mechanic's and materialmen's lien or any other lien which may arise in connection with the performance of construction work by Contractor on the Property to any construction loan to be made to Owner (or any party designated by Owner), including without limitation a construction loan from BA Mortgage Company of Texas, Inc.

"2. Simultaneously with the closing of such construction loan, Contractor shall execute a recordable document subordinating any such liens to the lien created by such construction loan in such form as may be satisfactory to Pioneer National Title Insurance Company.

"3. Contractor understands that this agreement is a material consideration to Owner in connection with the commencement of construction work by Contractor."

The first pile was driven by Raymond on August 7, 1974. Work was completed on October 17, 1974. On July 24, 1974, Raymond requested payment of $60,000, claimed owed to it to that date. It received $45,000. No other payments were made. A check, subsequently given in partial payment, was never cleared. Raymond filed a mechanic's lien on November 17, 1974, in the amount of $152,909.78. Notice of this lien was given to all defendants on November 27, 1974.

On August 28, 1974, OCC, Inc., mortgaged the real estate as follows:

1. To appellee Realbanc, Inc., $7,500,000.
2. To appellee Heitman Mortgage Investors, $1,000,000.
3. To Realbanc, Inc., $1,000,000.

Raymond argues first the validity of the subordination agreement. It takes the position there are two material questions of fact in reference to the

agreement. First, it argues there is an absence of any consideration benefiting Raymond. Second, it argues the general language of the instrument makes it apparent that the agreement is not complete in itself but requires something more in the future. There is no merit to either contention.

After the execution of the agreement, Raymond received $45,000 on expenses accrued to that date. Subsequent to that date, the proposed contract dated January 24, 1974, and revised February 4, 1974, and July 19, 1974, was executed. There is no question the execution of the contract depended upon the subordination agreement.

The evidence shows Raymond had not performed any work on the project with the exception of moving its equipment onto the job site prior to the execution of the agreement. Further, Raymond did not have a contract until its proposal was accepted on July 23, 1974, and subsequently approved. There is no question — the consideration was sufficient for the agreement.

Raymond's second point is the agreement was never completed. This contention is premised on the requirement that simultaneously with the closing of the construction loan, Raymond was to execute a recordable document, subordinating its lien in a form satisfactory to Pioneer National Title Insurance Company. This was never done.

In the first paragraph, however, Raymond specifically agreed to subordinate any mechanic's and materialmen's lien, or any other lien which would arise in connection with the performance of its construction work to the construction loan. The title insurance company, which provided the title and mortgage insurance required by the building and loan agreement, accepted the agreement as executed and did not require any further subordination agreement. Pioneer National Title Insurance Company decided the agreement of July 19, 1974, was in

itself recordable and was in a form satisfactory to it.

It is obvious to us that the first paragraph constituted the subordination agreement. The second paragraph merely provided for the execution of a recordable document in such form as would be satisfactory to the title insurance company. Pioneer was satisfied with the agreement tendered and did not require any further document. The additional document was nothing more than a housekeeping document which was to be executed if needed. Even if Pioneer had decided the agreement was not in recordable form, and insisted on the furnishing of a subsequent document, Raymond could not have avoided the fact that the agreement itself subordinated any lien it might have to the construction loan mortgages.

Raymond's main contention is that its lien should have priority over all advances made under the construction loan subsequent to November 27, 1974, the date notice of its lien was given to the defendants. Raymond has cited cases from other jurisdictions which do hold that advances made after a mortgagee could declare a default are optional rather than obligatory.

In Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N. W. 687 (1919), this court held: "If the owner of real estate contracts to borrow money to erect buildings thereon and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed."

The holding in Creigh was reaffirmed in Larson Cement Stone Co. v. Redlim Realty Co., 179 Neb. 134, 137 N. W. 2d 241 (1965). In Larson, we called attention to the fact that the Legislature had fixed the

priority of some optional advances at the time the mortgage was recorded. See § 76-238.01, R. S. Supp., 1963. Raymond refers to this statute as amended in 1974, but it is not applicable herein because we conclude the future advances in the present case were obligatory and not optional.

It is true, as Raymond argues, when it filed its mechanic's lien for record, defendants by the terms of their mortgage could have elected to declare the mortgagor in default. In that event it could have refused to make further advances on the construction loan. Raymond takes the position this right to declare a default negates any obligation to make future advances pursuant to the mortgage.

Among the options available to the mortgagee upon default are: (1) Declaration of the entire principal indebtedness due, or (2) the completion of construction. These options are usually not too satisfactory. We must recognize that a mortgagee may be obliged to continue advances for his own security, even though a mortgagee may have received actual notice of intervening liens. The mortgagee may still be under economic compulsion to make future advances, in order to protect his security in a partially constructed building. It would be a rare situation where a partially completed structure, under forced sale, would yield sufficient proceeds to pay off existing liens and encumbrances.

While we have discussed the issue raised by Raymond as to subsequent advances, we do not find it to be controlling herein. The terms of the agreement signed by Raymond to subordinate its liens to the construction loans are unqualified and controlling herein. Raymond knew, or should have known, that any construction loan would contain provisions for advances as the building progressed. Without specific language in the subordination agreement to the contrary, it must be deemed to contemplate future advances.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

KATHY L. BISHOP, APPELLEE, V. BOCKOVEN, INC., A CORPORATION, APPELLEE, IMPLEADED WITH METROPOLITAN PROTECTION SERVICE, INC., A CORPORATION, APPELLANT.

260 N. W. 2d 488

Filed December 21, 1977. No. 41186.

1. **Statutes.** Statutes which effect a change in the common law or take away a common law right should be strictly construed and a construction which restricts or removes a common law right should not be adopted unless the plain words of the act compel it.
2. **Statutes: Courts.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
3. **Statutes: Words and Phrases.** Under section 29-402.01, R. R. S. 1943, the words "a merchant's employee" do not include a merchant's agent who is not an employee.

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

Terry K. Barber of Johnston, Grossman, Johnston & Barber, for appellant.

Hal Anderson of Friedman & Berry, for appellee Bishop.

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

MCCOWN, J.

This action for false arrest was brought in the county court of Lancaster County, Nebraska, by the plaintiff, Kathy L. Bishop, against two corporate defendants, Bockoven, Inc., the owner of the supermarket, and Metropolitan Protection Service, Inc.,

which was engaged in the business of providing security services. After trial to the court sitting without a jury, the county court dismissed the action as to defendant Bockoven and entered judgment in favor of plaintiff and against defendant Metropolitan Protection Service, Inc., for $1,000 and costs. Metropolitan appealed to the District Court for Lancaster County which affirmed the judgment of the county court. Metropolitan has now appealed to this court.

The defendant Bockoven owns and operates a supermarket in Lincoln, Nebraska. For some time prior to 1974 Bockoven had contracted with defendant Metropolitan Protection Service, Inc., to provide security services for the Bockoven store in connection with the control of shoplifting. Metropolitan was an independent contractor which employed all security guards assigned to the Bockoven supermarket.

On January 19, 1974, the plaintiff was shopping in the supermarket. She was accompanied by her sister and three small children. They were in the store approximately 10 to 15 minutes. They stopped at the hosiery display rack at the rear of the store and spent approximately 5 minutes making their selections of hosiery. Plaintiff selected two pairs of stockings and her sister one pair. They testified they did not open any of the hosiery packages. They then put the hosiery in a cart with their other purchases and proceeded to the checkout stand where they paid for their purchases separately. The plaintiff and her sister then left the store. Immediately outside the door they were approached by a Metropolitan security guard who displayed his badge and requested that they accompany him back into the store.

The security guard testified that through a one-way mirror in the rear of the store he observed the plaintiff open one package of hose, remove the hose from that package and add them to another pack-

age, and then put the single package with the two pairs of hose in her shopping cart. The guard then informed the store manager that he had seen the plaintiff "double packaging" the hose. The manager advised the Metropolitan security guard to stop the plaintiff when she was outside the store.

When the guard requested plaintiff and her sister to return to the store they accompanied him to the manager's office. The guard told the manager that the plaintiff was the person he had observed, and the manager asked to inspect plaintiff's packages. The plaintiff consented and the manager checked her purchases and found two hosiery packages, each containing one pair of hose, which the plaintiff had paid for. The manager apologized, explained that a mistake had been made, and that plaintiff and her sister were free to leave. This action was subsequently commenced.

After trial the county court dismissed plaintiff's action as to Bockoven and entered judgment against Metropolitan without any specific findings of fact or law. On appeal, the District Court specifically found that neither Metropolitan nor its employee was "a peace officer, a merchant, or a merchant's employee" under section 29-402.01, R. R. S. 1943, and Metropolitan was not entitled to the benefits of restricted liability for false arrest or unlawful detention provided for by that statute. The District Court then affirmed the county court judgment.

Section 29-402.01, R. R. S. 1943, provides: "A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer,

merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention."

Metropolitan contends that it and its employee, the security guard, were agents of a merchant and, therefore, entitled to the benefits of the statute.

At common law, in the absence of a statute, a private citizen, unlike an officer, is privileged to make an arrest only when a crime has, in fact, been committed, and must take the risk that a crime has not been committed. See Prosser, Torts (4th Ed.), § 26, p. 131.

Statutes such as section 29-402.01, R. R. S. 1943, granting a privilege to arrest, or an immunity from liability for an arrest, are ordinarily based on the principle that the beneficiary of the statutory privilege has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the individual arrested. The privileged person is allowed freedom of action because his own interest or those of the public require it and social policy will best be served by permitting it. Prosser, Torts (4th Ed.), § 17, p. 99.

In one connotation, section 29-402.01, R. R. S. 1943, creates a privilege to arrest or detain, and in another sense it takes away a common law right to be free from arrest or detention, when no crime has been committed. Statutes which effect a change in the common law or take away a common law right should be strictly construed and a construction which restricts or removes a common law right should not be adopted unless the plain words of the act compel it. See, Bank of Commerce & Savings v. Randell, 107 Neb. 332, 186 N. W. 70; Nielsen v. Chicago, B. & Q. R. R. Co., 141 Neb. 584, 4 N. W. 2d 569.

Section 29-402.01, R. R. S. 1943, in one comparatively short paragraph grants its benefits to "a

peace officer, a merchant, or a merchant's employee" and uses that exact specification three separate times. Similar privilege statutes have been upheld which specifically included "agents" along with merchants and merchants' employees. See, Draeger v. Grand Central, Inc., 504 F. 2d 142 (10th Cir., 1974); F. B. C. Stores, Inc. v. Duncan, 214 Va. 246, 198 S. E. 2d 595 (1973).

If the Legislature desired to broaden the classification of persons entitled to the privilege, it could have done so. The evidence here, however, is undisputed that the security guard was not a peace officer, a merchant, or a merchant's employee. The defendant, in effect, suggests that we add the words "or agent" to the language of the statute.

A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Gaughen v. Sloup, 197 Neb. 762, 250 N. W. 2d 915; Wendt v. Cavalier Ins. Corp., 197 Neb. 622, 250 N. W. 2d 243. Under section 29-402.01, R. R. S. 1943, the words "a merchant's employee" do not include a merchant's agent who is not an employee. The District Court was correct in its determination that neither Metropolitan nor its security guard employee was "a peace officer, a merchant, or a merchant's employee" within the meaning of section 29-402.01, R. R. S. 1943.

The defendant also contends that the award of $1,000 is speculative, conjectural, and excessive. There is evidence of embarrassment and mental anguish in this case, and there is no accurate method or formula by which such damage can be measured and determined. In awarding damages for physical discomfort and mental anguish, the fact finder must rely on the totality of the circumstances

surrounding the incident, the credibility of the evidence and witnesses, and the weight to be given to all these factors rests in the sound discretion of the fact finder. This court is reluctant to interfere with the verdict of the fact finder where the law provides no accurate measurement. See Huskinson v. Vanderheiden, 197 Neb. 739, 251 N. W. 2d 144.

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

AFFIRMED.

EDWIN G. SCHEUER, JR., PH.D., APPELLANT, V. CREIGHTON UNIVERSITY, A NEBRASKA NONPROFIT CORPORATION, APPELLEE.

260 N. W. 2d 595

Filed December 21, 1977. No. 41232.

1. **Contracts.** In interpreting the intention of the parties, a contractual provision must be interpreted in the light of other provisions of the contract.
2. **Contracts: Colleges and Universities: Words and Phrases.** The term "financial exigency," as used in the contract of employment herein, may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole.

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

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

Lyle E. Strom and Robert L. Matthews, Jr., of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

David M. Rabban and Matthew W. Finkin, for amicus curiae.

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

SPENCER, J.

This is an action for reinstatement of employment. Edwin G. Scheuer, Jr., was terminated as an assistant professor at the School of Pharmacy of Creighton University, on the ground of financial exigency in that school. The trial court dismissed his petition. Two questions are presented: (1) Should the contract be construed to require a showing of financial exigency on the part of the University as a whole or only as to the School of Pharmacy; and (2) whether a financial exigency existed within the meaning of that term as it is used in the contract between the parties. We affirm.

Edwin G. Scheuer, Jr., was a tenured assistant professor at the School of Pharmacy of Creighton University, Omaha, Nebraska. Creighton University is a private institution of higher education with its principal place of business in Omaha, Douglas County, Nebraska. Scheuer had been granted the status of a tenured member of the faculty of Creighton University in 1971.

The School of Pharmacy is one of four schools making up the Health Sciences Division of the University, the others being Medicine, Dentistry, and Nursing. Each of the four schools has its own Dean, with the Vice President for the Health Services being responsible for the entire Health Sciences Division.

Creighton University operates on a June 1 to May 31 fiscal year. The budget for each school year is prepared in the fall of the preceding year. The School of Pharmacy has three sources of income: Tuition and fees; income generated from clinical services; and federal funds. A large part of the federal funds received were "capitation funds," which represent a certain amount of federal funds given to health science schools for each student educated. These funds were contingent upon the school agreeing to a specified enrollment increase. Additionally,

in the School of Pharmacy, the funds were further conditioned on the school expanding its clinical pharmacy program.

In the fiscal year 1975-1976, the School of Pharmacy received approximately $160,000 in federal "capitation funds." For this same fiscal year, the School of Pharmacy's entire budget was between $600,000 and $700,000. In spite of federal aid, the School of Pharmacy had operated at a deficit since 1971. These deficits and the federal funding have been as follows:

Fiscal Year	Deficit	Federal Funding
1971-72	$11,407	$ 76,580
1972-73	68,311	70,199
1973-74	40,353	83,615
1974-75	56,656	142,733
1975-76	56,000	159,782

In June of 1975, the Vice President for the Health Sciences Division learned the Division was facing a $900,000 deficit for the fiscal year 1975-1976, which had just begun. The School of Pharmacy was responsible for approximately $50,000 of that deficit. Later that same summer, he learned the entire Health Sciences Division was facing a reduction of funds for the year 1976-1977, in the amount of $2,000,000, and this sum was on top of the already expected loss of $900,000. Of the $2,000,000 loss in funds for the Division, approximately $160,000 of that loss was attributable to the School of Pharmacy as a result of the loss of "capitation funds."

Adding to the problems of the School of Pharmacy was the fact that it was moving into a new building in the spring of 1976. This move created $100,000 in additional expenses for the School of Pharmacy. There was no possibility of postponing the move since the expenses had already been accrued in the building. Also, the School of Pharmacy had made a commitment to the federal government to move into the building or else refund certain government

grants. Additionally, the School of Pharmacy's accreditation depended upon its moving into the new facility.

The record indicates steps were taken to cut costs without impairing the essential goal of maintaining the integrity of the program in the School of Pharmacy. Cuts were made first in the area of nonsalary costs, such as equipment, traveling, and office supplies. A freeze was placed on faculty salaries. Steps were taken to terminate certain nonfaculty positions. These steps were not sufficient, so it then became necessary to reduce the faculty. After a review of the various positions and their relation to the program, it was found necessary to terminate four faculty members. One of them was the plaintiff. Plaintiff was chosen because the only course he taught was medicinal chemistry which could also be taught by a tenured faculty member who had seniority over him and who also could teach biochemistry which plaintiff had stated he could not teach.

On November 25, 1975, plaintiff was notified by letter from the President of the University that his appointment as a member of the faculty of the School of Pharmacy would terminate, effective December 1, 1976. The termination notice stated in part: "Because of financial exigencies which have arisen by reason of cut backs in federal support of basic Health Sciences educational programs, the School of Pharmacy has been required to make cuts in its program. * * * After consultation with the Vice President for Health Sciences and with the Dean of Pharmacy, it has been determined that your position is one which is being abolished."

Both parties agree that termination procedures are governed by the Creighton University faculty handbook. The handbook provides: "The right of tenure may not be revoked except for cause. In general we understand by 'cause', professional in-

competence; medical-physical incapacity; substantial and manifest neglect of duty; grave misconduct (including inciting the immediate impairment of the institution's functions, or personally and physically causing such impairment); personal conduct substantially impairing the individual's performance of his appropriate functions within the University community; *and financial exigency on the part of the institution.* The burden of showing cause and of substantiating such a showing with a preponderance of the evidence is upon the institution. * * *

"Where termination of appointment is based upon financial exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof, faculty members affected may have the issued (sic) reviewed by the Academic Senate or Academic Council, or by the Faculty Grievance Committee, with ultimate review of controverted issues by the Board of Directors. In cases of financial exigency, including discontinuance or reduction of a program or department of instruction, the faculty member concerned is to be given notice as soon as possible but never less than 12 months before termination; or, in lieu thereof, he may be given severance salary for 12 months.

"Before terminating an appointment because of discontinuance or reduction of a program or department of instruction, the university will make every effort to place affected faculty in other suitable positions. If an appointment is terminated before the end of the period or term of appointment because of financial exigency, the released faculty will not be replaced for two years thereafter unless the released faculty has been offered reappointment and a reasonable period during which to accept or decline this reappointment." (Emphasis supplied.) The emphasized portions of the quotations above are the portions which are pertinent to the discussion herein.

It is undisputed that Creighton University as a whole was not in a real state of financial exigency. However, as set out hereafter, the testimony of its Treasurer might suggest otherwise. The trial judge found plaintiff's appointment could be terminated upon a showing of financial exigency in the School of Pharmacy. We approach the case on that premise. The District Court found the language contained in the faculty handbook "clearly defines 'financial exigency' as possibly being 'bona fide discontinuance of a program or department of instruction or the reduction in size thereof,' " and concluded that " 'financial exigency' should be construed as requiring a determination with a particular college, rather than requiring consideration of the financial condition of the University as a whole." The District Court made no reference to the language "and financial exigency on the part of the institution."

Another section of the faculty handbook relied upon by the District Court in reaching its determination was a provision concerning dual appointments. The handbook states: "A faculty member may hold appointments in more than one department and/or school or college. Dual appointments may be set up when the chairman of the appropriate departments and the dean or deans, as the case may be, expressly request such an arrangement for the reason that it will help them discharge their educational and service responsibilities. One department or college or school should always be designated primary, within which the faculty member concerned will accrue time toward academic tenure. Tenure should obtain in only one department or school or college and shall refer only to the primary appointment. Whereas financial support for the salary of the faculty member may be derived from both departments, with the consent of both chairman, it is understood that the chairman of the secondary department may withdraw support at the end of any de-

fined budget period, and that the obligation for full-time support will then revert to the primary department." The court found "expressed in this provision of the contract a clear understanding that various departments — individually — shall be responsible for the salary of its faculty."

Provisions of the faculty handbook not cited by the District Court but which would also appear to be relevant are the following: "The chief administrator in a school or college carries the title of Dean. A dean exercises general executive responsibility for his school or college under the appropriate vice president, concerning himself with the broad educational policies, programs and procedures of his school or college. * * *

"A dean is empowered to employ, evaluate, reappoint or terminate faculty upon recommendation by the appropriate department chairman after the chairman has consulted with the full-time faculty of his department. He is also empowered to recommend faculty for promotion in rank and for tenure — again, after consultation with the appropriate department chairman. (The powers enumerated in this paragraph are to be exercised in conformity with policies and procedures established by the university's Committee on Rank and Tenure and in conformity with the procedures detailed in this Handbook for nonreappointment, termination and dismissal.) * * *

"A school or college may be organized by departments. A department is an administrative unit consisting of faculty members engaged in educational pursuits under the direction of a chairman. * * *

"Individuals become members of a school or college, and at the same time the entire university faculty, on the basis of a formal contract which is normally detailed in writing and fully executed by appropriate university officers. Such contracts are considered bilateral; that is, they are interpreted as

containing explicit or implicit promises on the part of the faculty member to perform his assigned duties satisfactorily in consideration of the university's promises to afford faculty status, with all its benefits, and a stated salary, etc. * * *

"Contracts between the university and tenured faculty are considered permanent or continuing in the sense that they are automatically renewed until the faculty member's retirement unless (1) the faculty member gives timely notice, as it is described in this Handbook, of termination; or (2) the university gives timely notice of intent to terminate for cause. Procedures governing termination or dismissal for cause are also set forth in detail in this Handbook."

The faculty handbook further provides: "Creighton University recognizes that its faculty is entitled to enjoy and exercise, without penalty or fear of reprisal, all the rights of American citizens, as well as the rights of academic freedom as they are understood in Academe.

"In evidence of this recognition, the university endorses the *1940 Statement of Principles on Academic Freedom and Tenure* adopted and promulgated by the Association of American Colleges and Universities and by the American Association of University Professors. The university likewise endorses the *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings* adopted and promulgated by these associations."

The 1940 statement provides: "After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies. * * * Termination of a continuous appointment because of financial exigency

should be demonstrably bona fide." "Financial exigency" is not defined in the statement.

The termination procedures contained in the faculty handbook closely parallel those proposed by the American Association of University Professors in its *1968 Recommended Institutional Regulations on Academic Freedom and Tenure.* The brief of amicus curiae suggests that the American Association of University Professors, hereinafter called AAUP, has since adopted its *1976 Recommended Institutional Regulations on Academic Freedom and Tenure.* This for the first time defines "financial exigency" as "an imminent financial crisis which threatens the survivial of the institution as a whole and which cannot be alleviated by less drastic means."

Plaintiff and amicus curiae, the American Association of University Professors, cite certain cases suggesting upon proper analysis they tend to support their interpretation that financial exigency was intended to extend to the University as a whole. We disagree. In none of these cases do we find even a suggestion that the issue should be so determined. In fact, a close analysis of some of them would indicate they may actually support the position of the defendant, Creighton University.

American Assn. of University Professors v. Bloomfield College, 129 N. J. Super. 249, 322 A. 2d 846 (1974), affirmed 136 N.J. Super. 442, 346 A. 2d 615 (1975), concerned a small college with an enrollment of less than 1,000 students. The college had been operating at a deficit for several years. The trial court found because it had assets in the form of real property which could be sold to alleviate the liquidity problem, there was no financial exigency. The appellate court disagreed and specifically found the evidence sufficient to prove the existence of the criterion of financial exigency required by the contract. We assume this case was included to imply

that Creighton University was not faced with a financial exigency because it had assets otherwise which could have covered the deficits in the School of Pharmacy.

So far as we have been able to ascertain, there is not a single case in any jurisdiction which sustains the plaintiff's position. The only case on point cited by the plaintiff, Browzin v. Catholic University of America, 527 F. 2d 843 (D. C., 1975), would appear to support the defendant's contention rather than that of the plaintiff.

In Browzin, the question of whether the financial exigency must be institution-wide did not arise because the parties stipulated the University was faced with a bona fide financial exigency at the time the plaintiff's contract was terminated. Plaintiff was a tenured professor in the School of Engineering and Architecture. In 1969, that department was faced with a severe budget reduction and steps were taken to identify areas which needed to be cut back. The administration decided not to offer courses in soil mechanics and hydrology which were taught by the plaintiff. The Dean of the School of Engineering and Architecture informed plaintiff of this decision and informed him his appointment would be terminated as of January 31, 1971, a date some 14 months in the future.

If we read that case correctly, the financial exigency existed in the School of Engineering and Architecture. It was in that school the contract terms were applied after two courses of study were eliminated. We read the case to suggest a financial exigency in the School of Engineering and Architecture was sufficient cause to terminate Browzin's employment. The Dean emphasized he was motivated solely by financial considerations in making the difficult termination decision. At the close of plaintiff's case the trial court sustained defendant's motion to dismiss. The Court of Appeals affirmed.

Plaintiff cites Johnson v. Board of Regents of the University of Wisconsin System, 377 F. Supp. 227 (W. D. Wis., 1974), affirmed 510 F. 2d 975. In Johnson, tenured University faculty members who were terminated due to financial exigency brought suit claiming that they had been denied procedural due process. In denying the plaintiffs' motion for a preliminary injunction, the court held the Fourteenth Amendment did not require a tenured faculty member have any control over which department's budget was to be cut or in what amount it would be cut. In that case, the Legislature had cut appropriations and the court accepted the position that exigency was present and that some terminations were necessary. That case is not helpful except for language which supports the concept that the administration must be given a free hand in allocating financial problems to their sources.

Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945 (Neb., 1974), cited by plaintiff, is a Nebraska Federal District Court case involving a situation where the Legislature had cut appropriations sufficiently to require some terminations. The plaintiffs were tenured instructors at Peru State College. The acting President of Peru made his recommendations for the termination of the plaintiffs and other faculty members. They were released because of the reduced budget, on the basis of objective evaluation of all the faculty members and the overall educational program. The court found the process utilized to select the plaintiffs for termination was fair and reasonable. It further determined that state college faculty members were not guaranteed any absolute constitutional right to continued employment even though they were tenured employees.

Plaintiff also cites the case of Mabey v. Reagan, 537 F. 2d 1036 (9th Cir., 1976), to support his proposition that financial exigency must exist at the Univer-

sity level. The holding in that case in no way deals with the question at which level a financial exigency must exist. The case involved the question of a First Amendment right, not a question of interpretation of the words "financial exigency." In fact, the term "financial exigency" was not found in the contract between the parties. The court merely referred to the term "financial exigency" citing the 1975 definition of that term given by the American Association of University Professors. However, the Mabey court specifically found the definition of the AAUP "is not binding upon us."

The Browzin court determined the cancellation of courses taught by the plaintiff was a discontinuance of a program of instruction. It therefore concluded the regulation based upon termination of appointment for financial exigency or bona fide discontinuance of a program was applicable. As heretofore suggested, Browzin is supportive of defendant's position. The Creighton faculty handbook provides for termination of an appointment based upon "financial exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof." The curtailing of the medicinal chemistry course in the School of Pharmacy is within the ambit of this provision.

The evidence supports a finding that plaintiff's termination was based upon a bona fide reduction in size of a program of instruction. For accreditation purposes and in order to obtain federal funding, the School of Pharmacy was required to emphasize its clinical pharmacy program. Medicinal chemistry, which plaintiff taught, was reduced to a 1 semester, 3 hours, course for freshman students. Another tenured faculty member, who had both rank and seniority over plaintiff, was qualified to teach medicinal chemistry as well as biochemistry. He assumed both these duties and plaintiff, who could

teach only medicinal chemistry, was released. The record fully supports a finding the process used to select plaintiff for termination was not only fair and reasonable but tended to maintain the most viable and best overall program for the School of Pharmacy within the financial limits of that college.

We do not accept the 1976 recommendation of the American Association of University Professors defining "financial exigency" so as to limit that term to an imminent crisis which threatens the survival of the institution as a whole. This definition was adopted several years subsequent to the execution of the contract being interpreted herein. It has no probative value as to the meaning of the term at the time of the contract.

Plaintiff's interpretation of the language "financial exigency on the part of the institution" entirely ignores the other provisions of the contract. To accept plaintiff's definition would require Creighton to continue programs running up large deficits so long as the institution as a whole had financial resources available to it. The inevitable result of this type operation would be to spread the financial exigency in one school or department to the entire University. This could likely result in the closing of the entire institution. We must construe the questioned language in the context of the contract as a whole. To accept plaintiff's interpretation of it would negate other provisions of the contract. In interpreting the intention of the parties a contractual provision must be interpreted in the light of other provisions of the contract. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co., 188 Neb. 308, 196 N. W. 2d 377 (1972).

The rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas faced with financial problems. Creighton University is a private institution. We can take judicial notice of the fact that many private universities are facing severe

financial crunches. When we consider only a single area we get an idea of the problem. The record indicates energy costs for Creighton University in a relatively short time have risen from $200,000 per year to $1,200,000.

If we read the record correctly, Creighton as an institution has less than $2,000,000 of unrestricted general funds available every year. Common sense dictates that plaintiff's contention is untenable. To sustain it, we must hold no tenured employee in any college may be released until the institution exhausts its total assets or at the very least reaches the point where its very survival as an institution is in jeopardy.

We specifically hold the term "financial exigency" as used in the contract of employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole.

The evidence is fairly conclusive the School of Pharmacy was faced with a financial exigency for the fiscal year 1976-1977. It had been operating with a deficit for the past 5 years. The deficit for 1974-1975 and 1975-1976 had reached $56,000 for each year. The deficit faced for 1976-1977 was in excess of $200,000. This deficit would be more than three times greater than any previous deficit.

The Vice President for Financial Affairs, who was Treasurer of Creighton University, testified the University generally subsidized each college in the amount of 6 to 7½ percent of the budget for that college. This subsidy came from the University general fund, which is made up of endowment earnings, Jesuit net contributed income, and gift income from the public. These sources total approximately $1,750,000 a year.

To continue the existing pharmacy program, the University would have been required to more than double the subsidy for that college, to the detriment

of its other schools. The Treasurer further testified Creighton University as a whole was in a delicate financial position. While stating the University was not then in a state of financial exigency, he did state it was on the edge of financial exigency. It was his further testimony that Creighton's endowment is only 1/10th of what it should have for a private university of its size.

For the reasons discussed above, the judgment of the District Court is correct and should be affirmed.

The judgment is affirmed.

AFFIRMED.

HELMUTH KREHNKE ET AL., APPELLANTS, V. FARMERS UNION CO-OPERATIVE ASSOCIATION, A COOPERATIVE, APPELLEE, IMPLEADED WITH SAND CONSTRUCTION COMPANY, A CORPORATION, APPELLANT.

260 N. W. 2d 601

Filed December 21, 1977. No. 41246.

1. **Negligence: Evidence: Juries.** Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Where, however, different minds may reasonably draw different conclusions or inferences from the evidence, or if there is a conflict therein, the issues of negligence and contributory negligence are for the jury.
2. **Negligence.** One who is capable of understanding and discretion, who fails to exercise ordinary care and prudence to avoid open, obvious defects and dangers, is negligent or contributorily negligent. Negligence must be measured against the particular set of facts and circumstances which are present in each case.
3. **Evidence: Judgments.** Where there is a conflict in the evidence, this court will presume that the controverted facts were decided in favor of the successful party, and the judgment will not be disturbed on appeal unless it is clearly wrong.
4. **Negligence.** In using an elevator a person is required to exercise reasonable care for his own protection, and ordinarily the question of contributory negligence is for the jury.
5. **Instructions: Appeal and Error.** Where instructions to the jury correctly state the law, it is not error for the trial court, in the ab-

sence of a request for a more specific instruction, to fail to give a more elaborate one. Failure to object to instructions after they are submitted to counsel for review precludes raising an objection to the instructions on appeal.

6. **Negligence: Evidence.** The violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue.

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

Nelson, Harding, Yeutter, Leonard & Tate, Kenneth Cobb, Scott E. Daniel, Richard P. Garden of Hutton & Garden, Cassem, Tierney, Adams & Gotsch, and Terry Grennan, for appellants.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

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

BRODKEY, J.

In separate petitions filed in the District Court for Colfax County, plaintiffs Helmuth Krehnke and his wife Leola, alleged that Helmuth had suffered personal injuries and other damages proximately caused by the negligent failure of defendant Farmers Union Co-Operative Association to properly inspect and maintain an electric manlift in its grain elevator. Sand Construction Company, employer of Helmuth, was named an additional defendant for subrogation purposes. We shall hereinafter refer to Helmuth, one of the appellants herein, as plaintiff, and to Farmers Union Co-Operative Association, appellee, as defendant. Plaintiff specifically alleged that defendant's failure to properly inspect and maintain the lifting mechanism and safety brake of the manlift caused it to plummet to the bottom of its shaft when plaintiff was riding therein. Plaintiff prayed for special and general damages. Defend-

ant admitted that plaintiff had been injured in an accident in its manlift, but denied plaintiff's allegations of negligence, and alleged that his injuries were proximately caused or contributed to by the negligence of the plaintiff in a degree more than slight. Specifically, defendant alleged that plaintiff failed to inquire about or determine the lifting capacity of the manlift before operating it; and that plaintiff operated the manlift when he knew or should have known that it was loaded beyond its lifting capacity.

The case was submitted to a jury on both the plaintiff's allegations of negligence and defendant's allegations of contributory negligence. The jury entered a verdict in favor of the defendant. Judgment was entered on the verdict, and plaintiff has appealed to this court. Although plaintiff sets forth 15 assignments of error in his brief, the assignments fall into 4 categories which may be summarized as follows: (1) The trial court erred in submitting the issue of contributory negligence on the part of the plaintiff to the jury; or, in the alternative, failed to instruct the jury with adequate specificity as to a passenger's duty of care to check the lifting capacity of a manlift and to the loading on a manlift; (2) the trial court erred in failing to instruct the jury with adequate specificity in regard to plaintiff's allegations of negligence on the part of the defendant; (3) the trial court erroneously admitted into evidence the opinion testimony of a defense witness concerning the cause of the accident; and (4) the trial court should have directed a verdict in favor of the plaintiff and submitted only the issue of damages to the jury. We affirm the judgment of the District Court.

The facts relevant to this appeal are as follows. The manlift in question was installed in defendant's elevator approximately 20 years ago and, as its name implies, was primarily designed to carry workmen to the top of the grain elevator so that they

could direct grain into the appropriate part of the elevator. The car of the manlift consisted of a wire cage on three sides, the fourth side remaining open. The interior floor space of the cage was 2 feet square. It was an electric manlift, and the lifting mechanism was located at the top of the shaft. A counterweight was attached to the end of the cable which was used to raise and lower the manlift. The capacity of the manlift was estimated by plaintiff's expert witness to be about 300 pounds, but he also stated that it would take 171 pounds more than the weight of the plaintiff (235 pounds) and the weight of the cage itself (270 pounds) to cause the counterweight to slide, that is to say, to cause the manlift to be overloaded to the extent it would fall. The manlift had an automatic safety brake, which was activated by a rope and governor. If the manlift would begin to fall too rapidly, a clamp on the rope would cause "dogs" extending from the cage to catch or imbed themselves on wooden rails which were located on both sides of the manlift shaft.

Plaintiff was an employee of a construction company which was engaged to install certain equipment on the top of defendant's grain elevator. Plaintiff was an experienced workman in this field, and was familiar with grain elevators and their operation. He was also familiar with the operation of manlifts such as the one in this case. In carrying out the job at defendant's elevator, plaintiff regularly used the manlift to transport himself to the top of the grain elevator, although he apparently did not use the manlift to transport equipment and materials. Plaintiff acknowledged that the manlift worked properly prior to the accident.

On October 7, 1971, the installation on the elevator having been completed, plaintiff and a coworker were removing equipment from the top of the elevator. Plaintiff admittedly was using the manlift to take some equipment to the ground, and testified

that he placed one oxygen bottle and one acetylene bottle in the manlift, sent the manlift to the ground floor, and "yelled down" for someone to remove the two bottles. Plaintiff stated that the manlift returned to the top, the bottles were gone, and that he then entered the cage with a portable welder and a small box of tools. As he started to descend, plaintiff heard a loud pop, a screech, and then the manlift plummeted to the bottom of its shaft.

Ivan Backes, an owner of the company which employed the plaintiff, stated that just prior to the accident he had attempted to use the manlift to go to the top of the grain elevator, but that it had stopped after rising about 10 feet. Backes descended to the ground floor, and went outside to call to the plaintiff. Backes stated that he could not remember seeing oxygen or acetylene bottles on the manlift when he attempted to use it, or after the accident occurred. He also did not remember seeing anyone remove such bottles from the manlift.

Roger Morris, the manager of the defendant elevator company, stated that he saw Backes get on the manlift shortly before the accident, and that the oxygen and acetylene bottles were on the manlift at that time. When the manlift stopped after rising several feet with Backes and the bottles in it, Morris told Backes that there was too much weight on the manlift. Backes then returned to the ground, and Backes and Morris went outside to call to the plaintiff. Plaintiff's coworker replied that plaintiff was already on his way down. When Morris and Backes went back inside the grain elevator, the manlift cage was no longer on the ground floor, and the accident occurred shortly thereafter. Morris could not remember seeing the oxygen and acetylene bottles on the ground floor, and said no one removed them from the manlift.

An expert witness testifying for the plaintiff expressed the opinion that the accident was caused by

a bearing block shifting, which in turn caused gears controlling the manlift cable to become disengaged. He stated that a bolt, the purpose of which was to hold the block in place, was missing, and that two set screws designed to secure the bearing in place were not fulfilling that function. This expert also stated that the safety brake was not in proper condition, although his testimony was somewhat inconclusive on this point.

The defendant, on the other hand, presented evidence that the manlift had been periodically checked before the accident, that it had worked properly up to the time of the accident, and that it was designed only to lift people, not freight. Defendant's expert witness, over the plaintiff's objection of inadequate foundation, expressed the opinion that the accident was caused by the overloading of the manlift. There is testimony in the record that any damage or irregularity found in the lifting mechanism after the accident could have been caused by the counterweight rising and striking that mechanism as the manlift plunged to the ground due to overloading. Evidence was also introduced from which it could be inferred that the safety brake failed due to overloading, and not due to a defect in the brake itself.

Testimony of the witnesses indicated that the portable welder which was on the manlift at the time of the accident weighed approximately 80 pounds, and was 12 inches wide, 16 inches long, and 22 inches high. The tools weighed about 5 pounds and were in a box the size of a shoe box. The oxygen and acetylene bottles were approximately 8 to 10 inches in diameter, and weighed 125 and 90 pounds respectively. However, as indicated above, there was a dispute as to whether the bottles were on the manlift at the time of the accident. If the bottles were on the manlift at that time, it would have been overloaded by approximately 135 pounds.

It was admitted at trial that there was no capacity plate in the manlift, and that the plaintiff had not been advised of the capacity of the manlift. Plaintiff acknowledged that he had not inquired about the capacity of the manlift, and that he had not looked for a capacity plate in the manlift before using it.

Plaintiff first contends that there was insufficient competent evidence to sustain the trial court's submission of the issue of contributory negligence to the jury. Plaintiff specifically argues that he had no duty to determine the capacity of the manlift beyond that which was "open and obvious," and that the testimony of defendant's expert witness was not sufficient to sustain a finding that the accident was caused by overloading of the manlift.

The applicable law is that where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Where, however, different minds may reasonably draw different conclusions or inferences from the evidence, or if there is a conflict therein, the issues of negligence and contributory negligence are for the jury. Oberhelman v. Blount, 196 Neb. 42, 241 N. W. 2d 355 (1976); § 25-1151, R. R. S. 1943. The 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, 198 Neb. 741, 255 N. W. 2d 272 (1977); Niemeyer v. Tichota, 190 Neb. 775, 212 N. W. 2d 557 (1973). One who is capable of undertanding and discretion, who fails to exercise ordinary care and prudence to avoid open, obvious defects and dangers, is negligent or contributorily negligent. Leary v. Martin K. Eby Constr. Co., Inc., 191 Neb. 575, 216 N. W. 2d 750 (1974). Negligence must be measured against the particular set of facts and circumstances which are

present in each case. Collins v. Herman Nut & Supply Co., 195 Neb. 665, 240 N. W. 2d 32 (1976).

In reviewing the evidence in its entirety, it appears that the evidence was sufficient to support the trial court's submission of the issue of contributory negligence to the jury. The evidence was sufficient to permit the jury to conclude that at the time of the accident the plaintiff was descending in the manlift with a portable welder, a box of tools, and oxygen and acetylene bottles. Even the testimony of plaintiff's witnesses indicated that if all these items were on the manlift, it was overloaded by at least 135 pounds. Although plaintiff argues that all these items, in addition to himself, would not have fit into the manlift cage at the same time, still it appears it was not a physical impossibility. The evidence clearly raised a factual question as to whether the manlift was overloaded at the time of the accident. Where there is a conflict in the evidence, this court will presume that the controverted facts were decided in favor of the successful party, and the judgment will not be disturbed unless it is clearly wrong. Buttner v. Omaha Public Power Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975).

The evidence also appears to have been sufficient to permit the jury to conclude that the plaintiff, by overloading the manlift, failed to exercise ordinary care and prudence to avoid an open and obvious danger. See Leary v. Martin K. Eby Constr. Co., *supra*. Plaintiff was admittedly an expert with respect to grain elevator construction, and was familiar with manlifts of the type normally used in grain elevators. There was evidence from which it could be inferred that the plaintiff knew or should have known that the manlift was designed for people, not freight. There was further evidence that the plaintiff was in a hurry on the day in question because he was behind schedule. Under the particular circumstances of this case, the jury could have properly

concluded from the evidence presented that the loading of a small manlift with heavy equipment in addition to the weight of the plaintiff himself constituted a failure to exercise ordinary care and prudence to avoid an open and obvious danger. A person in plaintiff's particular situation is not, contrary to his contention, free to load a small manlift with heavy items and his own weight simply because no capacity plate is in the manlift. In using an elevator a person is required to exercise reasonable care for his own protection, and ordinarily the question of contributory negligence is for the jury. 26 Am. Jur. 2d, Elevators and Escalators, § 33, p. 505. See, also, Van Horn v. Cooper & Cole Bros., 88 Neb. 687, 130 N. W. 567 (1911). Under the facts of this case, it cannot be said as a matter of law that the plaintiff exercised ordinary care and prudence to avoid the open and obvious danger of overloading a small manlift not designed for freight. Therefore it appears that it was proper for the trial court to submit the issue of contributory negligence to the jury.

The plaintiff next contends that the trial court erred in failing to instruct the jury with adequate specificity regarding plaintiff's duty of care to determine the capacity of the manlift and in submitting defendant's allegations of contributory negligence. The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence. Nebraska State Bank v. Dudley, 194 Neb. 1, 229 N. W. 2d 559 (1975). Instructions must be taken as a whole, and so long as the law on each specific issue is correctly stated and the jury is not misled by the instructions as a whole, prejudicial error may not be asserted. Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584 (1975). "A party who desires an instruction on some particular question should request it. When the general charge fairly presents the case to the jury, error cannot be

predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining." State v. Lynch, 196 Neb. 372, 243 N. W. 2d 62 (1976). Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Fisher v. Gate City Steel Corp., 190 Neb. 699, 211 N. W. 2d 914 (1973); Rawlings v. Andersen, 195 Neb. 686, 240 N. W. 2d 568 (1976); White v. Longo, 190 Neb. 703, 212 N. W. 2d 84 (1973). Failure to object to instructions after they are submitted to counsel for review precludes raising an objection to the instructions on appeal. Omaha Home for Boys v. Stitt Constr. Co., Inc., 195 Neb. 422, 238 N. W. 2d 470 (1976); Moser v. Jeffrey, 194 Neb. 132, 231 N. W. 2d 106 (1975).

In the present case the trial court clearly and concisely instructed the jury with respect to both defendant's and plaintiff's allegations of negligence and contributory negligence. The trial court accurately advised the jury of the meaning of "negligence" and "ordinary care." Plaintiff did not request more specific instructions and did not object to the instructions given. The instructions were not erroneous or misleading, and adequately advised the jury of the issues raised by the pleadings which found support in the evidence. Since plaintiff did not request additional or more specific instructions, and did not object to the instructions given, his contentions are without merit.

Plaintiff contends that the trial court erred in admitting in evidence the opinion of defendant's expert witness as to the cause of the accident. This witness stated that the manlift plunged to the ground because it was overloaded, and he based this opinion on his examination of the manlifting mechanism and safety device. This witness stated that when he placed the cable of the manlift back on its pulley,

the gears worked properly and lifted the cage. Plaintiff objected to this testimony on the ground of inadequate foundation, the objection being primarily directed at the witness' alleged incomplete examination of all relevant factors, and lack of knowledge regarding the manlift. Plaintiff now argues that the opinion testimony should have been held inadmissible because there was no evidence that the condition of the manlift when the witness examined it was the same as its condition when the accident occurred.

It would appear that plaintiff's objections go not to the admissibility of the expert witness' testimony, but to its weight and credibility. See Duling v. Berryman, *supra*. The witness testified in regard to the facts upon which his opinion was based. He was subjected to thorough cross-examination, through which plaintiff brought to the attention of the jury the reasons he believed the witness' opinion to be erroneous. The jury was aware of the facts on which the witness relied, the condition of the manlift when the expert examined it, and the condition of the manlift when other witnesses examined it after the accident. We conclude that the trial court was correct in finding that there was an adequate foundation for the testimony, and the weight and credibility of that testimony were issues for the jury. See Duling v. Berryman, *supra*.

Plaintiff also contends that violations of the American National Safety Standard Code, adopted by the Nebraska Commissioner of Labor pursuant to section 48-418.12, R. R. S. 1943, constitute negligence per se, and that the trial court should have held the defendant negligent as a matter of law because the evidence showed that defendant had violated that code with respect to the manlift. Defendant contends that this code does not apply to manlifts in grain elevators.

It is questionable whether the code applies to manlifts such as the one in this case, and it may well be

argued that it does not. In 1965 the Legislature enacted L. B. 213, now sections 48-418 through 48-418.12, R. R. S. 1943. That act established a state elevator inspector and provisions for the inspection of certain elevators in Nebraska. Section 13 of the act, as amended, section 48-418.12, R. R. S. 1943, provides that the American National Standard Safety Code as published by the American Society of Mechanical Engineers may be adopted as a regulation by the Commissioner of Labor, and the Commissioner of Labor has adopted the code. Section 5 of the act, however, provides that the act shall not apply to elevators "used exclusively for agricultural purposes." See § 48-418.04, R. R. S. 1943. The legislative history of the act suggests that manlifts in grain elevators were not meant to be covered by the act. See the Labor Committee Statement regarding L. B. 213.

We need not, however, resolve the issue whether manlifts in grain elevators are covered by the safety code. It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence. See, Piper v. Hill, 185 Neb. 568, 177 N. W. 2d 509 (1970); Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564 (1957); Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607 (1949). Therefore, even if the safety code in question does apply to manlifts, violation of the code would not constitute negligence per se, but only evidence of negligence. In the present case the jury was instructed, as requested by plaintiff, that violation of the code was evidence of negligence. Therefore plaintiff's contention that the trial court should have directed a verdict in his favor because violation of the code constituted negligence per se is without merit.

Finally, plaintiff contends that the trial court should have granted his motion for a directed verdict and submitted to the jury only the issue of damages. He cites the rule that where the facts adduced to sustain the issue of negligence are such that reasonable minds can draw but one conclusion therefrom, it is the trial court's duty to decide the question as a matter of law, rather than submit it to a jury for determination. Hoefer v. Marinan, 195 Neb. 477, 238 N. W. 2d 900 (1976). As previously indicated, in this case there was clearly a conflict in the evidence as to the cause of the accident and the negligence of each party. The evidence as to the issues of negligence and contributory negligence was not such that reasonable minds could draw but one conclusion therefrom. Therefore it was not only proper, but necessary, that the trial court submit the case to the jury. See Niemeyer v. Tichota, *supra*.

We have carefully reviewed the record and plaintiff's contentions, and find them to be without merit. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

ROBERT E. BARBEE, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

260 N. W. 2d 491

Filed December 21, 1977. No. 41254.

1. **Firemen: Public Officers and Employees: Municipal Corporations.** The right of a fireman to educational bonus points on promotional examinations in accordance with a program adopted and announced by the city vests upon completion of the work as provided in the program.
2. **Public Officers and Employees: Ordinances: Municipal Corporations.** An ordinance which provides that promotional examinations shall take into consideration the length of service of employees is binding on the city.

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

Herbert M. Fitle and James E. Fellows, for appellants.

James P. Costello of Costello & Dugan, for appellee.

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

BOSLAUGH, J.

The plaintiff has been employed by the fire department of the City of Omaha for 7 years. During the last 4 years he has been a member of the rescue squad. On June 1, 1976, the personnel department of the defendant city announced that a closed promotional examination for the classification of emergency medical technician would be held on September 1, 1976. The notice for the examination stated that it would be a written examination for which 100 points would be allocated.

This action was commenced on August 27, 1976, by the plaintiff, who was a candidate for the promotional examination, on behalf of all firefighters similarly situated, to enjoin the city and its personnel director from not giving credit for seniority and schooling on the examination in accordance with the policy adopted by the city in the past. The trial court ordered that the city could not promote the plaintiff or any other firefighter to the position of emergency medical technician without giving credit to the plaintiff and all others for the educational and seniority points they had acquired. The defendants have appealed.

The record shows that in 1969 the city announced a point credit program for firemen who would complete approved college training. The program provided that point credit would be added to promotional examination scores of firemen based upon col-

lege credits earned by them. The plaintiff, in reliance upon the program, completed college work which entitled him to the maximum number of educational points that would be awarded under the program.

The record also shows that section 7.04.390 (b) of the Omaha municipal code provided that: "In addition to other factors promotional examinations shall take into consideration the quality and length of service where records are available to provide the basis for such rating." The record further shows that the records necessary to determine seniority points are available in the personnel department.

The city alleges that the terms and conditions of the plaintiff's employment were controlled and governed by a labor contract and that an award of bonus points based upon seniority was contrary to public policy and in violation of the Civil Rights Act.

The labor contract between the city and the Omaha Association of Firefighters contained an article relating to management rights. It provided that nothing in the agreement should be construed to restrict, limit, or impair the rights, powers, and authority of the city under the laws of Nebraska, the home rule charter, and the city's ordinances unless expressly provided otherwise in the agreement. Among the rights enumerated in the article were the right to examine, classify, and promote employees; to establish and implement policies for the selection, training, and promotion of employees; and the right to modify, change, or discontinue any existing rules, regulations, procedures, and policies not in direct conflict with any provision of the agreement.

The contract clearly preserves the right of the city to change its policies and programs and discontinue existing programs. The problem in this case is whether the city can make such changes retroactive so that an employee such as the plaintiff will lose

his right to educational and seniority points after he has earned them.

The plaintiff contends that he and all other employees who relied upon the college training program and completed the work have a vested right to the educational bonus points. The plaintiff argues that the city is estopped from denying them the right to educational bonus points and cites May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

Whether the plaintiff's rights are founded upon estoppel or a theory of contract, we think it is clear that the city can not withdraw educational bonus points from employees who have earned them in the absence of an express agreement to that effect binding upon the employees. The labor contract on which the city relies did not authorize a retroactive change in promotional policies.

The city's contention in regard to bonus points awarded for seniority is based upon a theory that such a policy would tend to perpetuate discrimination which existed in the past. While this argument might have some validity in particular fact situations, it has no application to the facts in this case.

The examination for emergency medical technician was open to all uniformed members of the fire department with 2 years experience. The plaintiff's rank as a firefighter was the basic rank for any employee who had completed the probationary period.

The trial court held that the city was bound by its own ordinances and was required to give credit for length of service. We find no error in this holding.

The judgment of the District Court is affirmed.

AFFIRMED.

LORRAINE GREENFIELD, APPELLEE, V. MARLIN GREENFIELD, APPELLANT.

260 N. W. 2d 493

Filed December 21, 1977. No. 41256.

1. **Parent and Child: Adultery.** Sexual misconduct does not automatically disqualify a mother from obtaining custody of her minor children.
2. **Parent and Child: Divorce.** In child custody cases, this court gives great weight to the findings of the trial court in determining the best interests of a minor child.
3. **Appeal and Error: Evidence.** The trial court's findings will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

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

Ronald J. Palagi, for appellant.

Sandra K. Olejniczak, for appellee.

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

WHITE, C. THOMAS, J.

The parties to this action were divorced on March 5, 1976. The decree approved a property settlement and child custody agreement providing that Lorraine Greenfield, petitioner and appellee here, should have custody of the parties' two minor children, Shane, the adopted child of appellant and the natural child of appellee, now age 10, and Jay, the natural child of the parties, now age 4. The appellant had suffered a severe business reversal in a service station and was not able nor required to pay child support.

Appellant filed an application for change of custody on November 26, 1976, alleging a change of circumstances and that appellee Lorraine Greenfield was not a fit and proper person to have the custody of the minor children. The trial court denied

the application and confirmed the custody of the appellee with reasonable visitation to appellant. Appellant appeals.

All parties agree that the care for the physical needs of the children by Lorraine has been exemplary within her means; nor has any complaint been raised against the appellant Marlin who has contributed to the children's needs by purchases of clothing and toys and occasional modest support payments although not under court order to do so. Marlin has been faithful in visitation, and the older son Shane, a witness, testified he would like to live with both of them and loved each of them.

Each has an adequate income and support from relatives and friends although Marlin's work history is less stable than that of Lorraine.

The circumstances which gave rise to this application are easily stated, but difficult to resolve. About the latter part of September 1976, a Donny Ring moved into the home Lorraine was sharing with her children and lived with her in the one bedroom shared by all. Sexual relations between Donny and Lorraine were observed by Shane. Donny Ring was unemployed, drank a good deal, but was not unkind to the children or abusive toward them. He did not contribute to the household expenses and used whatever money he received to maintain a trailer, his car, and his drinking expense which ran approximately $100 to $150 a month. Upon notice to Lorraine of the application for change of custody, Donny moved out and, according to Lorraine, will remain out until such time as they marry, which is contemplated but not definitely planned.

Marlin also lived out of wedlock with a woman for a month although the children did not visit him at her home while he was doing so. The children were once brought to the woman's home for a visit.

The trial court obviously believed Lorraine's declaration that she would not again live with Donny

outside of marriage nor live with him in marriage in the same bedroom with the children.

We have long passed the point where sexual misconduct automatically disqualifies a mother from obtaining custody of her minor children. See Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581. We are further aware of the drastically changing life styles and the casualness with which intimate relations are entered and ended. We are, however, unaware of a case involving this type of action where custody was not changed or at least severely modified.

In child custody cases, this court gives great weight to the findings of the trial court in determining the best interests of a minor child. Reynek v. Reynek, 193 Neb. 404, 227 N. W. 2d 578.

The trial court's findings will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Boyles v. Boyles, 191 Neb. 66, 213 N. W. 2d 729.

We cannot condone the appellee's actions nor can we approve the appellant's life style. In view of the otherwise satisfactory care of the children and the trial court's belief that the objectionable conduct has ended, we only modify the trial court's order to the extent that physical custody of the minor children remain with appellee. Legal custody is placed in the District Court, with the suggestion that the court require periodic visits in the home by the welfare department of the county. Appellant shall continue to have reasonable rights of visitation. We affirm, as modified, the decision of the District Court. No costs are allowed to either party.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. LARRY L. HENGGELER, APPELLANT.

260 N. W. 2d 495

Filed December 21, 1977. No. 41403.

1. **Trial: Evidence.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling.
2. _____: _____. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry.
3. **Courts: Witnesses.** It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised.
4. **Courts: Witnesses: Evidence.** Great latitude is allowed the trial judge in ruling on the admissibility of a hypothetical question.

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

Michael T. Levy, for appellant.

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

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

WHITE, C. J.

Defendant was charged with the offense of burglary to which he entered a plea of not guilty. Trial was had to a jury and a guilty verdict returned. Defendant filed a motion for a new trial which was overruled. The District Court sentenced defendant to a term of 3⅓ to 10 years imprisonment in the Nebraska Penal and Correctional Complex. Defendant appeals. We affirm the judgment and sentence of the District Court.

James R. Stanek, a truck driver employed by Cur-

tis, Inc., testified that he arrived at the Curtis premises around 10:30 p.m. on the evening of January 1, 1977, for the purpose of picking up a trailer of meat. As he approached the parking lot he noticed a pickup truck parked in front of the office door. He parked his truck at the gate of the truck parking lot, approximately 20 to 30 yards away, and observed the pickup truck to determine whether it was occupied. Shortly thereafter, he noticed a party walking toward and into a cooler located in the building. He observed this party for 3 or 4 seconds and described the party as wearing a baseball cap and coveralls and having a mustache.

Stanek decided to get the license number of the pickup truck and drove his vehicle behind the pickup truck, approached the front of the pickup, and wrote down the license number. Upon returning to his vehicle, he observed two juveniles lying across the front seat of the pickup truck. He drove his truck to the far end of the truck parking lot, hooked up his trailer, and continued his observation.

Stanek then contacted the authorities on his CB radio about a possible break-in at the Curtis plant. He then observed a party emerge from the cooler with one or two boxes in his hands. As the party opened the cooler door he noticed Stanek at the far end of the lot, threw the boxes back into the cooler, stepped back, and pulled the cooler door shut. About 3 or 4 minutes later the same party opened the cooler door about a foot, looked out to see if Stanek was still there, closed the door, and remained in the cooler for another 5 minutes. He then emerged from the cooler for a third time, closed the door, fiddled with the lock, and casually walked toward the pickup truck.

About 3 or 4 seconds after Stanek lost sight of the party, a police cruiser arrived at the Curtis plant. Officer James Krzemien approached the pickup truck and questioned the defendant. In response to

a question, the defendant indicated that he had called about the possible break-in, but that it was only a couple of kids running through the area. Officer Krzemien then allowed defendant to drive off.

Upon seeing that the police had released the defendant, Stanek got out of his truck, approached the officer, and told him that he, Krzemien, had just released the party that he, Stanek, had observed entering and leaving the cooler.

The defendant was subsequently apprehended and returned to the Curtis plant where he was identified by Stanek as the party he had observed entering the cooler. Stanek testified that he identified the defendant as the party he had observed entering the cooler based upon his clothing and facial features. He identified the defendant, as the party he saw, in court and testified that he was the same height, race, and build as the party he observed.

Evidence was introduced that the door to the meat cooler at the Curtis plant had been tampered with and that several cartons of meat had been moved from where they were observed the previous day. Officer Gutchewsky examined the interior of defendant's pickup truck and observed various heavy tools. Officer Gutchewsky also stated that no CB radio was found in defendant's truck.

When interrogated at the police station following his apprehension concerning his purpose for being at the parking lot of the Curtis plant that evening, defendant stated that he was there to meet another party for the purpose of working on the latter party's trailer. He refused to identify the party who was to meet him at this location. At the trial, defendant's son corroborated this story and a witness, Ray McPhillips, testified that he was the party defendant was to meet that evening.

As part of his case, defendant called Gerald Bishop, an expert witness in the field of photography, to the stand. Bishop was retained by the de-

fendant for the purpose of photographing a recreation of the scene at the Curtis plant. On February 11, 1977, at approximately 10:30 p.m., Bishop, the defendant, and others went to the Curtis plant to recreate the scene as it existed on January 1, 1977.

At the trial the court sustained an objection to having Bishop state his opinion based upon a hypothetical question posed to him as to whether the photographs taken by him would fairly and accurately reflect what a party such as Stanek could have observed on January 1, 1977, on the grounds that the attempted recreation was made 5 to 6 weeks after the fact, was not factually accurate, and could not be considered reliable by the jury. The court also, for the same reasons, sustained an objection to the introduction of the photographs into evidence. Defendant cites the sustaining of these objections as error.

"The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling." Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607 (1969). See, also, Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628 (1962). "Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry." Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44 (1974). See, also, Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221 (1960).

Bishop admitted that he had no personal knowledge of the conditions which existed on the premises as of January 1, 1977, and that he did not know if the conditions were the same on January 1 and February 11, when the photographs were taken, regarding the amount of overcast or dimness or lightness. Each of Bishop's photographs was taken with a 1-second exposure. Bishop admitted that since Stanek

had observed the scene for a period of several minutes and not just 1 second, conditions might have changed considerably while Stanek was looking. Bishop stated that the results of his photographs would be different if he had used a different speed film and a different shutter speed. Bishop admitted that the only one who could say with any certainty that the photographs which he took fairly and accurately represented what the witness Stanek saw on January 1 would be the witness Stanek.

It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. Kresha Constr. Co., Inc. v. Kresha, 184 Neb. 188, 166 N. W. 2d 589 (1969). Great latitude is allowed the trial judge in ruling on the admissibility of a hypothetical question. Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643 (1973). " 'Determination of admissibility generally rests within the sound discretion of the trial court.' " State v. King, 197 Neb. 729, 250 N. W. 2d 655 (1977). See, also, State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973). "The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown." Dovey v. Sheridan, 189 Neb. 133, 201 N. W. 2d 245 (1972).

There was no abuse of discretion by the District Court in sustaining objections to the introduction of the photographs into evidence and to Bishop's opinion testimony concerning what these photographs represented. There is no merit to these contentions.

Defendant's last contention is that he received an excessive sentence. Defendant received a sentence of 3⅓ to 10 years imprisonment in the Nebraska

Penal and Correctional Complex.

The presentence report shows that defendant has a lengthy arrest record having, since 1955, been arrested over 70 times. He has been previously convicted of a felony. His probation officer concluded that he was not an acceptable candidate for probation.

The record shows that defendant owns and manages a tree service which grosses $28,000 to $30,000 annually, owns a camper storage business, and works as a diesel mechanic earning an additional $650 to $750 per month. Defendant steadfastly denies any involvement in the burglary that led to his conviction. The record also shows that defendant's two sons, aged 13 and 15, accompanied him on this escapade and were arrested as a result on a charge of loitering or prowling.

Defendant's sentence was within the statutory limits and, as such, will not be disturbed on appeal absent an abuse of discretion. State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15 (1976). We find no abuse of discretion in defendant's sentence.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WESLEY H. PEERY, APPELLANT.

261 N. W. 2d 95

Filed December 28, 1977. No. 40967.

1. **Criminal Law: Trial: Evidence.** 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 pro-

bative force that it is insufficient to support the finding of guilt beyond a reasonable doubt.

2. _____: _____: _____. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.
3. **Mistrial: Prosecuting Attorneys: Appeal and Error.** Failure to declare a mistrial when the prosecutor indicated a desire to give testimony is not prejudicial error where the trial judge unequivocally sustained the defendant's objection and instructed the jury to disregard the prosecutor's remark.
4. **Criminal Law: Homicide: Aggravating and Mitigating Circumstances: Death Penalty.** In determining whether the sentence shall be fixed either at death or life imprisonment, such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death; or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.
5. **Criminal Law: Automatic Review in Supreme Court: Homicide: Death Penalty.** This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate.
6. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts.
7. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** Under aggravating circumstance (1) (c) of section 29-2523, R. R. S. 1943, a murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds.
8. _____: _____: _____: _____. Aggravating circumstance (1) (d) of section 29-2523, R. R. S. 1943, exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.
9. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty.** In the balancing of the ag-

gravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, WILLIAM F. COLWELL, and LLOYD W. KELLY, JR., Judges. Affirmed.

Stanley D. Cohen and Donald R. Hays, for appellant.

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

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

WHITE, C. THOMAS, J.

On June 6, 1975, the body of Marianne Mitzner was found by her son in a bathroom at the rear of the Mitzner Rare Coin Shop, 6106 Havelock Avenue, Lincoln, Lancaster County, Nebraska. Mrs. Mitzner's hands and feet were tied. An autopsy disclosed that Mrs. Mitzner died as a result of three gunshots to the head, any one of which could have been fatal. One of the shots had its point of entry inside the mouth of the victim. The defendant, Wesley H. Peery, was arrested for the crime and pled not guilty to two counts, murder in the first degree and robbery. A jury found the defendant guilty of each of the counts. A sentencing panel consisting of the trial judge and two judges appointed by the Chief Justice, pursuant to law, sentenced the defendant to death for count I. The trial judge sentenced the defendant to a term of not less than 16 nor more than 50 years on count II to run consecutively to the sentence imposed on count I. The defendant appeals.

The defendant assigns four separate errors. Three of the assigned errors relate to the sentencing of the defendant on count I and the fourth only to the con-

duct of the trial itself. That assignment is as follows: "Misconduct on the part of the prosecuting attorneys denied the defendant his constitutional right to a fair trial." The defendant in his brief argues that the evidence was not sufficient to sustain convictions for the crime of first degree murder and robbery. We shall consider the argued error, even though the same was not assigned, in view of the gravity of the crime charged and the penalty imposed.

Essential to an understanding of this issue is a recitation of the facts offered in evidence at the trial. The evidence established that after leaving her home, the victim Marianne Mitzner was observed going toward her coin shop between 9 and 9:30 a.m. on June 6, 1975. A number of witnesses testified that the coin shop was open at various times in the morning of June 6, 1975, but no one saw Mrs. Mitzner. Ronald Svehla testified that he went into the Mitzner Rare Coin Shop at 10 a.m., stayed in the store 40 minutes, until approximately 10:40 a.m., and did not observe Marianne Mitzner. He did not go to the rear of the store. Richard Barnes testified that he went into the store at 10 a.m. with the witness Svehla, stayed 1½ hours, until 11:30 a.m., and never saw Mrs. Mitzner. He did not go to the rear of the store. Joanne Biggerstaff and Ronald Biggerstaff testified they were in the store at approximately 10:30 a.m., stayed 15 minutes, came back just after 11:07 a.m., stayed a short time, and did not see Marianne Mitzner. The pathologist, Dr. Robert F. Shapiro, performed an autopsy on the victim and concluded that death occurred between 9 a.m. and 10:30 a.m.

At the time of the murder, defendant, Wesley H. Peery, was an employee of Nebraska Wesleyan University. His supervisor, Darwin Penrod, testified that on the day of the murder the defendant was sent to the Action Locksmiths, 6214 Havelock Avenue, Lincoln, Nebraska. On the previous day, June 5,

1975, the defendant had taken a lock for repair to the Action Locksmiths and had been informed that the lock cylinder could not be repaired without the master key. It was for this purpose that the defendant was sent by his supervisor, the witness Penrod, to the Havelock area. Robert Schoonover, proprietor of Action Locksmiths, testified that he opened his locksmith shop about 9:15 a.m., and that he left for a service call at 9:45 a.m. and returned at approximately 11:05 or 11:30 a.m. He testified that when he returned from the service call, he observed the Nebraska Wesleyan lock, which previously had been locked, lying open on the bench. He testified that he did not know who brought the key to open the lock. The evidence was offered by the State to show that the defendant was in the area of the murder scene at or during the time when Marianne Mitzner met her death.

The victim's husband, who was in custody on June 6, 1975, testified that on that date he was notified of his wife's death and taken to the coin shop to make a partial inventory for police purposes. Among the items missing were a number of watches taken from a display case in the store proper, approximately $400 in cash, and 21 boxes of coins from a safe, including approximately 600 quarters, 600 half dollars, 350 silver dollars, 250 Canadian half dollars, 250 Canadian silver dollars, roughly 200 foreign coins, and a roll of 1962 uncirculated silver dollars. Mr. Mitzner further testified that in the operation of the coin store, he made use of an ultrasonic cleaning device whereby dirt or foreign substances within the natural crevices and scratches in a coin were removed by use of sound waves. He stated that he had covered some of the coins with a coat of lacquer.

Evidence discloses that on June 6, 1975, the defendant, Wesley H. Peery, was living with and at the apartment of one Mary Blazek. A witness, Nathan Bernstein, testified that on May 23, 1975, he sold an

RG .22 caliber revolver to Mary Blazek. Mary Blazek testified that the gun disappeared after about a week. She testified that the gun had been purchased to defend herself against the threats of a former husband. Later, the instruction book for the gun and the warranty card were found in the defendant's own apartment. The gun has never been recovered.

A witness, Vernon W. Byler, an investigator for the Nebraska State Patrol, testified that an RG .22 caliber revolver had eight lands and grooves with a right-hand twist for rifling. He also testified that one of the metal fragments removed from the brain of Marianne Mitzner had four lands and grooves and because the fragment appeared to be half of a .22 slug that, in his opinion, it came from a gun with eight lands and grooves. It appeared to be fired from a gun with a right-hand twist. The gun purchased by Mary Blazek, whose instruction book was later found in the defendant's apartment, was such a gun.

A witness, Sam Bitkower, testified that he had sold several Enicar watches to Kenneth Mitzner, the operator of the Mitzner Rare Coin Shop. Mr. Bitkower also testified that he had sold other Enicar watches to Stevens Jewelers in Lincoln, but Stevens Jewelers had gone out of business in August of 1974; he had since observed Enicar watches on sale at the Rare Coin Shop. On the morning of the crime, a witness, Mr. Ronald Biggerstaff, noticed that watches were missing and when Mr. Mitzner inspected the Rare Coin Shop after the crime, he also noticed that watches from his store had been taken. On June 27, 1975, an Enicar watch tag was found in the defendant's car. The previous owner of the defendant's Cadillac automobile testified that she regularly cleaned the car and that to her knowledge there had not been an Enicar watch tag in the car while she and her husband owned it.

In a search of the Mary Blazek apartment, an am-

munition box was found on the floor of a closet covered with clothes. The ammunition box was opened by a key on the defendant's key chain. After the ammunition box was opened, it was found to contain two quarters on the top tray and a can of stain and a small grease can. The small grease can contained 139 quarters. Later these coins were found to be of the type stolen from the Rare Coin Shop. Upon examination by Mr. Mitzner, some of these coins were shown to be lacquered and some had been ultrasonically cleaned. Mr. Mitzner said, in his opinion, the coins were from the Rare Coin Shop. Darwin Penrod, superintendent of building and grounds for Nebraska Wesleyan University, testified that the ammunition box was of the type used by the defendant in his employment. Mr. Penrod also testified that the can removed from the ammunition box was one similar to cans they had in their work area and that there was no longer a can like it in the work area.

The victim's body had been tied with a rope or cord. The rope was examined scientifically and found to be identical to rope found at the defendant's place of work. Harold Deadman, a special agent of the F.B.I., testified that the rope used to tie Marianne Mitzner could have originated from the same roll as that found in the Nebraska Wesleyan boiler plant and that the type of rope was of an unusual nature. An attempt to buy rope of a similar type in the Lincoln area by Lincoln police was unsuccessful.

A rag was found at the scene of the crime. The witness Deadman examined this rag and compared it with rags found at the defendant's place of work. He testified that the rags were of the same weave and color. In his opinion, the rags probably originated from the same source. Mr. Mitzner later testified that he did not use rags of the type found. The rag was identified by Robert Allen, whose business distributes such rags, as having its origin from a rag

company located in the Eastern United States. Nebraska Wesleyan University was a customer for the rags of this witness. The rags were of the identical type found at the scene and a large supply of which was still on hand at the Nebraska Wesleyan University campus.

When Marianne Mitzner was found dead, a gag had been placed on her mouth. The gag used on the victim was analyzed and found to contain human blood. The blood was analyzed and determined to be "B" type. The gag also had an "A"-type secreter on it. The evidence indicates that the defendant Peery was an "A"-type secreter and that the secretion contained on the nonblood portion of the rag was due to the sweat or saliva of an "A"-type secreter. A secreter, the evidence shows, is a person whose saliva or perspiration reveals the blood type of the person secreting. Not all persons are secreters but the defendant was established to be a secreter.

The stolen quarters were of silver, a type not issued in the United States after 1964. After the robbery and murder, coins were discovered in vending machines in places where the defendant frequented: The Villager Motel in Lincoln, Nebraska, where the defendant had worked for 5 months; Matthews Texaco where the defendant was a customer; the Treasure City gas station where the defendant was an old customer; and in Mary Blazek's apartment. In addition, a witness, Mark Mercier, testified that on June 12, 1975, he approached two persons on the Nebraska Wesleyan campus and asked them for change for a dollar. One of the persons, an Orville Rielly, stated that he did not have any change but the defendant, Wesley H. Peery, identified as that person by Orville Rielly and the witness Mercier, gave the witness Mercier four quarters. The quarters were silver. Mercier, who is a collector, recognized them as such and kept them. All the silver

coins recovered from the various sources, from Mark Mercier, and the apartment of Mary Blazek, were testified to as the type that were taken from the Rare Coin Shop.

A witness, Charles Graham, testified that at a time prior to the crime he and the defendant went for a ride in the defendant's car, and that the defendant asked the witness Graham for a gun. The defendant stated to Graham that he was tired of being broke and that he wanted to pull off "a big job."

When arrested, the defendant surrendered a pocketknife. The pocketknife was found to have both cotton and synthetic fibers on the blade. The rope with which Mrs. Mitzner was tied and the rope at the Nebraska Wesleyan campus also contained cotton and synthetic fibers. The defendant denied the crime and hypothesized that a Mr. Joe Cannito might have committed the crime. The defendant further testified that Mr. Cannito made a loan to him of $43 in quarters. The witness Cannito denied ever making such a loan.

The jury was in a position to weigh the evidence both for and against the defendant. The jury's finding of the defendant's guilt is amply sustained by the evidence. "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. Allen, 198 Neb. 755, 255 N. W. 2d 278.

To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and,

when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Earlywine, 191 Neb. 533, 215 N. W. 2d 895.

The evidence offered is totally consistent with the guilt of the defendant Wesley H. Peery. Other than a denial of the crime and an explanation for the presence of coins found in the locked ammunition box in Mary Blazek's apartment, which explanation was denied by a prosecution witness, the defense offers only a hypothesis as to how the crime may have been committed. Obviously, the jury was fully justified in finding the defendant guilty of the crimes charged and the evidence offered is sufficient to exclude any reasonable hypothesis other than guilt of the defendant. The evidence supports the finding of the jury.

The defendant next assigns as error a statement made by the county attorney immediately prior to the State's final rest on rebuttal. A specific question was asked of the court by the county attorney: "Your Honor, do I understand the rule of the Court correctly that if I testify in this case I can no longer participate." The court answered in the affirmative. The question was objected to by defense counsel. The objection was sustained and the jury was instructed to disregard the comment of the county attorney.

The remark was made during the State's presentation of rebuttal testimony. The next to last witness for the defense had been the defendant Wesley H. Peery. During the cross-examination, the county attorney asked the defendant questions concerning certain conversations he had had with the county attorney in the office of the county attorney. Some of the questions were answered in the affirmative by the defendant. Some of the alleged conversations were denied. The defense rested and the State

called as a rebuttal witness a police officer, who had previously testified, and who testified as to certain conversations he had had with the defendant in the Lincoln police department. It was at the conclusion of the extended examination and cross-examination of this witness that the county attorney addressed the remarks just cited to the court. The defendant now contends that in spite of the court's sustaining his objection and the instructions to the jury to disregard the statement, the remark was nevertheless prejudicial and denied the defendant a fair trial. It is the argument of the defendant that the remarks could only be interpreted as an assertion by the county attorney that, if permitted to testify, he would contradict statements made by the defendant on cross-examination and had the effect of informing the jury that if he, the county attorney, had been permitted to testify, he would contradict the defendant.

Assuming that a reasonable juror would place such a construction on the statement by the county attorney, were the remarks prejudicial to the right of the defendant to receive a fair trial? We conclude that the remarks were not prejudicial. In State v. Blockton (Mo. App., 1975), 526 S. W. 2d 915, a case cited by the State, the defendant was being tried on three counts of first degree murder and one count of assault with intent to kill. The prosecutor at one point during the trial stated: "I wish I could; if I could testify, we wouldn't be trying this case." The defense counsel objected. The court sustained the objection and the jury was instructed to disregard the statement. On appeal, the Court of Appeals of Missouri held that where the trial court did sustain the objection and instructed the jury to disregard the remarks, and the failure to declare a mistrial was not error. The Missouri court stated: "We have considered Chapman v. California, 386 U. S. 18, 24-25, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and Bru-

ton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and do not believe that these cases require the declaration of a mistrial under these circumstances." The trial judge unequivocally sustained the defendant's objection and instructed the jury to disregard the prosecutor's remark. We feel this was sufficient to cure the error. Even assuming the defendant's contention to be true, we are unconvinced that if, in fact, any error took place, it was prejudicial and we hold that the error, if any, was promptly cured by the action of the trial court. We find no merit in defendant's contention.

At the conclusion of the trial, a verdict of guilty being received by the trial court, two additional judges, along with the trial judge, proceeded to hold a hearing pursuant to section 29-2521, R. R. S. 1943, for the determination of the sentence. The additional judges were designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge. Evidence was presented and the court made findings of the aggravating and mitigating circumstances required in section 29-2523, R. R. S. 1943.

Section 29-2522, R. R. S. 1943, provides that in determining whether the sentence shall be fixed either at death or life imprisonment "such determination shall be based upon the following considerations:

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

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

Section 29-2523, R. R. S. 1943, defines the aggravating circumstances in eight categories and the mitigating circumstances in seven categories. The sentencing panel, pursuant to the command of the statute, made written findings, based on the records of the trial and the sentencing proceeding, and referred

to the aggravating and mitigating circumstances involved in its decision.

We will consider the aggravating and mitigating circumstances found by the trial court in the order set forth in section 29-2523, R. R. S. 1943, and the objections of the defendant thereto.

Before proceeding, however, we note that the proceedings before the three-judge panel took place before our decisions upholding the constitutionality of the Nebraska Death Penalty Act, sections 29-2519 to 29-2546, R. R. S. 1943, were decided. In those cases, State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876, State v. Rust, 197 Neb. 528, 250 N. W. 2d 867, State v. Simants, 197 Neb. 549, 250 N. W. 2d 881, and State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849, the Nebraska Death Penalty Act was reviewed and found, by an unanimous court, to be constitutional. Defendant's counsel contends that the aggravating and mitigating circumstances contained in section 29-2523, R. R. S. 1943, are unconstitutionally vague and indefinite. The contentions raised by the defendant were discussed in State v. Simants, *supra*, were rejected, and will not be discussed further.

We further note that under the command of the four death penalty cases: "This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate." State v. Rust, *supra*. We have compared the circumstances involved in each of the previous four cases decided under the Nebraska Death Penalty Act with the facts in this case and with one another. See, State v. Holtan, *supra*; State v. Rust, *supra*; State v. Simants, *supra*; State v. Stewart, *supra*. We have not found the imposition of the death penalty in this case to be a disproportionate sentence in relation to the above cases. The crime committed in State v. Holtan, *supra*, was similar to the one at issue here. Defendant entered a

business premises, robbed the person in charge of a considerable sum of money, and shot and killed this person at close range while the victim was of no threat to the defendant. In State v. Holtan, *supra*, four aggravating and no mitigating circumstances were found applicable to defendant. This is clearly in contrast to State v. Stewart, *supra*, the only case where the imposition of the death penalty was found to be inappropriate. In State v. Stewart, *supra*, two mitigating circumstances were found as opposed to a single aggravating circumstance.

Defendant makes two further assignments of error with respect to the sentencing proceedings. The first is that it is unconstitutional to apply the death sentence to a defendant who is convicted by circumstantial evidence. The defendant does not discuss the assignment in his brief nor does he cite any authority for that proposition. The circumstances proved were sufficient for the jury to have found the defendant guilty of the crime of first degree murder. The facts were resolved against him by the verdict of the jury by ample evidence. Those facts inhere in the verdict and are proved beyond a reasonable doubt. Defendant's contention is without merit.

The final assignment of error alleges that the sentencing panel committed reversible error in misapplying the aggravating and mitigating circumstances with respect to the defendant. As noted above, the panel considered this matter prior to our opinions in the death penalty cases and did misapply, according to those opinions, certain factors which this court suggested were not appropriate in the determination of aggravating circumstances. We shall apply the standards set forth in those cases to the findings of the panel and weigh anew the aggravating and mitigating circumstances.

The evidence at the sentencing hearing consisted of the presentence investigation report and the testimony of a state patrol officer and a police officer of

the City of Lincoln. An exhibit was received in evidence consisting of a letter purportedly written by defendant, after his conviction, in which the defendant proposed a plan whereby $12,000 in coins would be offered to help recruit five men to enable the defendant to escape from custody. The evidence of the escape plan was received by the panel as indicating an intent or disposition of serious assaultive or terrorizing criminal activity. Such evidence was not properly received by the panel in a sentencing hearing since the term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge but refer solely to earlier acts. See State v. Rust, *supra*. Under the previous holding of this court, such evidence, since it did not relate to an earlier act, should not have been received by the panel and will not be considered by this court in reviewing the sentence. The evidence then consisted of the report of the presentence investigation, and the admissible evidence introduced at the trial. The presentence investigation report consists of a history of the investigation of the Mitzner murder and prior juvenile and criminal history of the defendant, including reports of statements made by him to the state probation officer and to in-take officers at the various penal institutions in which the defendant has been incarcerated. The record reflects that the defendant and his counsel were each asked by the sentencing panel at the sentencing hearing whether they wished to correct or point out any inconsistencies in the presentence investigation report and were given an opportunity to do so. In each case the defendant and his attorney declined to do so. The defendant did not take the stand to refute

any of the statements or records contained in the presentence investigation report.

The sentencing panel considered the following criminal history of the defendant which is supported by the presentence investigation report. The defendant has no previous murder convictions. In 1947 the defendant was convicted of the felony offense of escape from custody. Such act, admitted to by the defendant, involved forcible detainer and robbery of the jailer. The following year the defendant was convicted of armed robbery. During this robbery, the defendant and his accomplice, who both wore masks and carried guns, forcibly robbed a service station attendant and a customer who entered the station. Defendant now denies he participated in this robbery; however, in an in-take statement at the Nebraska State Penitentiary, the defendant admitted participation and the use of a gun. The sentencing panel correctly observed that the jury's verdict of guilty is binding on the panel, there being no credible evidence to the contrary. The defendant was sentenced to a 10-year term in the Nebraska State Penitentiary for the armed robbery.

Within 4 months of defendant's release in 1955 from serving the above sentence, he was arrested and subsequently convicted for burglarizing and obtaining a gun from the home of the assistant chief of police of Lincoln, Nebraska. Shortly thereafter, before the defendant was brought to trial on the charges stemming from the above incident, the defendant was tried and convicted for forcing a woman off the highway and raping her at gunpoint. A 10-year sentence was imposed for this crime. Since the Supreme Court of Nebraska reversed the rape conviction for lack of corroboration, the panel was correct in not considering such conviction in evaluating the existence of aggravating circumstance (1) (a).

During the trial on the burglary incident of the assistant police chief's home, a neighbor of the chief

testified that defendant had robbed her and her husband on the same day of the burglary in their home, using a snub-nosed revolver. She identified the defendant. The defendant was released on bond on August 13, 1957, while the burglary conviction was on appeal to the Nebraska Supreme Court, which later affirmed it.

On September 22, 1957, while out on bond, the defendant stole an automobile in Columbus, Ohio, where he had arrived 10 days previously. During the ensuing days, the defendant committed at least three robberies carrying a sawed-off shotgun to which robberies he pled guilty and received sentences of 30 to 75 years in the Ohio penitentiary. Again using a sawed-off shotgun as the threatening instrument, defendant robbed and raped a 7½-month pregnant woman in her home. He entered a plea of guilty to the robbery charge and admitted the rape charge. Defendant stated that he purchased a shotgun shortly after arriving in Ohio, committed the robberies for "easy money," and as well admitted the rape to Ohio prison officials. The presentence investigation report contains a statement of the defendant that there were a lot of robberies in Ohio, 26 in all, that "he was along on some, but not all."

On January 16, 1958, while making a court appearance in the Ohio cases, the defendant crawled through a transom in the security holding room, whereupon he proceeded to the roof of the courthouse. Wielding a 2-foot by 4-foot board procured from the roof, the defendant entered the courthouse library. He hit the librarian in the head which resulted in a slight injury.

The sentencing panel found that: "Throughout, and as late as November 16, 1972, defendant showed no remorse for the Ohio crimes nor is there any indication in the presentence report that the defendant has ever shown any remorse for any of the crimes which he has committed. All of the crimes for

which defendant was convicted were cold, calculated and premeditated."

The sentencing panel also pointed out that the defendant is 51 years of age and that of these 51 years, 33 years and 10 months have been spent in jail or prison. He has been free only 2 years, 8 months, and 11 days since the initial incarceration. The sentencing panel concluded: "The total criminal record and history of defendant as shown by the presentence report establishes substantial convictions of crimes involving the use of, or threat of violence to the person, and as constituting a substantial history of serious assaultive or terrorizing criminal activity within the meaning of the statutory definition." We agree with the sentencing panel that aggravating circumstance (1) (a) does exist.

Section 29-2523 (1) (b), R. R. S. 1943, reads: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of the crime." The presentence investigation report and evidence reveal that the defendant had been in the coin store prior to the robbery. The victim knew her assailant by name and could recognize his physical features. Prior to her murder, Mrs. Mitzner had been tightly bound and gagged. She posed no threat to the defendant for some period of time. We agree with the sentencing panel that the "only conclusion that can logically be reached is that Mrs. Mitzner was murdered to conceal the identity of the defendant, the perpetrator of the crime of robbery, and to, for at least a period of time, conceal the commission of the robbery." Therefore, aggravating circumstance (1) (b) does exist.

Section 29-2523 (1) (c), R. R. S. 1943, reads: "The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant." The sentencing panel correctly stated: "A portion of this circumstance is

intended to apply to murder actually committed by another at the instance and request of the defendant. This murder was not so committed." However, the sentencing panel went on to hold that "the defendant did commit it as a part of the robbery, which robbery was for pecuniary gain of the defendant. This aggravating circumstance exists, but only insofar as the robbery itself contributed to the pecuniary gain of the defendant." We disagree. "A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds." State v. Rust, *supra*. Here, this aggravating circumstance does not exist.

Section 29-2523 (1) (d), R. R. S. 1943, reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." The scope of this circumstance has been discussed and interpreted by this court. In State v. Rust, *supra*, this court approved the interpretation and finding of the sentencing panel regarding this circumstance: " 'We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed, but by the use of the words "especially" and "exceptional" the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. Here the murder was effected by three bullets causing almost instantaneous death and the imposition of extreme suffering of the victim was not involved. It is a close question as to whether this particular aggravating circumstance exists. In view of our foregoing interpretation of the application of this aggravating circumstance, we

find this aggravating circumstance does not exist.' " Here, the evidence establishes that the defendant fired three gunshots, any one of which could have killed Mrs. Mitzner. Instantaneous death was the probable result. While placing a gun in the victim's mouth and firing would involve torture to the victim, the victim may already have been dead when this atrocity was committed. There is no evidence as to which shot was fired first. However, while this probability would negate the element of torture, an attack on a body after death may be considered in evaluating the existence of this circumstance. See State v. Simants, *supra*.

Furthermore, we said in State v. Rust, *supra*, that aggravating circumstance (1) (d) exists "where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life." Here the defendant fired the shots when the victim was thoroughly and effectively bound, both wrists being tied tightly behind her, and her ankles tightly tied; she was not offering any resistance, posed no threat to the defendant, and was totally helpless. The victim was shot once between the eyes, once in the right temple, and, as mentioned above, once when the mouth was open, the gun thrust into her mouth, and a bullet was fired into the roof of the mouth directly into the brain.

This court agrees with the sentencing panel that "these facts conclusively show that the defendant deliberately murdered Marianne Mitzner; that he did so premeditatively, purposely, and with a shocking display of maliciousness and ruthlessness." Aggravating circumstance (1) (d) does appear.

Section 29-2523 (1) (e), R. R. S. 1943, reads: "At the time the murder was committed, the offender also committed another murder." The District Court held this aggravating circumstance does not exist. We agree.

Section 29-2523 (1) (f), R. R. S. 1943, reads: "The

offender knowingly created a great risk of death to at least several persons." We agree that this circumstance does not exist.

Section 29-2523 (1) (g), R. R. S. 1943, reads: "The victim was a law enforcement officer or a public servant having custody of the offender or another." We agree that this circumstance does not exist.

Section 29-2523 (1) (h), R. R. S. 1943, reads: "The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." We agree that this circumstance does not exist.

As to mitigating circumstances, we find: Section 29-2523 (2) (a), R. R. S. 1943, reads: "The offender has no significant history of prior criminal activity." In evaluating the applicability of aggravating circumstance (1) (a), we set out in some detail the defendant's previous criminal history. It is substantial and indeed, significant. We agree with the sentencing panel's finding that "defendant's record constitutes a significant history of serious assaultive and terrorizing criminal activity" and that this mitigating circumstance does not exist.

Section 29-2523 (2) (b), R. R. S. 1943, reads: "The defendant acted under unusual pressures or influences or under the domination of another person." The evidence establishes that the defendant acted alone in committing the robbery. We agree with the sentencing panel that the "defendant was acting under pressures of being apprehended for the robbery and thus spending the rest of his life in institutions for criminal wrongdoing, but these pressures were of his own making in committing the robbery." This mitigating circumstance refers only to external pressures, not those a defendant chooses to create for himself. This mitigating circumstance does not exist.

Section 29-2523 (2) (c), R. R. S. 1943, reads: "The crime was committed while the offender was under

the influence of extreme mental or emotional disturbance." There has been no claim nor is there any evidence that the defendant was mentally or emotionally disturbed when he committed the murder. The actions of defendant prior to the crime reveal a deliberate plan. He entered the coin shop with a gun, rags, and rope. His goal was money. He implemented his plan with this single-minded purpose and an indifference to human life. This mitigating circumstance is absent here.

Section 29-2523 (2) (d), R. R. S. 1943, reads: "The age of the defendant at the time of the crime." The defendant was 51 years of age. Youth or extreme age might mitigate the crime; here, in the absence of either of these factors, this mitigating circumstance does not exist.

Section 29-2523 (2) (e), R. R. S. 1943, reads: "The offender was an accomplice in the crime committed by another person and his participation was relatively minor." The defendant was a lone actor in committing a major crime. We agree with the sentencing panel that this mitigating circumstance does not exist.

Section 29-2523 (2) (f), R. R. S. 1943, reads: "The victim was a participant in the defendant's conduct or consented to the act." The sentencing panel found this circumstance does not exist. We agree.

Section 29-2523 (2) (g), R. R. S. 1943, reads: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." We agree with the sentencing panel that: "No claim has been made nor has any evidence been adduced that the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication. The defendant did

not and does not drink alcoholic beverages and was not intoxicated at the time the crime was committed." This mitigating circumstance does not exist.

We find three of the aggravating circumstances are applicable and that sufficient aggravating circumstances exist to justify the imposition of a sentence of death.

We further find that none of the seven statutory mitigating circumstances is applicable and there are no mitigating circumstances to approach or exceed the weight given to the aggravating circumstances.

"In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances." State v. Simants, *supra*. The aggravating circumstances found by the sentencing panel were sufficient for the panel to impose the death penalty.

We affirm the judgment of the District Court.

AFFIRMED.

DONALD E. HANSEN ET AL., APPELLEES, V. CIRCLE LAKE DEVELOPMENT CORPORATION, APPELLANT.

260 N. W. 2d 609

Filed December 28, 1977. No. 41241.

1. **Trial: Judgments.** The judgment of the trial court in an action at law when 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. _____: _____. Where trial is to the court, 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.
3. **Contracts: Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous.

4. **Contracts.** In trying to determine the meaning of ambiguous terms in a contract the court may, in an attempt to ascertain the intent of the parties to the contract, look to the preliminary negotiations of the parties or to the interpretation placed on the contract by the parties during the period of performance.

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

Brogan & Stafford, for appellant.

Hutton & Garden, for appellees.

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

WHITE, C. J.

This is an action by the buyers-plaintiffs to recover $1,000 paid by them to the seller-defendant pursuant to a real estate purchase agreement. Defendant filed a cross-petition alleging that it was entitled to retain the $1,000 as liquidated damages under the agreement. The case was tried to the county court of Madison County which found in favor of the defendant. Plaintiffs appealed that judgment to the District Court, which on October 22, 1976, heard the case on appeal, and on November 29, 1976, reversed the judgment of the county court and found in favor of the plaintiffs. Defendant appeals from the judgment of the District Court. We affirm the judgment of the District Court.

The case below was tried to the court without a jury. "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, 198 Neb. 533, 253 N. W. 2d 849 (1977). See, also, Mickelson & Mickelson Hay Contractors v. Christensen, 197 Neb. 34, 246 N. W. 2d 655 (1976). The District Court, in finding for the plaintiffs, made no findings of fact. Where trial is to the court, "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., 198 Neb. 153, 251 N. W. 2d 888 (1977).

Defendant built a condominium structure in Norfolk, Nebraska, for the sale of units therein. Plaintiffs entered into a purchase agreement for the purchase of Unit 3 for the sum of $49,900 on September 12, 1974. This purchase agreement contained the following provisions:

"1) The undersigned Buyers jointly and severally promise to purchase the above condominium apartment constructed or to be constructed thereon for a total price of $49,900.00 payable by means of a per cent minimum cash down payment (of which $1,000.00 has been paid per attached receipt and the balance to be paid by financing as follows:

"$48,900.00 upon settlement date October 15, 1974.

"Buyers will close said loan and pay the balance of the minimum cash down payment and closing costs and escrows upon demand of Seller after financing has been procured. If financing cannot be procured, Seller will notify Buyers of such failure and return Buyers' down payment, whereupon this agreement shall be void. * * *

"In the event of the refusal or failure of the Buyers to consummate the purchase, said deposit shall be retained as liquidated damages for breach of said contract."

Plaintiffs delivered a check in the sum of $1,000 to defendant, which was held by it. On September 14, 1974, plaintiffs obtained a mortgage commitment in the amount of $35,000 from the Norfolk 1st Federal Savings & Loan Association. Plaintiffs listed their home for sale, but were unable to sell it. When the mortgage loan commitment expired, plaintiffs notified the defendant that they could not obtain financing and requested the return of the $1,000 check which defendant was holding. Defendant, on Jan-

uary 15, 1975, deposited the check and this litigation followed.

It is plaintiffs' position that their agreement with the defendant to purchase the condominium unit was conditioned upon their obtaining 100 percent financing for the purchase; that this financing included the sale of their house; and that if this financing could not be obtained, the proposed purchase would not transpire and the agreement would be void, with their $1,000 deposit being returned to them.

In order to examine that contention we first look to the words of the purchase agreement. We find the purchase agreement to be ambiguous. While the agreement refers to procuring financing, it does not explain or specify what is meant by that term. A provision of a contract is ambiguous when considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Frank McGill, Inc. v. Nucor Corp., 195 Neb. 448, 238 N. W. 2d 894 (1976); Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828 (1975).

It is thus necessary to resort to parol evidence to explain the meaning of this term in the purchase agreement. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. Olds v. Jamison, 195 Neb. 388, 238 N. W. 2d 459 (1976). Where a contract is ambiguous, the court must determine the intent of the parties and resolve the ambiguity to give effect to that intent. Spencer-O'Neill House, Inc. v. Denbeck, 196 Neb. 456, 243 N. W. 2d 767 (1976). In trying to determine the meaning of ambiguous terms in a contract the court may, in an attempt to ascertain the intent of the parties to the contract, look to the preliminary negotiations of the parties. Stover v. Ed Miller & Sons, Inc., 194 Neb. 422, 231 N. W. 2d 700 (1975). In such a case, the court may also look at the interpretation placed on the contract by

the parties during the period of performance. Knight Bros., Inc. v. State, 189 Neb. 64, 199 N. W. 2d 720 (1972).

With these rules in mind, we examine the record before us. Plaintiff, Donald Hansen, testified that based upon his conversations with John Hespe, president of defendant corporation, he understood the financing to consist of two elements — obtaining a loan and selling his house. The proceeds from the loan and the equity from his house would be used to purchase the unit in the condominium.

Mr. Hespe testified that on September 12, 1974, the date on which the agreement was signed, Mr. Hansen told him that he would make application for a loan and list his house for sale. On cross-examination Mr. Hespe admitted that Mr. Hansen needed to sell his house to meet the purchase price. The record shows that plaintiffs entered into a listing agreement for the sale of their house on September 13, 1974, the day after the purchase agreement was signed. This listing ran until January 13, 1975.

Mr. Hansen testified that he had met with Mr. Hespe at least once after the agreement was signed and had telephone conversations with him, and on those occasions the topic of discussion was the progress he was making toward selling his home. Hansen testified, and Mr. Hespe agreed during his testimony, that Hansen had asked the defendant to hold his deposit check for a while.

While the purchase agreement called for a settlement date of October 15, 1974, it is clear from the record that the parties gave no effect to this date. Defendant did not cash plaintiff's check until January 15, 1975.

There is ample evidence in the record to support plaintiffs' interpretation of the term "financing" in the purchase agreement. We note that the purchase agreement was drafted by the defendant. "Ambiguities in a contract are construed most strictly against its author." Don Nelsen Constr. Co. v. Landen,

supra. There is also ample evidence in the record that plaintiffs' attempt to sell their home was in good faith.

Other contentions raised by the defendant have been examined and found to be without merit.

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

AFFIRMED.

MARCELLA PAASCH, APPELLANT AND CROSS-APPELLEE, V. JULIA BROWN, APPELLEE AND CROSS-APPELLANT.

260 N. W. 2d 612

Filed December 28, 1977. No. 41264.

1. **Contempt: Courts.** The power to punish for contempt of court is a power inherent in all courts of general jurisdiction such as the District Court of this state.
2. **Contempt: Obstructing Justice: Trial.** By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court.
3. **Contempt.** As contempt proceedings are in their nature criminal, no intendments or presumptions will be indulged in to support a conviction.
4. **Contempt: Injunctions.** The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt.
5. **Contempt: Motions, Rules, and Orders.** In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered.
6. **Trial: Witnesses.** This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility.
7. **Premises, View of: Appeal and Error.** This court will give consideration to the fact that the trial court inspected the premises.

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

H. E. Hunt, Jr., and James A. Gallant, for appellant.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, for appellee.

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

WHITE, C. J.

This case involves a continuing controversy between the plaintiff, an upper landowner, and the defendant, a lower landowner, over the obstruction by the defendant of the flow of surface waters from the plaintiff's land through a natural drainway.

In the first appearance of this controversy before this court, Paasch v. Brown, 190 Neb. 421, 208 N. W. 2d 695 (1973), the plaintiff brought suit seeking damages and injunctive relief. In that case, we held as follows: "We find defendant obstructed surface water that ran in the equivalent of a natural drainage channel from plaintiff's 'long 40.' Plaintiff is accordingly entitled to an order of injunction."

The case was remanded to the District Court for Dodge County, Nebraska, for it to make findings or grant a new trial on the issue of damages and to proceed in accordance with the court's opinion.

On July 23, 1973, this court issued its mandate to the District Court. On August 23, 1973, the plaintiff filed a motion with the District Court requesting that judgment be entered on the mandate. On October 10, 1973, the District Court entered judgment on the mandate as follows: "It is the further order of this Court that the defendant, her agents, servants and employees be and they are hereby permanently enjoined from permitting any obstruction in the drainage by which surface water drains from real property owned by plaintiff * * *."

The plaintiff thereafter filed an action in tort for outrageous conduct, seeking damages for mental distress allegedly caused her by the defendant's refusal to comply with the above judgment of the District Court. In the second appearance of this contro-

versy before this court, Paasch v. Brown, 193 Neb. 368, 227 N. W. 2d 402 (1975), this court upheld the sustaining of a demurrer to and the dismissing of the plaintiff's petition by the District Court. We held: "The facts alleged here, with the benefit of all proper and reasonable inferences from them, are insufficient to constitute a cause of action for outrageous conduct intentionally causing severe emotional distress."

On August 29, 1975, the plaintiff filed a motion and affidavits in support thereof with the District Court for the defendant to show cause why she should not be held in contempt of court for failure to comply with the October 10, 1973, judgment of the District Court. The same day a citation to show cause was issued to the defendant by the District Court. A hearing on the matter was held on September 30, 1975, after which the District Court sustained the defendant's motion to dismiss the action filed by the plaintiff. On October 8, 1975, the plaintiff filed a motion for a new trial. The record is silent as to the disposition of this motion and of any attempts by the plaintiff to appeal from the September 30th decision.

On June 30, 1976, a second motion to issue a citation and affidavits in support thereof were filed by the plaintiff with the District Court. A citation to show cause was issued on the same date to the defendant by the court. A hearing on the matter was held on August 4, 1976. On October 26, 1976, the District Court, having heard the evidence and having viewed the premises, found that the defendant was not in contempt and ordered the citation to show cause be dismissed. This controversy makes its third appearance before this court. We affirm the judgment of the District Court.

The sole issue before us on this appeal, and we emphasize this at the outset of our discussion, is the correctness of the District Court's finding that the defendant was not in contempt. We have, on this

appeal, neither the jurisdiction nor the evidence properly or fully presented, nor do we attempt in any way to reach the underlying substantive issues of this dispute.

The power to punish for contempt of court is a power inherent in all courts of general jurisdiction such as the District Court of this state. State ex rel. Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N. W. 2d 281 (1962). The power to punish for contempt is incident to every judicial tribunal, derived from its very Constitution, without any express statutory aid. Nebraska Children's Home Society v. State, 57 Neb. 765, 78 N. W. 267 (1899). "By statute courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court * * *." Payne v. Glebe, 190 Neb. 268, 207 N. W. 2d 386 (1973). Section 25-2121, R. R. S. 1943, specifically provides: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of * * * (3) *willful* disobedience of or resistance *willfully* offered to any lawful process or order of said court." (Emphasis supplied.)

"A civil contempt has for its purpose the preservation and enforcement of the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce private rights to which the court has found them to be entitled." McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182 (1957).

"Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt." McFarland v. State, *supra*.

As contempt proceedings are in their nature criminal, no intendments or presumptions will be indulged in to support a conviction. Halverson v. Halverson, 189 Neb. 489, 203 N. W. 2d 452 (1973). See,

also, Crites v. State, 74 Neb. 687, 105 N. W. 469 (1905).

In a civil contempt proceeding willfulness is an essential element. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N. W. 2d 811 (1975); Megel v. City of Papillion, 190 Neb. 238, 207 N. W. 2d 377, cert. den. 415 U. S. 919, 94 S. Ct. 1419, 39 L. Ed. 2d 474, appeal after remand, 194 Neb. 819, 235 N. W. 2d 876 (1973). The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512 (1963). It is necessary to establish guilt beyond a reasonable doubt. Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382 (1940).

In order for the defendant to be found in contempt, the District Court had to conclude that the defendant had violated its order, and that her disobedience was willful. The District Court did not, in its order, specify the grounds upon which it concluded that the defendant was not in contempt. The District Court could have concluded either that the defendant had satisfactorily complied with its order or that the defendant's violation of its order was not willful.

What did the order require? Plaintiff's position is that the flow of surface waters from her land is obstructed by the following in the drainway: (1) A 15-inch diameter metal tube or culvert; (2) fill dirt around the culvert; (3) two small cottonwood trees growing near the culvert; and (4) general brush and debris. She is adamant in her position that removal of all these is required if the court's order is to be complied with.

Our original decision contained a general finding of fact that the defendant had obstructed the flow of surface waters from the plaintiff's land in the drainway, and held that the plaintiff was entitled to an injunction. In our recital of facts in that case, sole reference was made to the 15-inch diameter metal tube or culvert. No mention was made of fill dirt,

cottonwood trees, debris, or any other specific item which could constitute an obstruction to the flow of the surface waters.

The case was remanded for "further proceedings in accordance with this opinion." Paasch v. Brown, 190 Neb. at 425. Pursuant to our mandate, the District Court entered its judgment enjoining the defendant "from permitting any obstruction in the drainage by which surface water drains from real property owned by plaintiff." The District Court's judgment also does not mandate the removal of any specific items. We note that the record is devoid of a motion by either party to have this decree modified or made more specific.

"In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered." Malec v. Malec, 196 Neb. 533, 244 N. W. 2d 82 (1976). See, also, Drake v. Drake, 183 Neb. 677, 163 N. W. 2d 598 (1968).

It seems clear to us that the purpose of the original decree was to prevent the obstruction of the flow, as existed at the time of the decree, of surface waters from plaintiff's land in the natural drainway. The defendant is thus required to do whatever is necessary in order to accomplish that purpose. If the flow, as it existed at the time of the decree, is not being obstructed, then the defendant is not violating the order.

At the hearing on September 30, 1975, Wilbur Paasch, plaintiff's husband, testified that on May 18, 1974, there was a heavy rain and that the Paasch land was under water. This was the only specific date after issuance of the mandate that he could recall there being water on the property. Exhibits 9, 10, and 11 were photographs introduced into evidence showing the Paasch property under water after the May 18th rain. He testified that these photo-

graphs showed only the Paasch property. Paasch testified that grain, straw, and things up against the two cottonwood trees in the ditch tended to slow and hold back the water. He stated that the cottonwood trees held back the flow of water.

At the August 4, 1976, hearing, the defendant, Julia Brown, testified that she removed the metal culvert in the drainway directly after receiving correspondence from her attorney advising her to do so. The record shows that the culvert was removed in January of 1974. She testified that she always kept the ditch in question clean. She stated that there was no obstruction at the point of the cottonwood trees and that there is more drainage at the point of the cottonwood trees than directly east from there. Mrs. Brown testified that there was never any obstruction preventing the flow of waters at the point in controversy after the culvert was removed. She testified that there was nothing in the ditch from where it starts at the Paasch property eastward across the property that would in any way impede or retard or change the direction of the flow of water.

Ed Rasmus testified that he was contacted in the fall of 1973 by the defendant to remove a culvert on her property. He testified that Mrs. Brown had a letter from her attorney which requested that she remove obstructions from the drainage ditch and that he followed the instructions as set forth in the letter.

Roger Vacha, the defendant's tenant, testified that at the time of the heavy rainfall in the spring of 1974, there was no obstruction in the ditch at the point of the cottonwood trees. He stated that since he has been associated with the defendant's land, the ditch around the cottonwood trees has not in any way impeded or retarded or changed the flow of water. He testified that in the spring of 1974, the Brown property was also under water. Mr. Vacha testified that he always tried to keep the drainage ditch clean and that he keeps debris out of the ditch around the cot-

tonwood trees. Vacha testified that he observed drainage from the Paasch property onto the Brown property twice after heavy rainfalls and observed no evidence of back-up of any water or of debris collecting.

There was evidence that the defendant had on her property, near the disputed site, equipment which could have removed the cottonwood trees and fill dirt in April of 1976.

Much of the evidence before the District Court was conflicting and contradictory in nature. The trial court had the opportunity to view the parties and the witnesses. This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Donahoo v. Home of the Good Shepherd of Omaha, Inc., 193 Neb. 586, 228 N. W. 2d 287 (1975). On August 9, 1976, the trial court personally inspected the area in question. This court will give consideration to the fact that the trial court inspected the premises. Steffen v. County of Cuming, 195 Neb. 442, 238 N. W. 2d 890 (1976).

There was sufficient evidence for the trial court to have concluded that the flow of surface waters, as existed at the time of the original decree, was not being obstructed and that defendant was thus in compliance with the order; or that if such was not the case, that defendant's noncompliance with the order was not willful. Where a case is tried to the court, without a jury, the finding of the trial court will be given the same weight as a jury verdict and will not be disturbed on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TOM CARADORI, APPELLANT.

260 N. W. 2d 617

Filed December 28, 1977. No. 41461.

1. **Criminal Law: Evidence: Intent.** Knowledge and intent may be proved by circumstantial evidence.
2. **Criminal Law: Receiving Stolen Goods: Evidence.** If the facts are such that a man of the age, intelligence, and experience of the defendant would know that property was stolen, then the evidence is sufficient to sustain a finding of guilty knowledge.
3. **Criminal Law: Trial: Impeachment: Records.** A prior conviction of the defendant offered for the purpose of impeachment may be proved only by an admission of the defendant or the public record of the conviction.
4. **Impeachment: Evidence.** Evidence of a juvenile adjudication is not admissible for the purpose of impeachment.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded for a new trial.

Walter J. Matejka, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee.

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

BOSLAUGH, J.

The defendant appeals from a sentence to imprisonment for 1 to 3 years for receiving stolen property. The assignments of error relate to the sufficiency of the evidence to support the conviction, the admission of evidence of a previous conviction of the defendant, and the overruling of the defendant's motion for a new trial for newly discovered evidence.

The evidence shows a model home in Douglas County was burglarized sometime around August 30, 1976, and a quantity of furniture was stolen from the property. On September 1, 1976, the defendant purchased from Eugene Wyman two of the items that had been stolen from the model home. Later the de-

fendant took four more of the items from Wyman to apply on rent Wyman owed to the defendant. The stolen items were recovered after a search of the defendant's apartment on January 7, 1977.

The defendant purchased the first two items, a chair and a couch, from Wyman early in the morning of September 1, 1976. According to the defendant, Wyman came to the defendant's apartment that morning and said he wanted to sell some furniture to the defendant. The furniture was in a U-Haul truck. Wyman brought the chair up to the apartment, which was on the second floor, and then brought up the sofa. The defendant agreed to pay Wyman $150 for the two items. A girl who was living with the defendant gave Wyman $25 to apply on the purchase. Wyman at that time was living with the defendant's brother, Shane, in another apartment in the same building. Earlier the defendant and Wyman had shared an apartment, and Wyman still owed the defendant $80 for rent from that arrangement.

On the day the search took place, the defendant made a voluntary statement at the sheriff's office. A deputy sheriff testified that the defendant said he had known Wyman for about 2 years. The defendant described Wyman as a "ripoff" or thief and said he had stolen a stereo system from the defendant's brother.

The defendant contends the evidence was insufficient to establish guilty knowledge and there was no evidence as to the value of the property the defendant purchased from Wyman.

Knowledge and intent may be proved by circumstantial evidence. State v. Henry, 174 Neb. 432, 118 N. W. 2d 335. If the facts are such that a man of the age, intelligence, and experience of the defendant would know that property was stolen, then the evidence is sufficient to sustain a finding of guilty knowledge.

The evidence of the State in this case was suffi-

cient, if believed, to sustain a finding of guilty knowledge. The circumstance of Wyman, who the defendant described as a thief, coming to his apartment early in the morning with a truck load of furniture for sale was highly suspicious. From this evidence the jury could conclude that the defendant knew the furniture was stolen.

A material element of the crime of receiving stolen property is that the property have a value of $100 or more. The State produced evidence that the chair and sofa had been purchased in 1975 for $450. The owner valued them at $425. The defendant admitted he had agreed to pay $150 for the chair and sofa and his mother testified that was a reasonable price. This evidence was sufficient to sustain a finding that the property in question had a value in excess of $100.

On cross-examination the defendant was asked if he had ever been convicted of a felony. He answered no. On rebuttal the State was allowed to prove, over objection, that the defendant had been convicted of unlawful distribution of LSD in 1974. Although the defendant was 16 years of age at the time of the offense, he had been charged as an adult and not as a juvenile. The defendant contends the admission of this evidence was error because the inflammatory nature of the evidence outweighed its probative value and the transcript received in evidence was improper because it went beyond showing only a prior conviction.

The record shows that the evidence of the prior conviction was a matter of some consequence, so far as the jury was concerned, because it directed an inquiry to the trial court as to whether the offense could be considered a felony.

The defendant's contention is based upon sections 27-609 and 27-403, R. R. S. 1943, which provide in part as follows: "(1) For the purpose of attacking the credibility of a witness, evidence that he has been

convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment. * * * (4) Evidence of juvenile adjudications is not admissible under this rule." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The defendant's first contention is without merit. The defendant's credibility was in issue and the fact that he had been convicted of a prior felony and had incorrectly answered the inquiry was a circumstance that was proper for the jury to consider. However, only the record of the prior conviction was admissible to prove the conviction. § 27-609, R. R. S. 1943.

The State is severely limited as to what may be introduced as proof of a prior conviction and the rule has been clearly stated in the prior decisions of this court. In Latham v. State, 152 Neb. 113, 40 N. W. 2d 522, this court said: "The statute prescribes and limits the scope of any inquiry initiated by the State that may be made on cross-examination of a defendant in a criminal case. It permits inquiry of the defendant when he is a witness if he was previously convicted of a felony. If the answer is in the affirmative, he may be asked the number of such convictions, and if an answer is correctly given, the inquiry must end there. If any answer of the defendant in this regard is incorrect or if he claims he does not remember, the fact of his conviction or convictions may only be shown by 'the record thereof.' The statute does not permit exploration of the charge

or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed upon the defendant. The purpose of the restricted inquiry permitted by the statute is for whatever effect the fact of a previous conviction may have on the credibility of the defendant as a witness, and not for the purpose of tending to show that he is prone to engage in criminal actions."

Instead of introducing a record of just the prior conviction, the State offered a transcript which included an order directing the Separate Juvenile Court of Douglas County, Nebraska, to make all medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers relating to the defendant available to the adult probation office. The order was clearly irrelevant and not otherwise admissible.

Although no Juvenile Court records appeared in the transcript which was received in evidence over the objection of the defendant, the implication was that in addition to the conviction for unlawful delivery of a controlled substance the defendant had a record in Juvenile Court. Evidence of juvenile adjudications are inadmissible under section 27-609 (4), R. R. S. 1943.

Upon the record presented we are unable to determine that the defendant was not prejudiced by the admission into evidence of the order directed to the Juvenile Court. The judgment must, therefore, be reversed and the cause remanded for a new trial. It is unnecessary to consider the assignment of error relating to newly discovered evidence.

REVERSED AND REMANDED FOR A NEW TRIAL.

SPENCER, J., dissenting.

The order of the Juvenile Court referred to in the opinion was an order to make all medical, psychological, psychiatric, and social welfare reports and records of juvenile probation officers available.

The Juvenile Court handles many juvenile prob-

lems that do not involve misconduct on the part of the juvenile. Even if the jury saw it, I seriously doubt if it would have had any effect. If anything, the order might have suggested psychological or psychiatric problems. While the order should have been excluded, its inclusion in the record was at the very most harmless error.

EL FREDO PIZZA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, V. ROTO-FLEX OVEN CO., A TEXAS CORPORATION, APPELLANT.

261 N. W. 2d 358

Filed January 4, 1978. No. 41194.

1. **Uniform Commercial Code: Contracts: Sales: Warranties.** Under section 2-315, U.C.C., a warranty of fitness for a particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Whether or not the warranty of fitness for a particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting.
2. **Trial: Verdicts: Evidence.** It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. 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.
3. **Sales: Warranties: Damages: Evidence.** Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach. Such damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
4. **Uniform Commercial Code: Warranties: Damages: Evidence.** Lost profits, proximately caused by a seller's breach of warranty,

are consequential damages which may be recovered under section 2-715, U.C.C., if the evidence is such that damages can be ascertained with a reasonable degree of certainty.

5. **Sales: Damages: Evidence.** The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof.

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

Eugene L. Pieper of Thompson, Crounse & Pieper, for appellant.

James F. Kasher of Brady, Kasher & Pavel, for appellees.

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

BRODKEY, J.

In their second amended petition filed in the District Court for Douglas County, El Fredo Pizza, Inc., and Center Street Pizza, Inc., plaintiffs and appellees herein, alleged that defendants Roto-Flex Oven Co. and Kiesel Associates, Inc., had breached implied warranties of merchantability and fitness for a particular purpose in regard to a defective pizza oven sold by defendants to plaintiffs. Plaintiffs prayed for money damages in the amount of $24,802.60 for the cost of the oven, increased labor costs, and lost profits. Defendants entered general denials. Kiesel Associates, Inc., was dismissed from the action at the close of plaintiffs' evidence, leaving Roto-Flex Oven Co. ("Roto-Flex") as the sole defendant. The jury found that Roto-Flex had breached an implied warranty as to the fitness and merchantability of a pizza oven it sold for use in the retail pizza operation of Center Street Pizza, Inc., and awarded plaintiffs damages of $17,500. Roto-

Flex' motions to remit damages and for a new trial were overruled, and it has now appealed to this court, contending that the trial court erred in permitting El Fredo Pizza to remain as a party, and in submitting to the jury the questions of implied warranty of fitness for a particular purpose and of damages allegedly sustained by plaintiffs due to lost profits. We affirm as modified.

The facts relevant to this appeal are as follows. Dennis Walker is the president and principal owner of several El Fredo Pizza restaurants in Omaha, Nebraska. Walker has been in this business in Omaha since 1972, and his partner is Fred Lennon, who operates El Fredo Pizza restaurants in Sioux City, and who has been in the business for more than 20 years. Walker and Lennon had a policy of incorporating their restaurants separately, even if they were in the same city.

In 1973, at which time he successfully operated one El Fredo Pizza restaurant in Omaha, Walker planned to open a new El Fredo branch on Center Street, and needed to purchase a pizza oven for the new location. Walker desired to purchase the oven from Roto-Flex, as a Roto-Flex oven in Fred Lennon's restaurant in Sioux City had performed favorably for many years, and Lennon recommended it. Walker negotiated with Kiesel, an agent of Roto-Flex, and a contract was entered into on September 1, 1973, under which Walker purchased a "Pizza Oven Special" for $4,802.60, exclusive of shipping and installation charges. The contract was signed by Walker as president of El Fredo Pizza, Inc., as the new restaurant, to be formally known as Center Street Pizza, Inc., was not yet officially incorporated. Subsequently, however, the contract was orally assigned to Center Street Pizza, Inc., which paid for the oven.

The oven was installed on October 22, 1973, and problems immediately ensued. Although the evi-

dence was voluminous on this point, suffice it to say that the oven did not bake pizzas properly because of uneven heating. In order to fully bake a pizza, a two-step process would have to be utilized; first the pizza was baked in a pan, and then the pan had to be removed to permit the crust to finish baking. Constant monitoring of the oven was required, and delays occurred in serving customers. Roto-Flex was notified of the problem, suggestions were made, and a Roto-Flex employee attempted to fix the oven in February 1974. The oven, however, continued to bake pizzas improperly, despite Roto-Flex' attempts to remedy the problem, and despite Center Street Pizza's endeavor to follow exactly the procedures used in the Sioux City operation, where a similar Roto-Flex oven worked properly. When the oven continued to malfunction, Center Street Pizza removed and replaced the oven in November 1974, advising Roto-Flex of that fact. After the Roto-Flex oven was replaced with an oven from a different company, Center Street Pizza's problems in regard to baking pizzas disappeared.

With respect to damages, testimony by plaintiffs' witnesses indicated that Center Street Pizza had incurred increased labor costs during the time the Roto-Flex oven was used because the oven required constant monitoring, and additional employees were necessary due to the defect in the oven. Walker and Lennon testified that in the pizza industry in general, but particularly in El Fredo Pizza operations, labor costs are usually 21 to 22 percent of the total sales. They testified that while the Roto-Flex oven was in operation, labor costs were 27 to 28 percent of total sales, and that when the oven was replaced labor costs dropped to the expected 21 to 22 percent figure. They further stated that the pizza retail business is one where "instant maturity" is the norm, meaning that after the first several months of operation, revenue and profits will remain approximately the

same thereafter, with only small increases likely in the future. Monthly operating statements of Center Street Pizza were admitted in evidence, and these statements reflected the labor costs referred to above, as well as the fact that the total sales of Center Street Pizza increased by approximately 20 percent in the year after the Roto-Flex oven was replaced. A more detailed analysis of the evidence in regard to damages will be hereinafter set forth.

Roto-Flex first contends that the trial court erred in permitting El Fredo Pizza, Inc., to remain as a party in this action because the evidence showed that it had no interest herein. El Fredo Pizza, Inc., was initially named as a plaintiff because there was a question as to whether it had in fact assigned the oven contract to Center Street Pizza, Inc. The evidence was undisputed, however, that the contract had in fact been assigned, and therefore it is clear that El Fredo Pizza has no interest in the action, and is not entitled to judgment in its favor. As assignee of the contract and purchaser of the oven, only Center Street Pizza had an interest in the action. Therefore the judgment below should be reversed insofar as it is in favor of El Fredo Pizza as well as Center Street Pizza. Although El Fredo Pizza should have been dismissed as a plaintiff at the close of the evidence, the error in this respect did not prejudice Roto-Flex. The appropriate remedy under the particular facts of this case is not, as Roto-Flex suggests, to reverse the entire judgment, but only to reverse the judgment insofar as it is in favor of El Fredo Pizza. The error did not result in the jury being confused or misled, and no additional award was made because El Fredo Pizza remained a plaintiff. As a practical matter, the error had no effect in this case with respect to the judgment in favor of Center Street Pizza. No judgment shall be reversed or affected by reason of any error or defect in the

proceedings which does not affect the substantial rights of the adverse party. § 25-853, R. R. S. 1943.

Roto-Flex next contends that the evidence was insufficient to submit the issue of implied warranty of fitness of the oven for a particular purpose to the jury because the evidence did not show that Center Street Pizza had relied on Roto-Flex' skill or judgment in purchasing the oven. Two implied warranties provided for in the Uniform Commercial Code are relevant to this case. Under section 2-314, U.C.C., a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. In order for goods to be merchantable under section 2-314, they must be at least such as are fit for the ordinary purposes for which such goods are used. Under this implied warranty, no reliance upon the seller need be shown. Under section 2-315, U.C.C., a warranty of fitness for a particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. See, Ruskamp v. Hog Builders, Inc., 192 Neb. 168, 219 N. W. 2d 750 (1974); Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 209 N. W. 2d 177 (1973).

In the present case, the special verdict form submitted by the court did not require the jury to indicate which warranty, if any, it found applicable, as both kinds of warranties were referred to in one question; and the record does not disclose which warranty the jury found to apply, or whether it found both to be applicable. There can be no question that the evidence was sufficient to submit the issue of implied warranty of merchantability to the jury, and Roto-Flex does not argue to the contrary. Roto-Flex contends only that there was not sufficient

evidence of reliance on the part of Center Street Pizza as required under section 2-315, U.C.C.

Roto-Flex' argument essentially is that Center Street Pizza did not rely on Roto-Flex' skill or judgment in buying the oven, but relied on the judgment of Fred Lennon, who recommended the Roto-Flex oven because his experience with a similar oven had been favorable. This argument misses the mark. Comment 1 to section 2-315, U.C.C., provides that whether or not the warranty of fitness for a particular purpose arises in any individual case "is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller." If anything, the fact that Center Street Pizza went to Roto-Flex to purchase an oven because of Lennon's knowledge of past success with a similar oven underscores the fact that Center Street Pizza was relying on Roto-Flex' skill to furnish suitable goods for its business. The testimony indicated that Roto-Flex ovens are custom built for Roto-Flex customers, and Roto-Flex was aware of the particular purpose for which the oven was required in this case. Under the circumstances of this case, the evidence was clearly sufficient to raise the factual question of reliance under section 2-315, U.C.C., and it was proper to submit that question to the jury. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Huskinson v. Vanderheiden, 197 Neb. 739, 251 N. W. 2d 144 (1977). Roto-Flex in effect desires

a directed verdict on the issue of liability under an implied warranty of fitness under section 2-315, U.C.C. "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, 198 Neb. 139, 251 N. W. 2d 880 (1977). Under these standards, it was proper for the trial court to submit the issue of reliance under section 2-315, U.C.C., to the jury in this case, and Roto-Flex' contention to the contrary is without merit.

The principal issue raised in this case is whether the evidence was sufficient to permit Center Street Pizza to recover damages for lost business profits it allegedly incurred due to the defect in the oven. "Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach." Shotkoski v. Standard Chemical Manuf. Co., 195 Neb. 22, 237 N. W. 2d 92 (1975). Under section 2-715, U.C.C., which provides for the recovery of consequential damages resulting from the seller's breach, such damages "need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. * * * It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture." Shotkoski v. Standard Chemical Manuf. Co., *supra*. Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be recovered under section 2-

715, U.C.C., if proof of such loss is sufficient. National Farmers Organization, Inc. v. McCook Feed & Supply Co., 196 Neb. 424, 243 N. W. 2d 335 (1976); Lewis v. Mobil Oil Corp., 438 F. 2d 500 (8th Cir., 1971); White and Summers, Uniform Commercial Code, § 10-4, p. 319 (1972).

The only question Roto-Flex raises with respect to the recovery of consequential damages for lost profits under section 2-715, U.C.C., in this case is whether the evidence of lost profits was such that the jury could ascertain actual damages with a *reasonable degree of certainty.* Roto-Flex contends that it was not, and that on the evidence presented the jury could only reach a conclusion with respect to damages by relying on speculation and conjecture.

Roto-Flex cites the general rule that lost profits of a new business may not be recovered because such damages are too speculative and conjectural. See 22 Am. Jur. 2d, Damages, § 173, p. 245. The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor, however, "is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof. * * * Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the *amount* is not." (Emphasis in original.) Fisher v. Hampton, 44 Cal. App. 3d 741, 118 Cal. Rptr. 811 (1975). See, also, Earle M. Jorgensen Co. v. Tesmer Manuf. Co., Inc., 10 Ariz. App. 445, 459 P. 2d 533 (1969); Barbier v. Barry, 345 S. W. 2d 557 (Tex. Civ. App., 1961); Reefer Queen Co., Inc. v. Marine Constr. & Design Co., 73 Wash. 2d 774, 440 P. 2d 448 (1968); Boring v. Geis Irrigation Co., 547 P. 2d 988 (Okla. App., 1975); Biothermal Process Corp. v. Cohu & Co., 119 N.Y.S. 2d 158 (S. Ct. N.Y., 1953), reversed on other grounds, 283 App. Div. 60, 126

N.Y.S. 2d 1 (1st Dept., 1953), affirmed 308 N.Y. 689, 124 N. E. 2d 323 (1954); 25 C.J.S., Damages, § 42 b, p. 741. Therefore, although in many, if not most, instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, "where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery of lost profits cannot be denied, even though a new business venture is involved." Earle M. Jorgensen Co. v. Tesmer Manuf. Co., Inc., *supra.* In prior Nebraska cases involving recovery of damages for lost profits, the focus has been on whether it was proven that it is reasonably certain such profits would have been realized, and that the lost profits can be ascertained and measured from the evidence introduced with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable certainty by the evidence. K & R, Inc. v. Crete Storage Corp., 194 Neb. 138, 231 N. W. 2d 110 (1975); National Farmers Organization, Inc. v. McCook Feed & Supply Co., *supra;* Shotkoski v. Standard Chemical Manuf. Co., *supra.*

Under the above authorities, the crucial issue in this case is not so much whether Center Street Pizza was a new business, but rather whether damages for lost profits were proven with reasonable certainty. Both parties in this case have set forth arguments with respect to whether Center Street Pizza was a new business, or whether it was merely an extension or new branch of an established business. This question is not decisive. The fact that a business is new is relevant only insofar as that fact affects the certainty of proof of lost profits; it does not establish as a matter of law that damages for lost profits may not be recovered. Therefore we turn to the question of whether damages for lost profits were proven with reasonable certainty in the present case.

It should first be noted that of the $17,500 awarded

for damages in this case, only approximately $12,000 can be attributed to damages for lost profits, as the purchase price of the oven, shipping expenses, and traveling expenses of a Roto-Flex employee, all paid by Center Street Pizza, amounted to nearly $5,400. Therefore, the specific question presented is whether an award of damages of approximately $12,000 for lost profits can be sustained by the evidence.

Before referring to detailed evidence, it is important to note several factors present in this case which are relevant to the issue of damages for lost profits in general: (1) The evidence was undisputed that the retail pizza restaurant business is an "instant maturity" business, one where, unlike many other business enterprises, the success or failure of the business can be quickly ascertained, and where a lengthy period of losses is not the norm before the business becomes profitable; (2) Center Street Pizza did not go out of business, and therefore records exist which show performance of the restaurant both during and after the period the defective oven was in operation; (3) even if Center Street Pizza is considered to be a new business, the history of other El Fredo Pizza restaurants owned by the same individuals and operated in the same manner as Center Street Pizza was operated is relevant in regard to the issue of whether a defective oven would reduce profits; (4) Center Street Pizza sought damages for lost profits not only on the basis that sales would have been greater if the Roto-Flex oven had not been defective, but also on the basis of increased costs caused by the defective oven, such increased costs resulting in decreased profits even if the oven did not cause a loss of gross revenue; and (5) evidence regarding lost profits adduced by Center Street Pizza consisted of business records as well as oral testimony, a fact which is critical under K & R, Inc. v. Crete Storage Corp., *supra*. With these fac-

tors in mind, it is appropriate to review the monthly operating statements of Center Street Pizza, which were introduced in evidence.

The monthly operating statements reflect the total sales and total costs of Center Street Pizza for the period the Roto-Flex oven was in operation, and for a period of the same duration after that oven was replaced with an oven that worked properly. The costs were broken down into five categories, one category being labor costs. We have reviewed these records to determine whether they, in conjunction with the testimony of witnesses as set forth above, constituted sufficient evidence to prove with reasonable certainty that Center Street Pizza suffered lost profits. We have compared records of the period the Roto-Flex oven was in operation with records of a period of the same duration after that oven was replaced; and have also compared relevant periods excluding a short period of time after each oven was installed so as to avoid any possible disparities resulting from the initial time it may take to adjust an oven and become familiar with it. Regardless of which comparison is used, the results are roughly similar, and the following figures reflect an average of the results obtained under the two comparisons.

First, from an examination of the records with respect to increased labor costs, it appears that labor costs while the Roto-Flex oven was in operation were 28 percent of sales, but dropped to 21 percent of sales after that oven was replaced. Had labor costs been at 21 percent of sales while the Roto-Flex oven was in operation, Center Street Pizza would have had approximately $8,000 more profit on the same sales it made during the Roto-Flex period. During the period after the Roto-Flex oven was replaced, it appears Center Street Pizza had a profit rate of approximately 6 percent of sales. Had Center Street Pizza had the same profit rate during the Roto-Flex period, its profit would have been approximately

$8,000. Center Street Pizza, in fact, lost approximately $350 during the Roto-Flex period, and this figure excludes losses in the first 2 months for the reason that a new pizza restaurant, even if an instant maturity business, will probably suffer initial losses. It can be seen that under either approach, whether one refers to labor costs or profit margins, the records indicate that Center Street Pizza had diminished profits of approximately $8,000 during the period the Roto-Flex oven was in operation due to increased labor costs. It should be noted that this computation of loss does not rest on an assumption that the Roto-Flex oven caused decreased sales, but is based on increased costs, which reflect lost profits, even assuming that the Roto-Flex oven did not cause a loss of gross revenue.

The monthly operating statements therefore support the testimony in this case that labor costs in El Fredo Pizza restaurants are about 21 percent of sales when the restaurant is being operated normally and properly. The testimony in this case was that there were no changes in the operation of Center Street Pizza other than the replacement of the Roto-Flex oven. There was evidence that additional employees had to be hired due to the inefficiency and defective nature of the Roto-Flex oven. We conclude that there was sufficient evidence to permit the jury to conclude with reasonable certainty that Center Street Pizza suffered lost profits due to increased labor costs attributable to the defective oven, at least to the extent of $8,000. Therefore we conclude it was proper to submit that issue to the jury.

The records also reflect that in the relevant period after the Roto-Flex oven was replaced, the sales of Center Street Pizza increased by approximately $24,000, or by about 20 percent. Center Street Pizza attributes this increase as being solely due to the Roto-Flex oven being replaced, relying on its evi-

dence that the pizza restaurant business is an instant maturity business, and arguing that therefore the sales in the relevant period after the Roto-Flex oven was replaced reflect what the sales would have been had the Roto-Flex oven not been defective. Center Street Pizza contends that in addition to damages for increased labor costs, the jury could properly have awarded it damages for lost profits due to decreased revenue. It contends that it is entitled to 49 percent of the $24,000 difference in sales as lost profits, arriving at the percentage by computing that food and labor costs are normally 51 percent of total sales, and concluding therefore that 49 percent is the appropriate profit margin. We do not find this argument persuasive, and for the following reasons conclude that the evidence was not sufficient to permit the jury to award Center Street Pizza damages for lost profits due to decreased revenue.

We do not believe the evidence supports Center Street Pizza's position that 49 percent is the proper profit margin on the alleged decreased sales. Its own records indicate that profits after the Roto-Flex oven was replaced were 6 percent of total sales, as the total percentages of the various categories of costs was 94 percent. Therefore 6 percent of $24,000, or about $1,500, is the most Center Street Pizza could recover for lost profits on decreased revenue. It should also be noted that Center Street Pizza's argument is essentially that had the Roto-Flex oven worked properly, it would have had the same revenue and profits during the Roto-Flex period as it subsequently did. In the relevant period after the Roto-Flex oven was replaced, Center Street Pizza's profits were about $9,000 to $10,000. Under Center Street Pizza's own theory that it would have done as well during the Roto-Flex period as it did during the relevant time period thereafter had the oven not been defective, $10,000 is the maximum amount it could recover for lost profits, including

both increased labor costs and lost revenue. This figure is in accord with that reached by adding the $8,000 increased labor costs, as computed above, to the $1,500 loss of profits on the alleged decreased revenue.

In examining the record, however, we do not believe that the evidence supports the view that the defective Roto-Flex oven was the sole cause of the alleged decreased sales. The evidence that Center Street Pizza is an instant maturity business is not, standing alone, sufficient to permit the jury to conclude that the defective oven resulted in decreased sales. Although there was some evidence that customers were dissatisfied with the pizza baked in the Roto-Flex oven, such evidence was scanty at best. In the absence of more persuasive evidence, such as that other El Fredo Pizza restaurants in fact did not have significant increases in sales after a certain period of operation, we find that it would be speculative for a jury to conclude that Center Street Pizza would have sold as much pizza when the Roto-Flex oven was in operation as it did subsequently. Although sales did increase after the Roto-Flex oven was replaced, the increase was not so dramatic as to itself imply the defective oven caused lost revenue, and there are simply too many other factors such as location, increased public awareness of a restaurant, etc., to permit a jury to conclude with reasonable certainty that the oven caused reduced sales. Therefore we believe damages cannot be recovered for lost profits allegedly caused by decreased revenue because they were not proven with reasonable certainty.

We conclude that the evidence was sufficient to prove with reasonable certainty that Center Street Pizza suffered lost profits due to increased labor costs, but that it was not sufficient to prove lost profits from decreased revenue. In a post-trial motion, Roto-Flex moved the trial court to modify and remit

the amount of damages set out in the verdict in this case. We believe that the trial court should have granted such remittitur because the evidence does not sustain an award of $12,000 for lost profits in addition to the approximate $5,500 award for the costs pertaining to the defective oven. This court has the authority to direct a remittitur to be filed in such cases. See, Mangiameli v. Ariano, 126 Neb. 629, 253 N. W. 871 (1934); Curran v. Union Stock Yards Co., 111 Neb. 251, 196 N. W. 135 (1923). For the reasons set forth above, we find that the evidence was sufficient with reasonable certainty, to sustain an award of $8,000 for lost profits due to increased labor costs, but was not sufficient to sustain an award for more than that amount. Therefore, we direct a remittitur be filed reducing the award by $4,000, from $17,500 to $13,500. In all other respects, the judgment is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which directs that a remittitur be filed. A remittitur should be ordered only where the amount of the recovery which was excessive is subject to exact determination. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108.

WHITE, C.J., and CLINTON, J., join in this dissent.

FRATERNAL ORDER OF POLICE, OMAHA LODGE NO. 1, INCORPORATED, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

261 N. W. 2d 106

Filed January 4, 1978. No. 41242.

1. **Police Officers and Sheriffs: Statutes: Intoxicating Liquors: Licenses and Permits.** "No law enforcement officer shall have any interest in an establishment or place of business which has a

liquor license. This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-194.01, R. R. S. 1943.

2. **Constitutional Law: Statutes.** One, whose conduct a statute clearly governs, may not challenge its constitutionality on the ground it is vague because it is not clear whether it applies to others.
3. **Principal and Agent.** Ordinarily one cannot accomplish through an agent that which he is prohibited from doing himself.
4. **Constitutional Law: Statutes: Intoxicating Liquors: Licenses and Permits: Police Officers and Sheriffs.** A statute which prohibits active law enforcement officers from participating in any manner in the management or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, for it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors.

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

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

William E. Naviaux of Corrigan, Naviaux, Kinney & Titus, for appellee.

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

CLINTON, J.

This action arises from an order of the Nebraska Liquor Control Commission denying the application of the Fraternal Order of Police, Omaha Lodge No. 1, Incorporated, a Nebraska nonprofit corporation, for a Class H liquor license for its lodge premises in Omaha, Nebraska. A protest objecting to the granting of the license was filed with the commission. Pursuant to the pertinent provisions of the statutes, an administrative hearing was set by the commission, and the applicant was given notice of the time

and place of hearing and the issues to be met, which were stated as follows:

"1. The propriety of issuing an alcoholic liquor license that will be controlled by law enforcement officers.

"2. The eligibility of an association composed of police officers who have an interest in said license, all as prohibited by Section 53-194.01 and 53-194.02."

The hearing was held, representatives of the applicant appeared, and evidence was received. Thereafter the commission made its findings and order denying the application upon both of the grounds stated in the protest. The applicant appealed from the order of denial to the District Court for Douglas County. The court held that section 53-194.01, R. R. S. 1943, was unconstitutional because it was vague and indefinite. It further held that the action of the commission was arbitrary and unreasonable and ordered the commission to issue the license. From that order the commission appeals to this court. We reverse the judgment of the District Court and direct reinstatement of the order of the commission.

Section 53-194.01, R. R. S. 1943, provides as follows: "No law enforcement officer shall have any interest in an establishment or place of business which has a liquor license.

"This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." Section 53-194.02, R. R. S. 1943, provides the penalty for violation of the preceding section.

The record establishes that the Fraternal Order of Police, Omaha Lodge No. 1, Incorporated, is a nonprofit corporation and part of the national organization of the Fraternal Order of Police. The membership of the applicant lodge consists of active police officers, retired police officers, and associate mem-

bers who are not police officers. The Omaha lodge has 580 active members who are either police officers or retired police officers of the Omaha police department and 300 associate members. About 83 percent of the Omaha police department are active members of the local lodge. The lodge has some insurance benefits for its police members and has given financial assistance to police officers, their families, and widows and children of deceased police officers. The lodge is governed by its officers and a board of directors, all of whom are active members of the lodge. The present lodge officers include a president, a vice president, and a secretary-treasurer, all of whom are active members of the Omaha police department. At least one member of the board of directors is an active police officer. The status of the other members of the board of directors, whether active or retired police officers, is not shown by the record.

The record establishes that the executive board (apparently consisting of the officers and the board of directors) enacted a resolution as follows: "RESOLVED, that the following named individuals, being either retired law enforcement officers or associate members of the corporation are hereby appointed to a Special Board to administer, oversee, manage and be responsible for the proposed lodge premises at 1102 South 7th Street and also to assume responsibility for compliance with any and all local, state or federal regulations in regard to the operation of the lodge." Then appear the names of the six members of the committee. Two of the members of the building committee testified before the commission. It is clear from that testimony and other evidence that the committee serves at the pleasure of the executive board.

The applicant's position that section 53-194.01, R. R. S. 1943, is unconstitutional is founded upon two claims. The first is that since the term "law en-

forcement officer" is not defined in the statute, it has no definite and certain meaning and therefore is void for vagueness. The applicant argues that the term might include prosecutors, special deputies, enforcement officers for administrative agencies, and national guardsmen who are called to duty in case of emergency. The applicant, however, concedes, as it must, that active members of the Omaha police department are law enforcement officers within the meaning of the statute, however the term is defined. Whatever may be the limits of the definition of law enforcement officers, it clearly includes active police officers. See section 81-1401(3), R. R. S. 1943, which defines a "law enforcement officer" for purposes of the act establishing the Nebraska Law Enforcement Training Center. The applicant has no standing to challenge the constitutionality on the ground of vagueness. Some of its officers and directors are clearly within the terms of the statute. One, whose conduct a statute clearly governs, may not challenge the statute's constitutionality on the ground that it is not clear whether or not the statute applies to others. State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359; Blackledge v. Richards, 194 Neb. 188, 231 N. W. 2d 319.

The applicant's second premise is that to deny to law enforcement officers as a class the right to have an interest in, or participate in, the management of a nonprofit corporation organized on a fraternal basis simply because it has a liquor license is an arbitrary and unreasonable classification having no reasonable relationship to the objects of the legislation.

The significant portion of the statute in the context of the present case is the second paragraph: "This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-

194.01, R. R. S. 1943. The undisputed facts show that the officers of the nonprofit organization are all active police officers and at least one of the directors is as well. Thus, if the statute is constitutional, its terms would be violated by the officers if the organization held a liquor license. The applicant has sought to avoid the statute by the appointment of a board consisting entirely of retired police officers and associate members to "assume responsibility for compliance with any and all local, state or federal regulations in regard to the operation of the lodge." Such a board is obviously an agent of the lodge and is subject to removal and appointment by the officers and the executive board which consist in part of active police officers. It is elementary that ordinarily one cannot do through an agent that which he is prohibited from doing personally. The statute cannot be avoided in this manner.

We now turn to the classification question. The evident object of the statute is to prohibit conflicts of interest on the part of those who have some responsibility for enforcing the laws of the state relating to alcoholic liquors. The Legislature has determined that law enforcement officers may not participate in the management or administration of nonprofit organizations which have liquor licenses. Avoiding possible conflicts of interest in this way is not an invidious discrimination prohibited by the equal protection clauses of the state and federal Constitutions. Bali Hai', Inc. v. Nebraska Liquor Control Commission, 195 Neb. 1, 236 N. W. 2d 614. We cannot say that the classification is wholly arbitrary or has no reasonable relationship to the object sought to be attained by the legislation. See Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668. The applicant argues that other nonprofit fraternal organizations such as Elks, Moose, Eagles, etc., have liquor licenses. True, but even so the statute prohibits law enforcement offi-

cers from participating in the management or administration of these nonprofit organizations which have a liquor license. The statute by its terms does not apply just to the management of some nonprofit organizations. The statute controls directly only the activities of the officers, not of the nonprofit corporation. The organization is affected only because it has officers, or directors, or managers, who are law enforcement officers.

Since the record establishes that law enforcement officers participate in the management and administration of the applicant within the meaning of the statute, the order of the commission is justified and is supported by the evidence. Since this is so, we need not examine the other grounds stated by the commission.

REVERSED.

CAROLYN D. VOCELKA, APPELLANT, V. ROBERT R. VOCELKA, APPELLEE.

260 N. W. 2d 620

Filed January 4, 1978. No. 41270.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Stephen Greenberg, for appellant.

Michael N. Schirber, for appellee.

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

CLINTON, J.

This appeal arises from the dissolution of a marriage. The only contested issues in the trial court were: Division of property, alimony, and child support. These are the same matters which are contested in this court. We affirm.

By agreement, custody of the older child of the parties, a boy age 17, was awarded to the respondent husband, and custody of the younger child, a boy age 13, was awarded to the petitioner wife. The trial court awarded to the wife a 1975 Chrysler automobile on which the husband was required to pay the encumbrance, and household goods which were then in her possession. It awarded the husband a 1965 Pontiac automobile and the household goods which were in his possession. The decree further directed the parties to sell a residential property owned by them in the State of New York. The balance of the proceeds of the sale, after deduction of $960 for delinquent temporary child support owed by the husband and after payment of certain debts incurred previous to the separation of the parties, is to be divided equally between the parties. The wife was awarded $1 alimony per year. See § 42-365, R. R. S. 1943. The husband was ordered to pay the wife $100 per month child support. At the time of trial the husband was 37 years of age and the wife 36, and both were in good health.

The husband had been a meteorologist in the United Stated Air Force with the rank of Temporary Major. He was separated from the Air Force after 15 years service because of a reduction in force. As a consequence he lost all pension benefits, but received a $12,000 separation payment. After the husband's separation from the Air Force, the parties separated. The causes of the separation appear in the record. It would serve no useful purpose to recite these causes.

At the time of trial, the wife was employed as a cashier in an installment loan agency. The husband was unemployed. He testified that the $12,000 separation payment had been exhausted by the payment of living expenses, support payments, debts, and the purchase of two motorcycles for the sons. At the time of trial, the husband was drawing $100 per

week unemployment compensation from the State of Iowa, which unemployment benefits would terminate at the end of 5 months. The husband has a college degree and at the time of trial was attending the University of Nebraska at Omaha part time, hoping to obtain sufficient credits to be later admitted to dental school.

We have carefully read the record. We find that the trial court did not abuse its discretion in any of the matters on which it entered judgment.

Each party in this appeal shall pay his own costs and attorney's fees.

AFFIRMED.

HERBERT RELLER ET AL., APPELLANTS, V. CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

260 N. W. 2d 622

Filed January 4, 1978. No. 41283.

1. **Eminent Domain: Damages: Property.** The value of property includes its value for any reasonable use to which it may be put.
2. _____: _____: _____. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged.

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

John McArthur, for appellants.

Kile W. Johnson of Barlow, Johnson, DeMars & Flodman, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding in eminent do-

main. The defendant, Consumers Public Power District, condemned an easement for a high-voltage electric transmission line across the property of the plaintiffs, Herbert Reller and Freda Reller. The appraisers fixed the damages to the plaintiffs' land at $2,615. The plaintiffs appealed to the District Court where a jury was waived and the case tried to the court. The trial court found that the damages amounted to $2,500 and entered judgment for that amount. The plaintiffs have appealed.

The plaintiffs' land consists of two tracts. Tract 1 consists of 540 acres in Section 5 and tract 2 consists of 127 acres in Section 8, all in Township 7 North, Range 6 East of the 6th P.M., in Lancaster County, Nebraska. The easement, which is 100 feet wide, enters tract 2 near the southwest corner and runs to the northeast on a diagonal line to a point 770 feet west of the northeast corner of tract 2. The easement runs north and south across tract 1 close to the centerline of the section. The easement is ¾ mile long across tract 1 and approximately ½ mile in length across tract 2. There are three 2-pole structures erected on tract 2 and five 2-pole structures on tract 1. The easement permits the landowner to use and cultivate the land within the right-of-way.

The only witness who testified for the plaintiffs was one of the owners, Herbert Reller. He testified the damages amounted to over $100,000. The expert witness for the defendant testified the damages amounted to $2,500.

The plaintiffs claim the trial court failed to give proper consideration to the fact that the easement and the structures erected on the right-of-way prevent the plaintiffs from economically using automatic or center pivot irrigation on their land. They claim that 250 to 300 acres in Section 5 and the entire 127 acres in Section 8 are suitable for irrigation by a center pivot system.

The date of the taking was April 8, 1969. The ex-

pert witness for the defendant testified that there were no center pivot irrigation systems operating in Lancaster County, Nebraska, in 1969 and that adaptability of land to irrigation by a center pivot system was not a factor that was considered in the buying and selling of land at that time. There was evidence that part of the land is suited for gravity-type irrigation and that other parts can be irrigated by a gun-type system.

The value of property includes its value for any reasonable use to which it may be put. Harmony Lanes v. State, 192 Neb. 826, 229 N. W. 2d 203. Before a particular use may be considered there must be a basis for concluding that the use would affect the market value of the land in the mind of a good faith intending purchaser at the time of the taking. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107.

The evidence here was such that the trial court could conclude that the effect of the taking on the landowner's ability to use a center pivot irrigation system on the land was not an element to be considered in determining the amount of damages resulting from the taking.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the marjority opinion herein because I feel the condemnation award is wholly inadequate. When a public utility condemns an easement diagonally across the property of a landowner to save expenses for the utility, it should be required to pay an adequate sum to fully compensate the landowner.

A diagonal easement seriously restricts the use

the landowner can make of his land in the future. In most instances the damage sustained by the landowner is greater than the extra expense the utility would incur if it were to run its easement in a straight line along the boundaries of the land of the condemnee.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY P. NUSS, APPELLANT.

260 N. W. 2d 624

Filed January 4, 1978. Nos. 41300, 41301.

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

Dean E. Erickson, 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.

CLINTON, J.

On December 19, 1974, the defendant entered a plea of guilty to a charge of larceny from the person alleged to have been committed on September 18, 1974. At that time another similar charge, allegedly committed on September 23, 1974, was dismissed. On January 30, 1975, he was sentenced to 2 years probation. In October 1976, an information was filed charging him with violation of the terms of his probation by having failed to refrain from unlawful conduct, to wit, by having on July 30, 1976, unlawfully delivered a controlled substance, marijuana. Two separate criminal charges of delivery of controlled substances, to wit, marijuana on July 30, 1976, and possession of heroin on August 6, 1976, were also filed. He then pled guilty to the information charging parole violation and to the marijuana charge.

The heroin charge was dismissed. He was sentenced to terms of 1 to 2 years on the charge of larceny from the person and 1 to 2 years on the charge of delivery of marijuana. Said sentences were ordered to be served consecutively.

On this appeal defendant asserts that the trial court abused its discretion in imposing consecutive sentences because another person, an associate of the defendant, one Griggs, who likewise pled guilty to delivery of marijuana, received a sentence of 1 to 2 years. The defendant asserts, and the record shows, that Griggs was involved in and had also pled guilty to a charge of larceny from the person, apparently involving the same incident or incidents in which the defendant participated. Griggs, however, had been discharged from his probation previous to the commission of the marijuana offense.

The defendant argues that as between himself and Griggs there has not been evenhanded justice and therefore this court should order the sentences to be served concurrently.

It is evident that Griggs, having been discharged from his probation, could not be sentenced on the larceny charge. The record before us, including the presentence investigation report, clearly supports the conclusion that defendant was dealing in marijuana and other drugs and that he was in possession of the small quantity of heroin which was the subject of the charge that was dismissed. Although given an opportunity to challenge the record, the defendant did not do so.

The fact that Griggs, for apparently sufficient reasons, was discharged from his probation on the larceny charge and that the defendant, for apparently good reason, had not been so discharged is sufficient to justify the seemingly different results in this case. Griggs' prior record is not before us.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE D. REEVES, APPELLANT.

261 N. W. 2d 110

Filed January 4, 1978. No. 41369.

1. **Criminal Law: Arrest: Words and Phrases.** The language "or any person in legal custody" is interpreted to apply to anyone taken into custody for transportation to the place of confinement.
2. **Criminal Law: Escape: Words and Phrases.** It is the departure from custody rather than the departure from a place of confinement which is the essential element of the offense of escape from legal custody.
3. _____: _____: _____. The crime of escape from legal custody is committed when a prisoner escapes from the custody of an arresting officer while being taken to the place of confinement.
4. **Criminal Law: Words and Phrases.** The principal distinction between the terms "lawful" and "legal" is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden by law. To say that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner.
5. **Criminal Law: Escape.** Guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from legal custody.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Robert J. Krafka of Kuhlman & Krafka, 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.

SPENCER, J.

George D. Reeves, defendant, appeals his conviction for the offense of escape from legal custody. Defendant alleges six assignments of error, basically premised on the contention there was no legal custody, that an erroneous instruction was given on cus-

tody, and the court failed to give an instruction defining probable cause. We affirm.

Defendant was arrested pursuant to a "no knock" search warrant in room 27 at a Fremont motel. The warrant was issued pursuant to information supplied by a previously reliable informant. Marijuana was found in the room. Defendant was handcuffed inside his residence and turned over to a deputy sheriff for transportation to the county jail. Defendant was transported to the alley west of the courthouse. While the deputy sheriff was getting out of the car, the defendant got out on the opposite side and took off running. He made good his escape and was not apprehended until sometime later.

Defendant was charged with escape from legal custody and possession of marijuana with intent to deliver. On a suppression hearing the court entered an order suppressing all physical and oral evidence obtained as a result of the search made pursuant to the warrant. Defendant was tried to the jury on the offense of escape from legal custody.

Section 28-736, R. R. S. 1943, provides as follows: "If any person confined in any Nebraska Penal and Correctional Complex, or Nebraska Penal and Correctional Complex road camp, or any Nebraska Penal and Correctional Complex trusty, *or any person in legal custody,* or confined in any jail, either awaiting trial on any complaint lodged against him, or upon conviction for any offense, shall break such custody and escape thereform, or attempt to do so, he shall, upon conviction thereof, be fined not more than five hundred dollars, or be punished by confinement in the Nebraska Penal and Correctional Complex for a period of not less than one year nor more than ten years." (Emphasis supplied.)

The primary question presented is whether defendant was in legal custody within the meaning of section 28-736, R. R. S. 1943, when he was placed under arrest after discovery of a controlled substance

pursuant to a search warrant which was subsequently suppressed. Reeves argues "legal custody" as used in section 28-736, R. R. S. 1943, applies only to persons who have actually been confined in one of the institutions described. It is his contention the statute is not applicable to one being transported to jail. He argues the statute does not come into operation until defendant is incarcerated. We do not accept defendant's limited construction of the statute.

The statute reads "or any person in legal custody, or confined in any jail." We interpret the language to apply to anyone taken into custody for transportation to the place of confinement. It is the departure from custody rather than the departure from a place of confinement which is the essential element of the offense.

Reeves contends if we hold the statute applies to preincarceration situations, then legal custody requires a lawful arrest. He argues the arrest was unlawful because the warrant was suppressed. Defendant had been taken into custody pursuant to a warrant which appeared lawful on its face. He was found in the possession of marijuana. He was handcuffed, placed in a patrol car, and transported to the courthouse for incarceration. This is sufficient to bring the charge within the terms of the statute. The crime of escape from legal custody is committed when the prisoner escapes from the custody of an arresting officer while being taken to the place of confinement.

The statute in question does not expressly require "lawful" custody, nor a "lawful" arrest, nor probable cause, as Reeves maintains. The statute simply requires that the individual at the time of escape be in "legal" custody. Although the distinction between the terms "legal" and "lawful" is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some impor-

tance. This distinction is set forth in the narrative following the definition of "lawful" as stated in Black's Law Dictionary (4th Ed.), p. 1032. It reads as follows: "The principal distinction between the terms 'lawful' and 'legal' is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is 'lawful' implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is 'legal' implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner."

Defendant had no more right to escape from custody than he would have had to use force to resist arrest. State v. Bear Runner, 198 Neb. 368, 252 N. W. 2d 638 (1977), where, as here, he knew the arrest was being made by a police officer. Defendant knew he was placed under arrest by an officer who entered his apartment pursuant to a warrant. He should have known he was subject to arrest for possession of a controlled substance. After being placed under arrest he was entrusted to the custody of a deputy sheriff for transportation to jail.

We have repeatedly held guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from custody. State v. Howard, 185 Neb. 583, 177 N. W. 2d 566 (1970).

In Brown v. State, 166 Neb. 215, 88 N. W. 2d 775 (1958), defendant attempted to escape while being held in the juvenile ward at the Douglas county courthouse. We there found defendant was in legal custody sufficient to authorize his detention, subject always to challenge in the methods provided by law.

Reeves was not justified in resorting to self-help to test the validity of his arrest. The proper place to vitiate an arrest is in the courts and not on the streets. The regularity of his arrest cannot legally be tested by an act of escape. The detention and transportation of Reeves to jail was legal custody,

and set up the factual condition which made the attempt to escape an offense.

Defendant attacks the definition of legal custody as given in the instructions. The court defined legal custody as the holding or confinement under color of law. Defendant is testing it by the term "lawful" rather than the term "legal." As set out in Black's Law Dictionary, *supra,* "legal" implies that it is done or performed in accordance with the forms or usages of law. The instruction in the context given was not erroneous.

Defendant's last assignment complains that the court refused to give a jury instruction defining "probable cause" and requiring the jury to find probable cause to arrest before finding the defendant guilty of escape from legal custody. The court actually defined "probable cause" as a reasonable ground of suspicion supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. What we have said previously disposes of defendant's other contentions.

We find no prejudicial error and affirm the judgment of the trial court.

AFFIRMED.

72ND STREET PIZZA, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS "EL FREDO PIZZA," APPELLEE, V. NEBRAKA LIQUOR CONTROL COMMISSION, APPELLEE, IMPLEADED WITH CITY OF OMAHA ET AL., APPELLANTS.

261 N. W. 2d 614

Filed January 11, 1978. No. 41220.

1. **Administrative Law: Statutes: Intoxicating Liquors: Licenses and Permits.** "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the [Nebraska Liquor Control] commission." § 53-116, R. R. S. 1943.

2. **Administrative Law: Municipal Corporations: Intoxicating Liquors: Licenses and Permits.** The policy of a municipality limiting the number of liquor licenses to be issued is not binding on the Nebraska Liquor Control Commission.
3. **Administrative Law: Trial: Courts: Appeal and Error.** Without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Nebraska Liquor Control Commission, the court does not exercise independent judgment on fact and policy.
4. **Administrative Law: Records: Intoxicating Liquors.** After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the 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.
5. **Administrative Law: Municipal Corporations: Licenses and Permits: Intoxicating Liquors.** The recommendation of the city council founded upon a policy limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action.
6. **Administrative Law: Due Process: Notice: Licenses and Permits: Intoxicating Liquors.** Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part.

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

Herbert M. Fitle, Allen L. Morrow, and Daniel M. Murphy, for appellants.

James F. Kasher of Brady, Kasher & Pavel, for appellee 72nd Street Pizza, Inc.

No appearance for appellee Nebraska Liquor Control Commission.

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

CLINTON, J.

This action originated in an appeal to the District Court for Douglas County, Nebraska, from an order

of the Nebraska Liquor Control Commission denying the application of the applicant, 72nd Street Pizza, Inc., for an "on-sale" beer license. The city council of the City of Omaha had recommended to the commission that the application for the license be denied. Upon review in the District Court the denial was found to be arbitrary and unreasonable and that court directed the commission to grant the license. The City of Omaha and certain objectors appealed from the judgment of the District Court. We reverse that judgment and reinstate the order of the commission.

The pertinent facts about which there is no substantial dispute are as follows. The 72nd Street Pizza, Inc., which we will hereafter refer to as the applicant, is one of a chain of five pizza restaurants having a place of business in Omaha. Four previously established restaurants have liquor licenses. The applicant applied to the commission for an on-sale beer license for its recently established restaurant on 72nd Street. As required by statute, a copy of the application was sent to the city council which, pursuant to provisions of the statute, held a hearing and enacted a resolution which "recommended to said Liquor Control Commission to deny said license." The license applied for covered the period ending April 30, 1977. The city council transmitted its resolution to the commission.

Pursuant to the provisions of the applicable statutes, the commission notified the applicant of the time and place of hearing on its application, specifying in the notice that the hearing was being held for the "following reason(s):

"1. Due to the action of the local governing body recommending denial of your application.

"2. Due to protests having been filed against your application."

The protesters were individuals who were liquor license holders in the City of Omaha and who were also officers of a retail liquor dealers association.

The principal bases of their protest were (1) the city council recommendation for denial and (2) the license of one George Kahre which was sought to be "transferred" to the applicant was not a current existing license — no license having been issued to Kahre for the years 1975 or 1976.

The City of Omaha appeared at the hearing before the commission in resistance of the application. It presented to the commission a letter which stated in part: "The City Clerk was instructed to inform the Nebraska Liquor Control Commission that the only reason for the denial was due to the fact that, in essence, to vote to recommend the issuance of a license to sell beer on the premises from an Off Sale License would in effect be recommending a new license. This was the only reason the City Council voted to deny the application for the On Sale Beer License."

The city resisted issuance of the license by the commission because of a policy established by ordinance (which will be discussed in more detail later), limiting the number of liquor licenses in the City of Omaha. It was stipulated to the commission by the applicant and the city that: ". . . it was only the technical requirements of the ordinance which required them to recommend a denial, and if it had not been for that, that the favor of the City Council would have been in sympathy with and in favor of the issuance of that license at this location . . . ."

The ordinance in question was not received into evidence at the commission hearing, but was offered and received in the District Court as were the records of the proceedings and the exhibits received in the hearing before the commission.

On appeal to the District Court additional evidence was received. This consisted principally of the ordinance of the city establishing its policy with reference to recommendations to the commission for the issuance of licenses and its policy limiting the num-

ber of licenses. Briefly summarized, this ordinance provided that the total number of liquor licenses within the corporate limits should be limited to: ". . . one (1) 'Class C Liquor License' [liquor by the drink] for each One Thousand (1,000) inhabitants," and (2) one license "of all other classifications of retail alcoholic liquor licenses combined for each Fifteen Hundred (1,500) inhabitants . . . ." § 18.24.010, Ordinance 19531, City of Omaha. The ordinance contained a provision for an annual estimation of population upon which the foregoing limitations were to be based. The ordinance recognized the fact that at the time of the enactment of the ordinances the number of licenses then extant exceeded the number set by the ordinance. It further provided for reducing the number of licenses to meet the policy limitations by what we will call a policy of "attrition" founded on the premise that in the course of time some licenses would be "revoked, surrendered or not renewed." § 18.24.020, Ordinance 19531, City of Omaha.

The ordinance also contained a provision which is described by the parties as providing for holding unrenewed and unused licenses in "abeyance" for a period of time, to wit, the next possible license period. The apparent purpose of this latter provision was to assist a licensee or recent licensee in selling the assets of his liquor business, a market for which would not exist except for the prospect that a purchaser would be able to procure a license of his own if he did purchase the business. This provision seems to provide a form of legal approval to the "transfer" of liquor licenses, extending it to include the so-called license held in abeyance, and recognizes the notorious fact that contracts for the sale of a liquor business almost always contain provisions making the sale contingent upon the issuance of a license by the commission to the purchaser. The ordinance provides that if "renewal" (an apparent

euphemism for the term transfer) is not requested within the prescribed period, then the issuance of the license will not be recommended to the commission by the city council.

Another provision of the ordinance provides: "Nothing contained in this Chapter, however, shall be construed to prevent the City Council from recommending a retail alcoholic liquor license to a bona fide purchaser of a business belonging to a person now or hereafter holding a license . . . ." § 18.24-030, Ordinance 23875, § 1, City of Omaha.

The record before us shows that previous to and at the time the applicant applied for its license, the number of existing licenses within the corporate limits of the City of Omaha exceeded the number of licenses provided for in the portion of the ordinance limiting the number of licenses. The record would support the conclusion that the cause of that situation is that the attrition policy had not worked and, also, that because of annexations to the City of Omaha, licenses held outside the city limits came to be included in those in the city. As to the latter, of course, when those licenses were originally issued the city had no recommending power.

The basis of the District Court's holding, condensed to its essence, is that the city council's recommendation to the commission of denial of the license was based upon a misinterpretation of its own ordinance and was therefore arbitrary and unreasonable; and that since the commission based its refusal to issue a license upon the city's recommendation of denial, the commission order itself was "inadvertent" and without basis in law or fact and was therefore arbitrary and unreasonable. Among the District Court's findings was the conclusion that it was the practice of the city council, in determining the total number of licenses in either of the two classifications previously mentioned, to include those licenses described as held in abeyance. That term it-

self is not used in the ordinance. The trial court also found that in the second classification, to wit, "all other licenses," it was the city council's practice to permit the transfer of one license of the same type for another license of the same type. The effect of the District Court's holding is that it was arbitrary and unreasonable for the city council not to permit what is referred to as "upgrading" a license, that is, in this case permitting a substitution of an "on-sale" for an "off-sale" license then being held in abeyance. The ordinance itself does not contain a prohibition against such transfers. The District Court interpreted the ordinance to mean that transfers in the second classification from one kind of license to another could be freely made.

While the record discloses other grounds upon which the commission might have denied the license, e. g., the "abeyance" policy would seem to conflict with the legislative policy defining the nature of a liquor license in sections 53-149 and 53-150, R. R. S. 1943, and such policy would seem not to bind the commission, the stated ground was the city council's recommendation for denial. The purchase contract between applicant and Kahre pertained only to equipment and not to liquor inventory. It refers in the equipment as "formerly used in conjunction with his sale of beer" and refers to relinquishment of a "license formerly located at 5440 North 42nd Street." It appears probable that the commission, in stating the ground for denial, was relying upon previous opinions of this court which have explicitly held that the negative recommendation of a city council, founded upon its policy of limiting the number of liquor licenses, affords a sufficient evidentiary basis upon which the commission may deny a license. Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413; J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694.

Although citing no specific authority, the District Court may well have relied upon two recent opinions of this court in which we directed the commission to issue liquor licenses. In the first such case, Hadlock v. Nebraska Liquor Control Commission, 193 Neb. 721, 228 N. W. 2d 887, the District Court had set aside an order of the commission denying an application and directed it to hold a new hearing. We affirmed the portion of the order of the District Court setting aside the order of the commission denying the application, but we reversed the part of the order directing a new hearing and substituted therefore a direction that the license be issued. Our decision in that case, however, was founded upon a special provision of the statute, to wit, section 53-132 (1), R. R. S. 1943, under which licenses are to be issued as a matter of course. The effect of that section is to provide for routine issuance of a license where there is no recommendation of denial by the city council and no objections are filed. We there held that the issuance "as a matter of course" provision applied because a resolution of denial by the city council was invalid for the reason the resolution received two affirmative votes and one negative vote, there was one abstention, and one councilman was absent. That holding obviously has no application here. The other case in which we affirmed a District Court decision overturning a denial by the commission was J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*. That opinion was grounded upon our finding that provisions of the Administrative Procedures Act govern commission hearings and orders, and we found that the applicant had no notice or opportunity to present evidence on the issues it was required to meet at the commission hearing. We therefore held that due process had been denied and that it followed that denial was arbitrary and unreasonable and we directed that the license be issued. Upon reexamination of our opinion in that case we are con-

vinced that we erred in mandatorily directing the issuance of a license. The remedy in that case should have been an order to the commission in the alternative, that is, afford the applicant notice of the issues it was required to meet and an opportunity to be heard thereon, or issue it a license. In that particular case the issue involved an unformulated and previously unannounced policy of the commission to limit the number of licenses in the City of Fremont. The applicant had been afforded no notice, nor any opportunity to meet that issue. We overrule J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*, insofar as it conflicts with our acknowledgment of error above set forth.

Condensed to its essence, the question is whether the action of the commission becomes arbitrary and unreasonable because the commission relied upon the city council's recommendation for denial, which, if one accepts the applicant's and the District Court's interpretation of the ordinance, was itself contrary to the policy established by the ordinance of limiting the number of licenses.

We believe that an examination of some of the fundamental principles applicable to the powers and functions of the commission lead us to the proper answer to the question. The power to regulate the sale, et cetera, of alcoholic liquors is vested by statute exclusively in the commission. § 53-116, R. R. S. 1943; J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*; T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809. The policy of a municipality limiting the number of licenses to be issued is not binding on the commission. City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803; J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*. We have held that, without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Nebraska Liquor Control

Commission, the court does not exercise independent judgment on fact and policy. T & N P Co., Inc. v. Nebraska Liquor Control Commission, *supra*; C & L Co. v. Nebraska Liquor Control Commission, 190 Neb. 91, 206 N. W. 2d 49. See, also, Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683. After an administrative hearing the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*. If there is no evidence in the record to support the order it must be held to be unreasonable and arbitrary. J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*. We have held that the recommendation of the city council that the commission deny a license affords a sufficient evidentiary basis to support the commission's action. Allen v. Nebraska Liquor Control Commission, *supra*.

The District Court's interpretation of the ordinance, that the effect of that portion of the ordinance setting up two categories and limiting the number of licenses permitted in each category was to prevent the city from attempting to control the kinds of licenses in the second category, does not stand up upon close examination. That interpretation is only one possible interpretation, for the ordinance does not expressly cover the matter. Since it does not, determination of policy was initially for the city council to determine and then finally the commission and not for the court. Under these circumstances it was not proper for the court, under the principles we have cited, to substitute its judgment for that of the commission.

We adhere to our holding that the recommendation of the city council to the commission that a license be denied affords a sufficient evidentiary basis for an order of the commission denying the li-

cense. Allen v. Nebraska Liquor Control Commission, *supra*.

REVERSED.

WHITE, C. THOMAS, J., dissenting.

Appeal from a decision of the Liquor Control Commission denying the issuance of a license is controlled by the provisions of section 53-1,116, R. R. S. 1943. "The appeal, provided for or referred to in subsections (5), (6), and (7) of this section, shall be heard and tried de novo in the district court in the manner provided for the trial of suits in equity. Additional testimony may be introduced at the hearing on appeal." Subsection (5) of that section provides: "Any decision of the commission granting or refusing to grant or revoking or refusing to revoke or renew a license or permit for the sale of alcoholic liquors, including beer, may be reversed, vacated, or modified by the district court of the county where the applicant for a license * * * resides." This court has held that on trial de novo, the court should not reverse the order of the Nebraska Liquor Control Commission unless its action was unreasonable or arbitrary. See T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809.

At the trial in the District Court, the Omaha city ordinance was introduced in evidence as was the recommendation of the city council of Omaha, Nebraska, for denial. The recommendation was based solely on the city council's interpretation of its own ordinance. The trial court had before it the ordinance and placed a construction thereon which appears both reasonable and correct. It held that the city council had misinterpreted its own ordinance. Therefore, the commission had based its denial of the liquor license on the recommendation of the city council which misinterpreted its own ordinance. There was, therefore, no evidence on which a denial of the application could be sustained. Without addressing itself directly to the correctness of the Dis-

trict Court's interpretation, the majority opinion merely suggests that the interpretation placed on the ordinance by the District Court was one of several possible interpretations. It emphasizes that the city council did, in fact, recommend a denial of the application and refuses to consider the reasons for the recommendation.

Without, at this time, questioning the accuracy of the rule announced in T & N P Co., Inc. v. Nebraska Liquor Control Commission, *supra*, I specifically object to the majority's partial overruling of J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694. There is no question that under the plain terms of the statute, the District Court had the power to do what it did, that is, to order the commission to issue a license. To restate subsection (5) of section 53-1,116, R. R. S. 1943: "Any decision of the commission * * * refusing to grant * * * a license or permit for the sale of alcoholic liquors, including beer, *may be reversed, vacated, or modified by the district court* * * *." (Emphasis supplied.) It ought to be elementary that if the District Court possesses such power, this court also does. It is suggested that this court has no power on appeal in an appropriate case to give the relief which the District Court should have granted in the first instance. Our appellate authority is not so limited. The District Court was correct in directing the granting of the license. The most that may be said for the majority position is that the question of the correct interpretation of the ordinance ought to be met and, if the District Court's interpretation was correct, to remand the matter to the Liquor Control Commission with directions to consider anew the question of its denial of the license.

RONALD CHRISTENSEN, DOING BUSINESS AS CHRISTENSEN FARMS, APPELLANT, V. EASTERN NEBRASKA EQUIPMENT COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE, V. SNYDER INDUSTRIES, INC., THIRD PARTY DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE, V. POLY CAL PLASTICS, INC., THIRD PARTY DEFENDANT, APPELLEE.

261 N. W. 2d 367

Filed January 11, 1978. No. 41248.

1. **Uniform Commercial Code: Warranties.** Fitness for the ordinary purposes for which goods are used is a fundamental concept of section 2-314, U. C. C., and is covered by paragraph (c). Merchantability is also a part of the obligation owing to the purchaser for use.
2. **Appeal and Error: New Trial: Statutes.** An appellant in an appeal to this court following an appeal to the District Court pursuant to section 24-541, R. R. S. 1943, is required to file a motion for a new trial in the District Court if this court is to review the question of the sufficiency of the evidence and other assignments of error.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded.

Morgan & Morgan, for appellant.

Lauritsen, Baker & Brownell, for appellee Eastern Nebraska Equipment Co., Inc.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee Snyder Industries, Inc.

Kenneth H. Elson, for appellee Poly Cal Plastics, Inc.

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

SPENCER, J.

This is an action to recover consequential damages for breach of an implied warranty. The county court of Hall County sustained defendant's motion to dismiss made at the conclusion of plaintiff's evidence on the premise that the plaintiff had not proved the breach of an implied warranty of fitness. The judgment was affirmed on appeal to the District Court. We find plaintiff sufficiently proved the

breach of an implied warranty of merchantability and reverse and remand.

Plaintiff purchased a 5,500-gallon polyethylene tank from defendant Eastern Nebraska Equipment Company, Inc., for the purpose of storing liquid fertilizer. The tank was delivered to plaintiff's farm by Snyder Industries, Inc., who furnished the tank for Eastern. Under the direction of Snyder's driver, it was positioned on several railroad ties placed on the ground by plaintiff and spaced 6 to 8 inches apart. Shortly after delivery the tank was filled with fertilizer. This first load of fertilizer was immediately pumped out and distributed to three smaller tanks for future use in plaintiff's center pivot irrigation system. A few days later a second load of liquid fertilizer was delivered and placed in the storage tank pending future distribution to the three smaller tanks for use through the center pivot distribution system.

Ten days thereafter, while doing some work around the storage tank, Ronald Christensen noticed there had been some seepage. He investigated and found the tank was nearly empty. He immediately called his fertilizer distributor who pumped the remaining fertilizer from the tank and salvaged 3.735 tons out of the 23.75 tons which had been placed in the tank. The storage tank was thereafter replaced and plaintiff instituted this action against the seller to recover the value of the fertilizer lost through the leakage.

Eastern Nebraska Equipment Company, Inc., brought a third-party complaint against Snyder Industries, Inc., who sold the tank to Eastern. Snyder Industries, Inc., brought a third-party complaint against Poly Cal Plastics, Inc., who manufactured the tank in question and sold it to Snyder. These third-party actions were brought pursuant to section 25-331, R. R. S. 1943.

Plaintiff pleaded the fact the tank purchased was

to be used for the storage of liquid fertilizer. The tank was placed in position on his farm by an agent of the seller. It was placed on a lumber base pursuant to Eastern's advice. Christensen did not know how many railroad ties were under the tank. He does know the tank was not dropped when it was placed on the ties.

After discovery of the leak, Christensen called Eastern and talked with a secretary. He then called Snyder Industries and informed them of the situation. They sent representatives out that same day to inspect the tank. The cause of the leak was not apparent from an inspection at the location of the tank. Snyder's representatives suggested the tank be moved near a water supply and filled with water to see if it would be possible to determine where the leak might be. They started running the water in with a garden hose. This was a rather slow process and no leak had been detected by the time it began to get dark. The Snyder representatives suggested that Christensen continue to fill it and they would come back the next day when the tank was full. They returned the next day and the leak was then apparent. There were actually three leaks. The major one was a tear approximately 6 to 8 inches long. Christensen was informed by the Snyder representatives they would replace the tank and pick up the old one. This was done, so the tank thereafter was in the possession of Snyder.

The case was tried by the county court on the theory it was one for breach of an implied warranty of fitness for a particular purpose. This required plaintiff to meet three conditions: (1) The seller must have reason to know the buyer's particular purpose; (2) seller must have reason to believe the buyer is relying on his skill and judgment; and (3) the buyer in fact relies upon the seller's skill or judgment. § 2-315, U. C. C.

The pleadings set out the breach of an implied

warranty of merchantability. At the close of his pleadings, plaintiff did state: "That there was a breach of the Implied Warranty of Fitness of this tank." This was merely his conclusion. He was not pleading the tank was not fit for some particular purpose. As we review the pleadings and the evidence, we conclude plaintiff was using the term "fitness" interchangeably with merchantability. What he was trying to say, and what we believe he said, was the tank was not fit for the ordinary purpose for which it was to be used. This involves an implied warranty of merchantability, and is covered by section 2-314, U. C. C.

Section 2-314, U. C. C., so far as material herein, provides: "(1) * * * a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * *

"(2) Goods to be merchantable must be at least such as * * *

"(c) are fit for the ordinary purposes for which such goods are used; * * *."

The following from comment 8 of section 2-314, U. C. C., is applicable: "Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use."

The seller knew the use for which the tank was purchased. The seller's supplier placed the tank in position on plaintiff's farm. It took several days for liquid to leak from the tank. The source of the leaks could not be found when the tank was first inspected by Snyder's representatives when it was empty. Even when a small quantity of water was put into it, the leaks were not apparent. It was not until the tank was full that the leaks were found. The inference from the testimony that the supporting ties

were discolored indicates the leaks were in portions of the tank which rested on the ties. Plaintiff notified his seller as soon as he discovered liquid had seeped from the tank.

Christensen purchased this tank for the storage of liquid fertilizer. A leaky tank would not be suitable for this purpose. It would not be merchantable under section 2-314, U. C. C. While plaintiff's presentation of the issues herein left something to be desired, the pleadings and the evidence sustain a breach of an implied warranty of merchantability. The motion to dismiss should not have been sustained.

We note plaintiff did not file a motion for a new trial from the judgment of the District Court. The appeal to the District Court was taken pursuant to section 24-541, R. R. S. 1943, which provides for review de novo on the record. In Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50 (1976), we held: "On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court."

Plaintiff should have filed a motion for a new trial to afford the District Court an opportunity to review the question of the sufficiency of the evidence and the other assignments presented in his assignments of error before prosecuting an appeal to this court. In a law action where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings. Nebraska Children's Home Soc. v. Collins, 195 Neb. 531, 239 N. W. 2d 258 (1976).

There may be some confusion as to the necessity of filing a motion for a new trial in these situations. To clear up any question, we now hold it is necessary to do so in all cases tried after February 1, 1978. Inasmuch as the issue was not raised by any of the parties herein, we use this case as the one to

call attention to its necessity on and after February 1, 1978.

The judgment is reversed and the cause is remanded to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., concurs in the result.

EUGENE RULE, CONSERVATOR OF THE ESTATE OF EMMA RULE, APPELLANT, V. RICHARD ROTH ET AL., APPELLEES.

261 N. W. 2d 370

Filed January 11, 1978. No. 41261.

1. **Deeds: Evidence: Undue Influence.** To sustain a finding of undue influence in the case of a deed it must be shown by clear and satisfactory evidence: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
2. **Deeds: Conveyances: Evidence: Undue Influence.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.
3. **Deeds: Property: Conveyances: Undue Influence.** The mere existence of a confidential relationship does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her.

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

John McArthur and A. James McArthur, for appellant.

Perry, Perry, Witthoff & Guthery and Thomas M. Haase, for appellees.

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

SPENCER, J.

This is an action brought by a conservator to set aside a real estate purchase agreement and deed on the grounds of undue influence and misrepresentation. The trial court found plaintiff failed to sustain his burden of proof and dismissed the petition. We affirm.

The action involves a 92-acre tract purchased by Emma Rule in 1957 for approximately $94 per acre. She immediately rented the land to defendants who were tenants on an adjacent 148-acre farm she owned. Defendants had farmed the 148 acres since 1954, pursuant to an oral agreement whereby Emma Rule was to receive 40 percent of the crops produced, plus a cash rental for the farm house and pasture. A different rental arrangement was made on the 92 acres. Defendants were to pay the taxes on the land each year, plus an amount equal to 3½ percent of Mrs. Rule's investment. In addition, defendants were to improve the land and clean up debris caused by a tornado.

In January 1974, Richard Roth inquired of Mrs. Rule whether she would consider selling the 92 acres. She asked him what it was worth to him and he said $19,000. Mrs. Rule, who was then 80 years of age, said this figure was too high and made a counteroffer of $15,000, which defendant accepted. At Mrs. Rule's suggestion, Richard Roth set up a meeting for them with her attorney. A real estate purchase agreement was drafted by Mrs. Rule's attorney and executed by the parties on March 18, 1974. For income tax reasons the sale was made on an installment basis, with closing to be on January 15, 1976. The transaction was actually closed and the deed recorded on January 9, 1975.

Conservatorship proceedings were commenced in

the county court on December 20, 1974. Eugene Rule, the son of Emma Rule, was appointed her conservator. He instituted this action on February 18, 1975. The conservator does not contend his mother is incompetent. He does argue the defendants exerted undue influence over her and made misrepresentations concerning the advisability of selling the land.

Defendants concede they paid less than the fair market value of the land. Their own expert appraised it at $300 per acre, or $27,600. Plaintiff's expert testified the property, at the time of the sale, had a fair market value of $55,000.

Apart from the appraiser, plaintiff's only witness was Emma Rule herself. The case is somewhat unique in that she testified she was not influenced by the defendants, knew that other land in the area was selling for a higher price, and was still satisfied with the deal she made.

Emma Rule was asked by the attorney for the conservator if she felt in making the sale she was making a gift to Mr. Roth. Her answer was: "Not a gift, but I was doing some return for his kindness and thoughtfulness." When she was asked if it was her belief she was getting all the land was worth, she replied, "I told you I didn't live for money only." She was asked: "Was it your belief then that you were getting every dime the land was worth?" Her reply, "Well I am not figuring down to dimes, I got what I wanted and that was that." She was asked if she knew what the land was worth at the time she sold it. Her answer was, "Who does?" Her attention was called to a question and answer in the deposition: " 'Question: Did you think you were getting what it was worth?' And your answer: 'Yes.' "

The following questions and answers in response to questions in Emma Rule's deposition are pertinent: "Q. And did I ask you this question and did you give this answer? 'Question: Do you mean by

that, if you had taken $19,000 from Mr. Roth, you would be robbing him? Answer: I would.' A. Yes, I would. Q. 'Question: That was your feeling? Answer: I'd taken something I didn't think belonged to me.' Was that your feeling? A. Yes, sir. Q. And did I ask you this: 'And is that the reason you refused the $19,000 and sold it for $15,000? Answer: Yes, sir.' And was that your feeling? A. Yes, sir, it is today. Q. Did Mr. Roth at anytime during that conversation tell you what he thought the land was worth? A. No, I didn't ask him, he farmed it and he knew what it produced and how hard he had to drive around to get to his patches of crops and that was that. Q. Did he tell you that? A. No, he didn't. Q. Did he ever tell you what he thought it was worth? A. I didn't ask him. Q. But did he tell you? A. No, he didn't, he hasn't yet. Q. Very well. Did you tell him then that you would sell him the land for $15,000? A. I did."

The transaction was completed in Crete, Nebraska, at the office of Mrs. Rule's attorney, Joseph Vosoba. Mrs. Rule's husband and Mrs. Roth waited in the waiting room while Mrs. Rule and Mr. Roth conducted the business, completing the transaction in Mr. Vosoba's office. Mr. Vosoba testified he had seen Mrs. Rule in his capacity as an attorney on two or three prior occasions. He noticed no apparent change in her from those previous meetings. He asked about the purchase price because he thought it was low. One or both of the parties stated that part of the land was good and part of it was very poor. There was a discussion of the income tax consequences to Mrs. Rule and the contract was set up on an installment basis. Prior to the signing of the real estate purchase agreement and the deed, all the parties, including Mr. Rule and Mrs. Roth, had copies of the agreement and indicated that it was satisfactory.

Mr. Vosoba testified there was nothing to indicate

to him there was any fraud or undue influence involved in the transaction. In his opinion Mrs. Rule was competent to enter into the conveyance. Mr. Vosoba was asked if the consideration of the terms of the rental agreement for the 92 acres would change his judgment as to her competency. His answer was: "No, I don't believe it would, Mr. McArthur, I still would feel that at that time she was competent because my acquaintance of this lady led me to believe that she was very self-reliant, independent, had a mind of her own, she might not do what I would think she should, but I think she would do what she wanted to."

The misrepresentation relied on by the conservator is the testimony of Mrs. Rule that she had told Mr. Roth she intended for her grandchildren to have the 92 acres and he said: "* * * he could settle with me and we didn't have to wait for anybody to die to get it and then he said in a way it would be easier this way, he would be sure to have it because it would be handy for him and he could pay me anytime and I would have that settled with."

Mrs. Rule testified she also told Mr. Roth: "Well he told me it was quite expensive to go through the selling of something like that and that all had to be paid for out of the sale." In answer to a question as to whether he had told her anything to the effect that her grandchildren would be better off if she sold him the 92 acres, she replied, "No, he didn't."

After refreshing her recollection from the deposition relative to what Mr. Roth may have told her, she was asked, " 'What did he tell you?' " Her answer: " 'Well he just — I can't remember word for word, but either way I could understand that selling it now, I was ahead because after it was being divided, after my death, there would be various bills to pay.' " The record then is as follows: "Q. And did I ask you this question and did you give this answer? 'Question: Did he tell you you would do better to sell the land and not

leave it to your grandchildren? Answer: He did that.' A. Well they got it anyway. Q. But he did tell you that, did he not? A. I am not sure of that. Q. Did I ask you this question and did you give this answer? 'Question: And did you believe him? Answer: Yes, I did and I still do.' A. I still do. Q. Is that correct? A. I still do. Q. All right, Mrs. Rule, you did believe absolutely what Mr. Roth told you? A. I did and I could see through it, it was possible.''

The following principles are required herein. To sustain a finding of undue influence in the case of a deed it must be shown by clear and satisfactory evidence: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Guill v. Wolpert, 191 Neb. 805, 218 N. W. 2d 224 (1974).

It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must of necessity be applied according to the particular facts and circumstances of each case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be unequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Guill v. Wolpert, *supra*.

The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. See Guill v. Wolpert, *supra*.

The undue influence which will void a deed is an unlawful or fraudulent influence which controls the will of the grantor. Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266 (1954). A much more advantageous sale could have been made of the land. That, however, is not the question for decision herein. The question is whether or not the Roths were guilty of unlawful or fraudulent influence which controlled the will of Mrs. Rule.

The trial court, who saw the witness and observed her demeanor while testifying, found that the conservator had not sustained his burden of proof. Analyzing the elements necessary to sustain a claim of undue influence, we consider this case in the light of the four guidelines suggested above. The evidence does not show that Emma Rule was subject to undue influence. It is true that an opportunity to exercise it did exist. There is no showing there was a disposition to exercise it, although it may be argued that the result appears to be the effect of such influence. The proof in this case falls far short of meeting the test necessary to reverse the finding of fact made by the trial judge who was in a position to observe the competency of the grantor.

The grantor was represented in the transaction by an able attorney who had represented her in the past and who was convinced of her competency. His testimony is entitled to great weight. Gaeth v. Newman, 188 Neb. 756, 199 N. W. 2d 396 (1972). Her husband was present at the time the deed was executed and read the papers before he signed them. No facts about her husband are contained in the record. The only witnesses produced by the plaintiff were the grantor and her appraiser. Their testimony was supplemented by portions of a deposition of Richard Roth. One of the plaintiff's attorneys took Emma Rule's acknowledgement to the petition for the appointment of a conservator. He testified he felt she was competent at the time she signed the applica-

tion for a conservator, and understood the nature of what she was doing. The acknowledgement was taken November 1, 1974.

The mere existence of a confidential relationship, assuming a sufficient one existed in this case, does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. See Golgert v. Smidt, 197 Neb. 667, 250 N. W. 2d 628 (1977).

An action based on undue influence is an action in equity and is to be tried de novo on appeal. Our review of the record convinces us the conservator did not meet his burden of proving the four prerequisites to sustain an action for undue influence by clear and satisfactory evidence. The decision of the trial judge is correct and is affirmed.

AFFIRMED.

ALAN E. SMITH, APPELLEE, V. HAROLD E. WREHE, APPELLANT.

261 N. W. 2d 620

Filed January 11, 1978. No. 41294.

1. **Fraud: Pleadings: Damages.** To maintain or defend an action on the ground of false representation, the pleader must allege and prove what representation was made, that it was false and so known by the party making it or was made without knowledge as a positive statement of known fact, that the pleader believed the representation to be true, and that he relied on and acted upon it and was thereby injured.
2. **Fraud.** The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.
3. **Contracts: Assignments.** A contracting party cannot, by an assignment of the contract, relieve himself of his obligations thereunder, even where the contract is expressly made assignable and

contains a provision that it is binding on the assignee of a party. Accordingly, except where a party to the contract expressly agrees to accept the responsibility of the other party's assignee in the stead and place of that of the assignor, making a new contract by way of novation, the assignor remains bound by his obligations under the contract and is liable if the assignee defaults.

4. **Trial: Instructions.** Where a general charge fairly presents the case to the jury, it is not error for the trial court in the absence of a request for a more specific instruction, to fail to give a more elaborate one.
5. **Contracts: Trial.** Where a provision in a written contract is not ambiguous, the trial court must determine its meaning as a matter of law, and not submit the issue to the jury.
6. **Contracts.** A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more than one sense.
7. **Appeal and Error.** Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal.

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

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellant.

Joseph R. Moore, for appellee.

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

BRODKEY, J.

Alan E. Smith, plaintiff and appellee herein, initiated this action to recover the balance due on the purchase price of a contract for the sale of a taxicab company to Harold E. Wrehe, defendant and appellant herein. Defendant prayed for dismissal of plaintiff's petition on the grounds that he was not personally liable on the contract, and that he had been induced to sign the contract because of a false representation made by the plaintiff. The trial court determined as a matter of law that the balance due on the contract was owing to the plaintiff and that defendant's claim of misrepresentation was not sustained by the evidence. The court submitted to the jury only the issue of whether the defendant was

personally liable on the contract, or whether his assignee was liable. The jury returned a verdict in favor of the plaintiff, judgment was entered thereon, and defendant's motion for new trial was overruled. Defendant has now appealed to this court, contending that the trial court erred in failing to submit to the jury his claim of misrepresentation; and in failing to instruct the jury that should it find that the parties' intent was that the contract could be assigned by the defendant, then it must find that the assignee was liable for any indebtedness on the contract. We affirm the judgment of the District Court.

The facts relevant to this appeal are as follows. On October 1, 1973, defendant contracted to buy plaintiff's taxicab company, which was located in Council Bluffs, Iowa, for a price of $27,900. Initial payments totalling $12,900 were made at the time of closing. The contract provided that the balance of $15,000 "shall be satisfied by the promissory note of the Buyer." Immediately after this provision, the words "or his assignee" were deleted from the contract, which had been prepared by defendant's attorney, and both parties initialed the deletion. The balance due was to be paid in monthly installments of $500, with interest of 8 percent thereon.

The contract also provided: "It is expressly understood that the Buyer expects to cause a new corporation to be formed to own and operate the taxi cab business herein being purchased and to assume the Buyer's responsibilities under this Agreement. The Seller hereby consents to the assignment of the interest acquired by the Buyer under this Agreement to such corporation." The words "which shall then stand in the Buyer's stead to the same extent as if such corporation had been an original party to this Agreement" were deleted from the end of the last sentence quoted immediately above, this deletion being initialed by both parties.

At the time of the sale, the company, the Yellow Cab Company of Council Bluffs, was the only cab company in that city. Defendant did incorporate the newly purchased company, and assigned his rights and delegated his duties under the sales contract to the new corporation. The new corporation made payments on the balance due on the contract until March 1975, at which time neither the defendant nor the corporation made further payments. At the time of trial, approximately $12,000 remained owing on the contract.

The plaintiff testified that prior to the execution of the contract he told the defendant that the cab company was "the only cab company in Council Bluffs." Plaintiff introduced the defendant to city officials of Council Bluffs, in part to enable the defendant to ascertain whether the city would issue a cab company permit to another person so long as the defendant maintained a cab company without complaints. Plaintiff denied that he represented to defendant that he was selling a cab company franchise which was intended to be exclusive in nature.

On direct examination, defendant testified that plaintiff told him that he was buying the "exclusive right to the Yellow Cab Company of Council Bluffs," and that there would be no competition in Council Bluffs. Defendant also stated that a city official of Council Bluffs told him that "there was only one cab company and that was all the town could support." On cross-examination, defendant stated that he did not believe that plaintiff was "in cahoots" with the city officials with regard to the sale. Defendant also stated that he believed that the city officials were honest when they stated that only one cab company could exist in Council Bluffs. Finally, defendant was asked and answered questions as follows: "Q. And really Mr. Smith didn't tell you anything beyond what the city officials told you, did he? A. No, he said that it was only a one cab city, that it should

only be a one cab city. Q. And that is exactly what the city officials told you; isn't that right? A. That's right."

After the purchase, defendant's company did not fare well, apparently because of poor management. Approximately 1 year after the contract was executed, a second cab company began operation in Council Bluffs. This second company was founded by plaintiff's business associate, who also was a brother-in-law of the defendant. There was no evidence that the plaintiff was involved, directly or indirectly, with the second company, even to the extent of encouraging or suggesting its formation. Apparently some of the drivers who were employed by defendant's company chose to leave their employment and work for the second company. Defendant's company was eventually closed.

Defendant's claim concerning misrepresentation is that the plaintiff fraudulently represented to him that he would be able to continue the operation of the only authorized cab company in Council Bluffs. Since the trial court directed a verdict in favor of the plaintiff on this issue, we must review defendant's claim in accordance with the rule that 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, 198 Neb. 139, 251 N. W. 2d 880 (1977).

To maintain or defend an action on the ground of false representation, the pleader must allege and prove what representation was made, that it was false and so known by the party making it or was made without knowledge as a positive statement of known fact, that the pleader believed the representation to be true, and that he relied on and acted upon

it and was thereby injured. Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370 (1956). The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive. Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139 (1970); Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183 (1969). See, also, Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884 (1957).

In the present case, it is apparent that the defendant, as a matter of law, did not present sufficient evidence to sustain his burden of proof on the issue of misrepresentation. The alleged representation as described by defendant on cross-examination, was simply that Council Bluffs "was only a one cab city, (and) that it should only be a one cab city." At the time of the contract, the company purchased by the defendant was in fact the only cab company in Council Bluffs. Plaintiff's prediction that Council Bluffs would remain a "one cab city" so long as defendant operated the company properly cannot be said to be more than an opinion concerning a future event. There was no evidence that the prediction was falsely and fraudulently made with an intent to deceive. Defendant acknowledged that he did not believe that the city officials were in collusion with plaintiff in regard to the sale, and that he believed the officials were speaking honestly when they told him that Council Bluffs was and would remain a "one cab city." Furthermore, defendant admitted that plaintiff had said nothing more than did the city officials. Plaintiff did not guarantee to the defendant that no other persons would attempt to operate a cab company, and in fact could not have done so, as he had no control over the issuing of permits by of-

ficials in Council Bluffs, a fact of which defendant was aware.

It should be noted that the contract expressly prohibited plaintiff from participating, either directly or indirectly, in the taxicab business in Council Bluffs for 2½ years after the signing of the contract. Defendant did not allege, nor did he attempt to prove, that plaintiff had violated this provision of the contract because of any involvement whatsoever with the second cab company which began operating in Council Bluffs. Instead, defendant relied on his claim of misrepresentation. Defendant, although new to the cab business was an experienced businessman. The fact that he made inquiries of city officials with respect to the likelihood of future competition indicates that he knew that the plaintiff, alone, was not in the position to guarantee that no competition would arise.

On the evidence presented, giving the defendant the benefit of every inference which may be drawn therefrom, we must conclude that defendant did not sustain his burden of proof on the claim of fraudulent misrepresentation as a matter of law. Central Constr. Co. v. Osbahr, *supra*; Boettcher v. Goethe, *supra*; Cook Livestock Co., Inc. v. Reisig, *supra*.

Defendant's second assignment of error is that the jury was not properly instructed in regard to the issue of whether defendant was personally liable on the contract, or whether his assignee, his cab company, was the only party liable. The jury was advised of defendant's allegations that the parties had contemplated defendant's assignment of the contract to his cab company, and that the company, and not the defendant, was to be the sole party liable after the assignment. The jury was instructed that it must determine the intent of the parties as expressed in the contract in order to decide whether the defendant was personally liable thereon. The trial court did not specifically instruct the jury as to

the applicable rules of law concerning when an assignor is not liable on a contract as a result of an assignment and a novation thereof.

Although defendant complains that the jury was not adequately instructed with respect to the law of assignment and novation of contracts, he does not state precisely what instructions he believes should have been given. In his assignment of error, he states that the trial court erred in failing to instruct the jury "that should the parties' intent that the contract contemplate assignment to a corporation be found, then the jury must find that the corporation was liable for the indebtedness." That is not the law and such an instruction would have been erroneous. It is elementary that a contracting party cannot, by an assignment of the contract, relieve himself of his obligations thereunder, even where the contract is expressly made assignable and contains a provision that it is binding on the assignee of a party. Accordingly, except where a party to the contract expressly agrees to accept the responsibility of the other party's assignee in the stead and place of that of the assignor, making a new contract by way of novation, the assignor remains bound by his obligations under the contract and is liable if the assignee defaults. See, 4 Corbin on Contracts, Assignment, § 866, p. 452; Calamari & Perillo, Contracts, § 277, p. 430 (1970); 6 Am. Jur. 2d, Assignments, § 110, p. 293; 6A C. J. S., Assignments, § 97, p. 753, and cases cited therein.

The trial court in the present case instructed the jury that it was to ascertain whether the parties to the contract intended that the defendant was to be relieved of liability thereon after he assigned it to his cab company. The jury obviously concluded that there was no such intention. If anything, the lack of a more specific instruction was probably in favor of the defendant rather than the plaintiff. Defendant did not request more detailed instructions,

nor did he object to the instructions given. Where a general charge fairly presents the case to the jury, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. State v. Lynch, 196 Neb. 372, 243 N. W. 2d 62 (1976); Rawlings v. Andersen, 195 Neb. 686, 240 N. W. 2d 568 (1976).

It should be noted in this case that it is doubtful the question of defendant's liability on the contract should have been submitted to the jury. It is the general rule that where a provision in a written contract is not ambiguous, the trial court must determine its meaning as a matter of law, and not submit the issue to the jury. Nebraska-Im-Pruv-All, Inc. v. Sass, 197 Neb. 261, 247 N. W. 2d 924 (1976). A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Frank McGill, Inc. v. Nucor Corp., 195 Neb. 448, 238 N. W. 2d 894 (1976). The pertinent provisions of the contract in this case have been set forth above. The parties expressly deleted from the contract the proposed provision that defendant's assignee should "stand in the Buyer's stead to the same extent as if such corporation had been an original party to" the contract. Similarly, the parties deleted the proposed provision that the defendant's assignee should satisfy the balance due on the contract. Therefore, not only did the parties fail to expressly agree that the defendant's assignee should stand in defendant's stead, they expressly deleted the proposed provisions which so provided. Apparently the trial court found the provisions of the contract ambiguous and therefore submitted the issue to the jury. We are inclined to believe the contract is not in fact ambiguous, and that, under the authorities cited above, the defendant should have been held liable on the contract as a matter of law. In light of this conclusion, it is apparent that no reversible error occurred due

to allegedly erroneous instructions, as the issue should not have been submitted to the jury in the first instance; and any possible error in the giving of the instruction redounded to the benefit of the defendant.

Defendant also argues that plaintiff should be estopped from asserting a claim against him because he knew of the assignment. It is apparent from what has already been stated that plaintiff's knowledge of the assignment, and even his consent to the assignment of that contract, does not estop him from holding the defendant liable. Furthermore, the claim of estoppel has no basis whatsoever in either the pleadings or the evidence adduced at trial, nor does the record indicate that the issue of estoppel was ever raised in the trial court. Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal. See, Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694 (1973); Hardy v. Hardy, 161 Neb. 175, 72 N. W. 2d 902 (1955).

We find that the contentions of the appellant are without merit, and we therefore affirm the judgment of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE K. COMER, APPELLANT.

261 N. W. 2d 374

Filed January 11, 1978. No. 41305.

1. **Criminal Law: Lesser-Included Offenses: Words and Phrases.** A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
2. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

Ralph A. Bradley and L. William Kelly, III, 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 criminal prosecution of the defendant on two counts. Count I of the information charged the defendant with first degree sexual assault. Count II of the information charged him with incest. A plea of not guilty was entered by the defendant to the charges and a jury trial was had. The jury returned a verdict of guilty on both counts, and the District Court sentenced the defendant to a term of 20 years imprisonment on count I and 20 years imprisonment on count II, the two sentences to be served concurrently. The defendant appeals. We affirm the judgment and sentence of the District Court.

Prior to arraignment, defendant filed a motion to elect, seeking to have the prosecution elect between first degree sexual assault and incest. A hearing was held on the defendant's motion to elect, and the motion was overruled. The defendant assigns this ruling as error. Defendant's position is that the State should have been required to elect between first degree sexual assault and incest because first degree sexual assault is a lesser-included offense of incest. The defendant's position is without merit.

A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Bernth, 196 Neb. 813, 246 N. W. 2d 600 (1976); State v. Jones, 186 Neb. 303, 183 N. W.

2d 235 (1971); State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152 (1966). See, also, McConnell v. State, 77 Neb. 773, 110 N. W. 666 (1906).

Applying the above-stated rule, it is clear that first degree sexual assault is not a lesser-included offense of incest. In order for it to be such, all the elements of first degree sexual assault would have to be included in the charge of incest, without the addition of any elements irrelevant to the charge of incest.

First degree sexual assault is defined in section 28-408.03, R. R. S. 1943. The offense of incest is set out in section 28-906, R. R. S. 1943. Under both offenses, sexual penetration is required. For first degree sexual assault, however, the victim must have been overcome by force, threat of force, coercion or deception; or the actor must have known or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct; or the actor must be over 18 years old and the victim less than 16 years of age. These elements of the offense of first degree sexual assault are irrelevant to the offense of incest which requires a showing of sexual penetration and a parental relationship. The District Court correctly overruled defendant's motion to elect.

Defendant next contends that the sentence he received on count I was excessive.

The charges arose out of an incident on October 16, 1976, involving defendant and his daughter who was 12 years old at the time. The presentence investigation report reveals that defendant had been fondling his daughter since she was 6 or 7 years of age and that he had been having sexual relations with her for 2 years prior to the October 16th incident. The record indicates that the defendant had instilled fear in his daughter about both this incident and in general and had specifically warned his daughter not to relate the incident to anyone else.

The presentence investigation report shows that

the defendant served time in an Ohio work house for having sexual relations with a 16-year-old girl, and was charged in California with indecent exposure. He has served 7 days on a charge of receiving stolen property and, according to his military record, was dishonorably discharged for fighting with his sergeant.

A sentence imposed within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). We cannot say that the trial court abused its discretion in sentencing defendant as it did.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OGDEN WILSON, APPELLANT.

261 N. W. 2d 376

Filed January 11, 1978. No. 41365.

1. **Criminal Law: States: Arrest.** The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place.
2. **Courts: States.** In the absence of proof of the common law or statutory law of another jurisdiction, this court, in reviewing the matter, will presume that they are the same as the law of Nebraska.
3. **Police Officers and Sheriffs: Arrest: Probable Cause.** An officer may arrest without warrant if he has probable cause to believe that the person arrested has committed a felony.
4. _____: _____: _____. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer would warrant a prudent man in believing that the offense has been committed and that the person arrested committed it.

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

Charles Plantz, 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.

CLINTON, J.

Defendant was found guilty by a jury of the crime of feloniously entering a building with intent to steal, rob, or maim, pursuant to the provisions of section 28-533, R. R. S. 1943. He was sentenced to a term of 3 years in the Nebraska Penal and Correctional Complex. Defendant perfected his appeal to this court, making several overlapping assignments of error which are consolidated to the following: (1) The trial court erred in denying the defendant's motion to suppress a statement, which in substance was tantamount to a confession, given by the defendant to an investigating officer. (2) The evidence was insufficient to sustain the jury's finding of guilt. (3) The sentence is excessive and the defendant should have been placed on probation.

A statement of the factual conclusions which the jury could have drawn from the evidence and a statement of some of the evidence will suffice to lay the groundwork for discussion of the errors assigned and argued. Late on the evening of July 7, 1976, the defendant and four companions drove from Pine Ridge Indian Reservation in South Dakota to Whiteclay, Sheridan County, Nebraska, where three of the men, including the defendant, entered "Harry's Off Sale" beer establishment. Two of the defendant's companions were masked and one carried a shotgun. The defendant was not masked and he was not the one carrying the shotgun. The female operator of the establishment appeared. She stated the gun was pointed at her. She ducked and the gun discharged, striking a door. The three men fled, reentered the automobile, and returned to the reservation in South Dakota. The incident was reported to

the Sheridan County sheriff. He notified the Bureau of Indian Affairs officers on the reservation. These officers came to Whiteclay and obtained from the woman operator of "Harry's Off Sale" a description of the incident and vehicle, as well as other information. Included in the other information was a description of the articles which the two men wore as masks. Later that same night the defendant and others were arrested by the Bureau of Indian Affairs officers without a warrant and incarcerated, and the two articles which had been worn as masks were seized. No shotgun was found. There was evidence, however, that defendant had made an admission that he had broken up the shotgun and thrown it into a creek.

The next morning the defendant was questioned in South Dakota by a member of the Nebraska State Patrol. The officer testified that he first gave the defendant the Miranda warnings and that he waived his rights. The defendant gave the statement which the investigator reduced to writing. The defendant then signed the statement. A Bureau of Indian Affairs officer was present during the interrogation and signed the statement as a witness. The statement was received in evidence at the trial.

The defendant took the stand on his own behalf. He admitted his presence at the incident. He denied knowing there was going to be an attempted robbery. He stated he did not know that one of his companions had the shotgun until after they had entered the building. He testified that he was very intoxicated at the time. His defense was that he lacked the requisite criminal intent and therefore was not guilty of the crime charged. It is apparent the confession supplied direct evidence that the defendant knew what was going to take place. The court instructed on and submitted to the jury the issues of specific intent, the legal effect of defendant's intoxication, the giving of the Miranda warnings and

the voluntariness of waiver of the Miranda rights, the voluntariness of the confession, and the burden of proof as it depends upon circumstantial evidence. The correctness of the instructions is not attacked.

Before trial the defendant moved to suppress the confession. A hearing was held on the motion, evidence was received, and the motion was overruled.

With reference to his first assignment of error, the defendant's position is that the arrest of the defendant in South Dakota was unlawful; that the fruits of the arrest were the confession and that therefore it must be suppressed. Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441.

The first prong of the defendant's argument on this point seems to be that since the legality of the arrest is determined by the law of the state where the arrest takes place and since there is no showing as to what the law of South Dakota is, the warrantless arrest must be presumed to be illegal. The second prong of the argument is that because the Bureau of Indian Affairs officers came into Nebraska and there obtained whatever evidence of probable cause they had, such information was obtained without authority and therefore cannot furnish the foundation for a probable cause arrest.

It is elementary, of course, that the legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. Turk v. United States, 429 F. 2d 1327. It does not follow, however, that because no showing is made as to the requirements of a lawful arrest in the State of South Dakota that the arrest was in fact unlawful. No case cited by the defendant so holds. In the absence of proof of the common law or statutory law of another jurisdiction, this court, in reviewing the matter, will presume that they are the same as the law of Nebraska. State v. Addison, 197 Neb. 482, 249 N. W. 2d 746; State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500, cert. den. 389 U. S. 871, 88 S. Ct. 152, 19 L. Ed. 2d 150.

In Nebraska an officer may arrest without warrant if he has probable cause to believe that the person arrested has committed a felony. § 29-404.02, R. R. S. 1943; State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595. Probable cause justifying an arrest without a warrant exists if the facts and circumstances known to the arresting officer would warrant justifying a prudent man in believing that the offense has been committed and that the person arrested committed it. State v. Irwin, *supra*. The trial judge found, and the evidence we have summarized supports the conclusion, that the Bureau of Indian Affairs officers had probable cause in this case. We are bound by the factual determination of the trial judge unless those determinations are clearly erroneous. State v. Irwin, *supra*.

The claim of the defendant that the information the arresting officers obtained by their investigation in Nebraska cannot be used in determining probable cause is not supported by any authority cited by the defendant. The investigation by the Bureau of Indian Affairs officers in the State of Nebraska was not unlawful. We know of no law that prohibits an officer of one state from entering another state to make an investigation. If the officers were legally present at the place of the investigation, the information they obtained through personal inquiries can be considered in determining whether probable cause for arrest existed. 6A C. J. S., Arrest, § 34, p. 80.

The contention that the evidence was insufficient to support the verdict is frivolous. No discussion of that contention is required.

We now reach the contention that the defendant should have received a sentence of probation rather than incarceration. The defendant, age 19 at sentencing, has no significant prior record. The trial court, in determining whether to impose incarceration or probation, considered the factors listed in

section 29-2260 (2), R. R. S. 1943, and made findings with reference thereto. These are included in the presentence investigation report. The record supports the court's finding. The sentence imposed is the minimum sentence for the charge of which the defendant was convicted. § 28-533, R. R. S. 1943. We cannot therefore say that the court abused its discretion in denying probation.

AFFIRMED.

ERVIN MARTIN, APPELLEE, V. DELMER ZWEYGARDT, APPELLANT.

261 N. W. 2d 379

Filed January 11, 1978. No. 41438.

Judgments: Motions, Rules, and Orders: Appeal and Error: New Trial. An order of the District Court which vacates a judgment of the county court and remands the cause to the county court for a new trial is not a final order from which an appeal may be taken to this court.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. On motion to dismiss appeal. Appeal dismissed.

Holtorf, Hansen, Kovarik & Nuttleman, for appellant.

Wright & Simmons, for appellee.

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

BOSLAUGH, J.

This was an action for damages for a breach of warranty in the sale of a farm tractor at auction. The county court held the plaintiff's evidence as to damages was inadequate and dismissed the action at the close of the plaintiff's evidence. The plaintiff appealed to the District Court where the judgment of the county court was vacated and the cause

remanded for a new trial in the county court on all issues.

The defendant has appealed to this court. The plaintiff has moved to dismiss the appeal on the ground there was no final order from which an appeal could be taken.

An order which affects a substantial right in an action and in effect determines the action is a final order. § 25-1902, R. R. S. 1943. When the substantial rights of the parties in the action remain undetermined and the cause is retained for further action, the order is not final. Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303. Prior to the enactment of section 25-1315.03 in 1947, an order of the District Court granting a new trial in that court was not an appealable order. Egan v. Standard Oil Co., 132 Neb. 518, 272 N. W. 327.

The order in question here vacated the judgment of the county court and remanded the cause for a new trial in the county court. The general rule is that a judgment of reversal with a remand for further proceedings is not final for the purposes of appeal. See, 4 Am. Jur. 2d, Appeal and Error, § 59, p. 580; 4 C. J. S., Appeal and Error, § 152(i), p. 506.

Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967, cited by the defendant, is not controlling. It involved an order of the District Court which reversed an order of the county court and directed that leave be granted to file a belated claim in an estate proceeding. The order of the District Court was held to be an appealable order on the theory that the proceeding for leave to file the belated claim was separate from the hearing on the claim itself.

We conclude there has been no final order in this case and the appeal must be dismissed.

APPEAL DISMISSED.

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

261 N. W. 2d 847

Filed January 18, 1978. No. 41271.

1. **Constitutional Law: Sexual Sociopaths.** The Equal Protection Clause does not prohibit a state from classifying the sex offender in a special category and providing special procedures for dealing with a person in this group.
2. **Constitutional Law.** Equal protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made.
3. **Criminal Law: Sexual Sociopaths: Statutes.** The Sexual Sociopath Act, sections 29-2901 to 29-2910, R. R. S. 1943, proceeds on the premise that the sexual sociopath is neither normal nor legally insane and on the idea that the commission of sex crimes is evidence of a mental disorder which should be treated, if found treatable.
4. **Criminal Law: Sexual Sociopaths: Habitual Criminals: Confinement.** There are differing purposes for incarceration under the habitual offender law and sexual sociopath law. For the habitual offender, the purpose is punishment only; for the sexual sociopath, the purpose is treatment, if possible, and punishment is only incidental.
5. **Criminal Law: Sexual Sociopaths: Mental Illness.** The significant factor operating to permit differing treatment of those classified as mentally ill dangerous persons and those classified as sexual sociopaths, is the criminal conviction of the latter class.
6. **Legislature: Sexual Sociopaths: Mental Illness: Confinement.** The Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime.
7. **Criminal Law: Constitutional Law: Confinement.** A status offense is one where there is no actus reus present and the imposition of any punishment for such an offense violates the cruel and unusual punishment prohibition of the Eighth Amendment.
8. **Criminal Law: Sexual Sociopaths: Statutes.** The punitive aspect of the Sexual Sociopath Act is not merely limited to punishment for a status, but relates to an affirmative act or actus reus.
9. **Criminal Law: Sexual Sociopaths: Statutes: Confinement.** Upon the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, a sexual sociopath is confined in the Nebraska Penal and Correctional Complex indefinitely without treatment.

10. **Criminal Law: Sexual Sociopaths: Statutes: Sentences: Confinement.** Indefinite confinement under the Sexual Sociopath Act may well be a life sentence.
11. **Criminal Law: Sexual Sociopaths: Confinement.** A proceeding for investigation and for commitment of an alleged sexual sociopath is civil in nature.
12. **Confinement.** The nature and duration of civil commitment must bear some reasonable relation to the purpose for which an individual is committed.
13. **Criminal Law: Sexual Sociopaths: Statutes: Rehabilitation: Confinement.** Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature.
14. _____: _____: _____: _____: _____. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths.
15. **Sexual Sociopaths: Rehabilitation: Confinement.** An annual evaluation by qualified professional personnel must be made of each sexual sociopath housed in the penal complex and an annual review of treatability be made by the District Court from which such individual was originally committed.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

Michael D. Gooch, 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. THOMAS, J.

The defendant, a 58-year-old male, was charged with indecent exposure and fondling the sexual organs of a minor boy under the age of 16 years. Following pleas of guilty to each count by the defendant, and at defendant's request, proceedings were initiated under sections 29-2901 to 29-2910, R. R. S. 1943, the Nebraska Sexual Sociopath Act. The trial court, pursuant to that statute, suspended further proceedings and ordered an examination of the defendant. The court found the defendant to be an un-

treatable sexual sociopath and committed him to the Nebraska Penal and Correctional Complex.

The medical and criminal history of the defendant-appellant was introduced at the trial. The defendant had twice been convicted and committed in other states for sexual offenses involving minor children. It is not necessary to detail the factual situation of this case except to state that the evidence that the defendant is a sexual sociopath is overwhelming.

The defendant does not allege error in the proceedings or in the determination that he is a sexual sociopath. His complaint is focused on the place of confinement and the uncertain duration of the confinement under the sexual sociopath statutes. The defendant's challenge to the constitutionality of the statutes rests on two alternative bases: (1) The indefinite term of commitment to the Nebraska penal complex was an enhancement of defendant's sentence which violates the defendant's right to equal protection of the law; and (2) an order of commitment to the Nebraska penal complex of a person who is determined to be a sexual sociopath for an indefinite period is in violation of the Constitution's clause against cruel and unusual punishment since it is punishment for a status or because it is disproportionate to the nature of the offense.

Before we proceed to address ourselves to defendant's arguments, we note that the constitutionality of the Sexual Sociopath Act was upheld by this court against a previous challenge in State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595. In Irwin, it was noted the defendant attacked the statute generally: "The claim of the defendant that the sexual sociopath act * * *, sections 29-2901 to 29-2910, R. S. Supp., 1972, is unconstitutional is lacking in specificity, except the inferential claim made in argument that the commitment constitutes cruel and unusual punishment." Our holding in Irwin as to constitutionality was lim-

ited to a discussion of the act as to procedural due process, the indefinite term of commitment, and the status of time of confinement spent under the act in relation to the sentence that could be imposed for the crime which triggered the proceedings. Here, the defendant raises specific issues of constitutionality that were not raised or decided in State v. Irwin, *supra.*

The defendant's equal protection argument is two-pronged. First, he claims he is denied equal protection because his sentence is enhanced under the sexual sociopath statute rather than the habitual offender statute. A person convicted of a third felony may have his punishment enhanced under the terms of sections 29-2221 and 29-2222, R. R. S. 1943, as a habitual criminal. The theory is that defendant's past crimes operate to aggravate his guilt to justify heavier penalties. See State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406. The defendant concedes the constitutionality of the habitual offender statutes. See, State v. Martin, 190 Neb. 212, 206 N. W. 2d 856; Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446. The defendant points out that while the habitual offender may have his penalty enhanced to a stated number of years, the sexual sociopath found to be untreatable may have the statutory penalty further increased, in effect, to a life sentence without possibility of parole. Thus, the defendant says since this condition is indistinguishable from the other, the differing treatment is violative of equal protection.

The placement of the sexual sociopath in a distinct category is a permissible classification. In State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N. W. 297, an alleged sexual psychopath, committed under Minnesota law, unsuccessfully challenged the sex offender law on an equal protection basis. The Minnesota Supreme Court held that the Equal Protection Clause did not prohibit a state from classify-

ing the sex offender in a special category, and providing special procedures for dealing with a person in this group where the behavior of the members showed that they were actually dangerous and incapable of controlling their sexual impulses. On appeal, the United States Supreme Court affirmed the decision of the Minnesota court. Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744.

Equal protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made. Baxstrom v. Herold, 383 U. S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620. The question becomes whether the distinction of differing treatment made by the Legislature is reasonable in that it is relevant to the purpose of the initial classification. We hold that classification of sexual sociopaths apart from habitual criminals and the differing disposition it generates is a reasonable one. The classifications of habitual criminals and sexual sociopaths encompass groups of individuals with distinct characteristics. Habitual criminal laws provide that the repetition of criminal conduct aggravates the guilt and justifies greater punishment. State v. Losieau, *supra*. The sexual sociopath statutes, sections 29-2901 to 29-2910, R. R. S. 1943, proceed on the premise that the sexual sociopath is neither normal nor legally insane and on the idea that the commission of sex crimes is evidence of a mental disorder which should be treated if found treatable. The statutes provide that the offender, the sexual sociopath, shall be treated and held at the facility for treatment. If found to be untreatable and dangerous, the sexual sociopath is held at the Nebraska Penal and Correctional Complex separate from other prisoners. The purposes of the habitual offender law and the sexual sociopath law are alike in that both are for the protection of society. On the

one hand, the protection is from a dangerous criminal offender and on the other, from a person who is found to be dangerous to society by reason of his sexual proclivities. However, differing purposes are emphasized for the purposes of the incarceration. For the habitual offender, the purpose is punishment only; and for the sexual sociopath, the purpose is treatment, if possible, and only incidentally punitive. See State v. Irwin, *supra*.

The defendant's second equal protection argument relates to the confinement of incurably mentally ill, dangerous persons to the regional center as opposed to the sexual sociopath's confinement to the Nebraska Penal and Correctional Complex. We conclude again that these are distinct classifications marked by a distinguishing characteristic which is determinative. Section 29-2902, R. R. S. 1943, provides the sexual sociopath proceedings can only be triggered following a conviction of a crime of a sexual nature.

In Hill v. Burke, 289 F. Supp. 921, affirmed 422 F. 2d 1195, the court evaluated the Wisconsin sexual deviate law against an argument that the standards for discharge under the sexual deviate law were void under the Equal Protection Clause by reason of their failure to conform to the standards of classification of mentally ill dangerous persons. There, the court, in pointing out that the significant factor differing between the two was the fact of criminal conviction, stated: "The legislature has apparently concluded that the criminal conviction has some relevance to the determination of when an offender may be discharged without endangering the public. This conclusion is not unreasonable * * *." Here, we recognize the Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex

rather than in the regional center due to the fact of the prior conviction of the crime.

Defendant's next assignment of error relates to the length of the possible duration of the confinement as constituting cruel and unusual punishment. In support of the contention, defendant first argues that the punishment of an untreatable sexual sociopath is punishment for a status and thereby violates Robinson v. California, 370 U. S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758. In Robinson, the defendant had been arrested after a police officer had observed needle marks on his arm. The defendant was convicted under a statute that made it an offense to use or be addicted to narcotics despite the fact that it was never proven the defendant had used drugs while in the jurisdiction. According to the United States Supreme Court, the effect of the statute was to allow a conviction for the mere status of addiction rather than for the actual use of drugs. It was suggested that punishment for the status of being addicted to drugs is just as repugnant to traditional ideas of fairness and justice as punishment for a physical illness such as leprosy or venereal disease or a mental illness. The court held that a status offense was one where there is no actus reus present and the imposition of any punishment for such an offense violates the cruel and unusual punishment prohibition of the Eighth Amendment.

We do not find Robinson v. California, *supra,* controlling on the issue of the constitutionality of confinement under Nebraska's Sexual Sociopath Act. As we have pointed out, section 29-2902, R. R. S. 1943, provides that a proceeding under the act may only be instituted following a criminal conviction. The conviction is the actus reus that was absent in Robinson v. California, *supra,* and distinguishes it from that case.

Powell v. Texas, 392 U. S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254, involved both a status and actus reus.

In Powell, the defendant had been arrested under a statute prohibiting public intoxication. Although Powell was an alcoholic and thus arguably stood in the position of a status offender, the United States Supreme Court affirmed the defendant's conviction for the act of public drunkenness. The court concluded that the conviction was for the prohibited act of public drunkenness and not for the status as an alcoholic since Powell could have drunk at home to avoid the criminal act.

Among the purposes of confinement under the sexual sociopath statute is punishment. State v. Irwin, *supra.* An individual included under the terms of the statute is designated a sexual sociopath, concededly a status. However, such status has manifested itself in affirmative criminal behavior. The criminal conviction is an inherent part of the statute. The recognition that the punitive aspect of confinement of the sexual sociopath flows directly from the conviction of a statutory crime is consistent with our holding in State v. Irwin, *supra.* In Irwin, we held: "* * * under the Act a defendant may not be confined for a period longer than the longer of the following: (1) The period during which he remains a sexual sociopath, or (2) the maximum term or terms authorized for the crime of which he was convicted and which triggered the initial indefinite commitment." In essence, the penalty that may be imposed for the criminal conviction merges with the period of confinement under the act. Thus, the punitive aspect of the Sexual Sociopath Act is not merely limited to punishment for a status, but relates to an affirmative act.

Defendant's major argument that the confinement of untreatable sexual sociopaths dictated by statute constitutes cruel and unusual punishment rests on the premise that the sentence is disproportionate to the nature of the offense. Defendant states correctly that the indeterminate confinement may well be

a life sentence. After the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, the sexual sociopath is confined to the Nebraska Penal and Correctional Complex indefinitely without treatment.

As pointed out in State v. Irwin, *supra,* the statute does provide a procedure whereby a sexual sociopath may seek his release. Section 29-2906 (2), R. R. S. 1943, provides that: "A motion for a hearing to determine whether the defendant is a sexual sociopath may be made by or on behalf of the defendant at one-year intervals after initial commitment." A hearing may be held if the District Court determines that there is probable cause to believe that the defendant is no longer a sexual sociopath. The defendant is eligible for release only after a psychiatric evaluation shows that he is fit for discharge. He is still subject to sentence under the original criminal charge.

We cannot ignore the reality that, even with this procedure for discharge, the indefinite term of confinement may easily become a life sentence. Once the designation of untreatability is made, the statute places the sexual sociopath in legal limbo. The defendant is sent to a segregated portion of the penal complex with no evidence that he is given other than custodial care. By the terms of the statute, he is given no treatment. He is expected to bear the burden of proving he has somehow recovered in the vacuum situation in which the statute places him.

A proceeding for investigation and for commitment of an alleged sexual sociopath is civil in nature. State v. Madary, 178 Neb. 383, 133 N. W. 2d 583. The nature and duration of civil commitment must bear some reasonable relation to the purpose for which an individual is committed. Jackson v. Indiana, 406 U. S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435. We stated earlier that the purpose that differentiates the Sexual Sociopath Act from a criminal statute is

the element of treatment. Despite the labeling of the initial commitment as civil, the statutes' provisions for possible life confinement, without any provisions for treatability or review of treatability, make the statutes penal in nature.

Defendant relies on In re Lynch, 8 Cal. 3d 410, 105 Cal. Rptr. 217, 503 P. 2d 921, to support his contention of disproportionate punishment. In Lynch, the defendant was convicted of second offense indecent exposure, punishable as a felony by an indeterminate period of 1 year to life imprisonment. The California Supreme Court held that the sentence was so disproportionate to the underlying offense as to constitute cruel and unusual punishment.

We feel a case decided by the California Supreme Court after In re Lynch, *supra,* is more applicable to the issue here. In People v. Feagley, 14 Cal. 3d 338, 121 Cal. Rptr. 509, 535 P. 2d 373, the court made reference to its holding in In re Lynch, *supra,* by stating that the issue before it was "whether the state may achieve essentially the same result by the device of declaring the person to be a 'mentally disordered sex offender' and 'civilly' committing him for an indefinite period to an 'institutional unit' on the grounds of a prison." The court concluded that such confinement is likewise unconstitutional, both because of its undeniable prison setting and because of the admitted lack of treatment provided to those so detained.

The defendant Feagley was arrested for stroking the hair and necks of two 8-year-old girls. He pleaded guilty to simple assault. Feagley admitted, and the evidence showed, he had been involved in similar incidents in the past. He was found to be a mentally disordered sex offender within the meaning of the applicable California statute. Following determination by the court that he was both dangerous and untreatable, the defendant was civilly committed for an indefinite period to the California

Men's Colony, a state penal institution under the Department of Corrections. The institution had no facilities for providing treatment for mentally disordered patients; however, the sex offender could voluntarily enter group counseling which was conducted in weekly 75-minute sessions by a counselor of limited experience.

The California court held that while, in name, the commitment was a civil proceeding, in actuality, it was penal in nature. The court noted that the sex offender law is designed to serve both legislative aims of rehabilitation and protection of society and then reviewed the actual conditions of confinement. "Whatever the theory of such confinement, its reality is therefore indistinguishable from penal custody."

The court reached its conclusion by first confronting the issue of the place of confinement. The statute dictated that a mentally disordered sex offender be placed in an institutional unit "on the grounds of a state prison." The evidence showed that the unit, although separate, "was administered in the same manner as the rest of the prison. Furthermore, the rules and regulations governing the institutional unit are made by the Director of Corrections." Here, the defendant challenges the place of confinement generally, but offers no evidence as to the actual conditions of confinement. The Nebraska statute, section 29-2903 (3), R. R. S. 1943, provides that the untreatable sexual sociopath be committed "for an indefinite period in the Nebraska Penal and Correctional Complex which shall make adequate provisions to separate such defendant from the regular prison population, and to detain, house, and care for him while he is in the complex. * * * The person in charge of the Nebraska Penal and Correctional Complex may extend to any defendant confined therein pursuant to sections 29-2901 to 29-2910 such privileges as are consistent with protecting the pub-

lic interest." The fact of housing within the confines of a prison does not in and of itself make the provision constitutionally suspect. If the sexual sociopaths are indeed segregated from the rest of the prison population, defendant's challenge is without merit. See, In re Maddox, 351 Mich. 358, 88 N. W. 2d 470; Commonwealth v. Page, 339 Mass. 313, 159 N. E. 2d 82. We have no evidence before us that the sexual sociopaths are, in actuality, not segregated from the general prison population.

In Feagley, the California court next considered the issue of lack of treatment. The California statute provided for annual review of the case of each mentally disordered sex offender to determine whether he might have become "amenable" to treatment in a hospital facility. The court held that this was not enough — confinement without treatment for any length of time constitutes cruel and unusual punishment. The court based the holding on the finding that without ongoing treatment, the confinement of the untreatable sexual sociopath is punishment for a status under Robinson v. California, *supra,* without mention of Powell v. Texas, *supra.*

We do not embrace the California court's status rationale since, as we held earlier, we do not believe the Nebraska statute constitutes punishment merely for status. However, we agree with the California court that treatment is a necessary part of a statutory scheme involving sexual sociopaths. The Nebraska statute has no provision for even review of treatability once the initial determination of untreatability is made. As defendant points out, under the terms of the Sexual Sociopath Act: "For appellant and other untreatable sexual sociopaths, even the milieu of hope and opportunity of a treatment facility is foreclosed." Thus, without more, the untreatable sexual sociopath faces a probable life sentence. As such, the statute is penal in nature and

the sentence under it is so disproportionate to the offense committed in this case as to constitute cruel and unusual punishment.

Section 29-2903 (3), R. R. S. 1943, says the Nebraska Penal and Correctional Complex shall "detain, house, and care" for the sexual sociopath when he is in the penal complex. The "care" of such an individual must include, at the very least, some effort to make the possibility of treatment open to him. Thus, we hold that an annual evaluation by qualified professional personnel must be made of each sexual sociopath housed in the penal complex and an annual review of treatability be made by the District Court from which such individual was originally committed.

AFFIRMED.

HENRY E. KRAEMER, APPELLANT, V. MENTAL HEALTH BOARD OF THE STATE OF NEBRASKA ET AL., APPELLEES.

261 N. W. 2d 626

Filed January 18, 1978. No. 41284.

1. **Administrative Law: Statutes: Mental Health: Evidence: Words and Phrases.** Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943.
2. **Constitutional Law: Statutes: Mental Health: Words and Phrases.** A mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was declared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm.
3. **Statutes: Mental Health: Evidence: Witnesses.** "The facts or

data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." § 27-703, R. R. S. 1943. This statute is applicable to expert testimony presented in proceedings under the Nebraska Mental Health Commitment Act.

4. **Constitutional Law: Mental Health: Proof.** The Nebraska Mental Health Commitment Act is not unconstitutional because the standard of proof it prescribes is that of clear and convincing evidence rather than proof beyond a reasonable doubt.

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

Richard Douglas McClain, for appellant.

Ronald D. Lahners, County Attorney of Lancaster County, and Roger W. Hirsch, for appellees.

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

PER CURIAM.

The questions to be decided on this appeal involve interpretation of and determination of the constitutionality of portions of the Nebraska Mental Health Commitment Act, Laws 1976, L. B. 806, p. 571, now sections 83-1001 to 83-1078, R. R. S. 1943. The appellant, Henry E. Kraemer, having been previously committed under the predecessor act which was found unconstitutional and its enforcement enjoined in Doremus v. Farrell, 407 F. Supp. 509, was given a rehearing before the State Board of Mental Health pursuant to the provisions of sections 83-1072 to 83-1076, R. R. S. 1943. It was determined by the board that he was a mentally ill dangerous person within the definition contained in section 83-1009 (1), R. R. S. 1943, and he was ordered committed under the provisions of section 83-1040 et seq., R. R. S. 1943. Treatment was ordered under the provisions of sections 83-1044 et seq., R. R. S. 1943. From that order

of the State Board of Mental Health, Kraemer appealed to the District Court for Lancaster County under the authority of section 83-1043, R. R. S. 1943. The District Court affirmed the order of the State Board of Mental Health.

Kraemer then perfected his appeal to this court and here assigns and argues the following errors which we paraphrase as follows: (1) The opinions of the State's expert witnesses that Kraemer was a mentally ill dangerous person and suffered from paranoid schizophrenia were incompetent because they were in part founded upon statements made by Kraemer in the course of interviews with state psychiatrists while in confinement and thus Kraemer's right not to incriminate himself was violated. The appellant more specifically contends the failure to give him Miranda-type warnings and to specifically notify him that he could remain silent and that anything that he might say could be used as a part of the evidence which might result in his confinement bars the use of such statements as part of the foundation for an opinion as to diagnosis. (2) The evidence before the board did not support a necessary finding that the appellant presented a substantial risk of serious harm to another and that risk was not "manifested by evidence of *recent* violent acts or threats of violence or by placing others in reasonable fear of such harm." (Emphasis supplied.) § 83-1009 (1), R. R. S. 1943. (3) The board erred in admitting the opinion of the expert witness because it was founded in part upon hearsay testimony. (4) A finding that Kraemer refused to cooperate in treatment was essential to the order of confinement and the evidence did not support such a finding. (5) The act is unconstitutional because it permits the State Board of Mental Health to base its findings upon "clear and convincing evidence" and does not require "proof beyond a reasonable doubt."

When previous statutes relating to confinement of

the mentally ill became impossible of enforcement because of the judgment of the three-judge Federal District Court in Doremus v. Farrell, *supra,* the Nebraska Legislature responded by enacting Laws 1976, L. B. 806. One of the problems that had to be dealt with was the status of those who were confined at the time of the Doremus holding. The act established a temporary State Board of Mental Health and required that rehearings before the board be held for such persons. It granted to those then in confinement all the procedural and substantive due process rights provided by the new act. Kraemer was one of those who was entitled to a rehearing. The rehearing was held and Kraemer was provided with counsel. Except as indicated by the errors assigned above, no complaint is made by him that the act was not in all respects complied with.

Insofar as pertinent to this case, section 83-1009, R. R. S. 1943, provides: "Mentally ill dangerous person shall mean any mentally ill person who presents: . . . (1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . ." The substantive question for the board's determination, therefore, was whether Kraemer was a mentally ill dangerous person who presented one of the risks described in subsection (1) above.

The evidence before the board presented the following picture. In the fall of 1973 or the spring of 1974 Kraemer, who held a degree in architecture, was registered in a graduate seminar, conducted by Professor Puderbaugh, in the School of Architecture at the University of Nebraska at Lincoln. Puderbaugh's testimony was that Kraemer did not attend the classes as he should have, did not perform the work, and did not pass the course. In the early part of December 1974, Kraemer appeared at Puder-

baugh's office and demanded the professor's resignation because Puderbaugh "had not fulfilled [his] contract with the University." Kraemer was angry at the time and there was an exchange of words which the professor did not describe. The confrontation lasted about 30 minutes. Puderbaugh asked Kraemer to talk to the Dean of the School of Architecture. Kraemer refused. Puderbaugh got up and started toward the Dean's office. Kraemer followed, shouting. The noise made by Kraemer was so great the Dean interrupted the class he was teaching and came into the adjacent "gallery" to investigate. He found the professor with his back to the wall and Kraemer standing in front of him with his face 3 to 6 inches from that of Puderbaugh, "hollering." The Dean attempted to get Kraemer's attention, but could not get him to release his "fix." Finally the Dean, by use of force, pulled Kraemer away from Professor Puderbaugh and asked the latter to leave.

The Dean testified that Kraemer's "conversation" made no sense. His words and his manner seemed to threaten violence. The Dean escorted Kraemer to the exit, informed him that he was Dean of the school, and that he was the person that Kraemer should talk to. Kraemer rejected recognition, saying, among other things, "You're not the Steward (the Dean's surname) that I knew." The Dean asked Kraemer to leave. Kraemer stood there for a few minutes without conversation and then left.

The Dean then caused to be circulated in the architectural school a memorandum to all personnel directing that if Kraemer was thereafter present in the building the Dean was to be immediately notified.

About 2 weeks after the above incident Kraemer again came to Puderbaugh's office. A similar confrontation with similar charges made by Kraemer took place. On this occasion the University police

were called. An officer responded. He observed the argument for a few minutes and then called for another officer. Pending the second officer's arrival, he returned to Puderbaugh's office and again observed. The officer stated that Kraemer said that Puderbaugh would come around to his way of thinking "or else." Kraemer would not leave when requested to do so by Puderbaugh. The officer asked Kraemer to leave. Kraemer challenged the officer's authority. Kraemer then sat silently and stared at the professor as if he "were staring right through" him. The second officer arrived and the first officer then convinced Kraemer that he should leave and told him that complaints should be directed to the Dean. As the officers and Kraemer started down the steps with the first officer leading the way, a scuffle ensued between Kraemer and the second officer. When they reached the floor below Kraemer became violent. He was then handcuffed and placed under arrest, jailed, and charges were filed. The first officer appeared in court the following morning at Kraemer's arraignment. Kraemer "stared" at him and finally accused him of being part of a conspiracy. He requested the officer's name and badge number, which the officer furnished and which Kraemer recorded. At the arraignment Kraemer challenged the authority of the judge. After arraignment, during the course of the signing of an appearance bond, Kraemer noticed a misspelling and ran from the clerk's office to the rear of the judge's bench where the judge was seated, creating a noisy disturbance. Kraemer had to be forcefully removed. Later he had to be forcibly removed from the county attorney's office.

Kraemer was committed by the county board of mental health to the Lincoln Regional Center on December 13, 1974. He "escaped" 2 days after his commitment and was returned again the following day. He "escaped" again on December 26, 1974,

and while on the second escape, he was administratively "discharged" on January 3, 1975, without being returned.

While Kraemer was on "escape" in December of 1974, the University police officer, whose name and badge had been taken by Kraemer, received a call from his wife that a man was at the door of their residence acting strangely. The officer reported the matter to the Lincoln police department and Kraemer was picked up about 20 minutes later a few blocks from the officer's home.

In about the third week of May 1975 (fixed by one witness as either May 18th or May 23rd), Kraemer again appeared at Puderbaugh's office. He was carrying a rifle. He walked past the secretary's desk to the door of Puderbaugh's personal office. He was calm. He carried the rifle level or pointed down. Upon reaching the door he turned to the secretary and asked if Puderbaugh was there. She informed him that he was out of town and that he would be back at the end of the week. Kraemer responded, "All right, I'll be back later," and promptly left. Puderbaugh was informed by telephone of this incident and he immediately called the Lincoln police department from Atlanta, Georgia, where he then was, and asked the police department to guard his home in Lincoln, and that of his son and daughter who also lived in Lincoln.

As a consequence of the above incident members of the Nebraska State Patrol were informed that a warrant had been issued for Kraemer out of Lancaster County. Officers of the patrol made a search for Kraemer in Omaha and did not find him. He was located by them in a nearby Nebraska town where he had an apartment. Two officers, not in uniform, rapped on the door of Kraemer's apartment. Kraemer responded, opening the door about 18 inches. They identified themselves as officers and one of the officers exhibited his badge to

Kraemer. They informed him of the warrant. Kraemer questioned their authority, attempted to close the door, and then retreated into the apartment. The officers followed, reaching him as he was reaching into a closet. They placed him under arrest at that time. Later they obtained a search warrant, returned to the apartment, and found in the closet a loaded 30/30 Winchester rifle and a box of shells. The rifle was identified as the one carried by Kraemer on his last visit to Puderbaugh's office. The rifle and shells were received into evidence without objection. The evidence indicated the rifle had been purchased by Kraemer on May 15, 1975, which was a few days before his visit (with gun in hand) to Puderbaugh's office. Kraemer was committed to the Lincoln Regional Center by the county board of mental health on May 22, 1975, and it was with reference to that confinement that the rehearing was granted under the provisions of sections 83-1072 to 83-1076, R. R. S. 1943. The rehearing was held on June 22, 1976, and August 2, 1976, and it was at that hearing the foregoing evidence was adduced.

Additional evidence in the form of expert testimony was also offered and in part received.

The first such expert witness called was L. E. Woytassek, M. D., a psychiatrist employed at the Lincoln Regional Center. He was present when Kraemer was admitted to the security unit of the center on May 22, 1975. At that time he took a history of the patient and did a mental status examination of the patient. Dr. Woytassek testified from a report that he had made on that occasion.

Kraemer's counsel made objection to some of this testimony because it contained statements made by Kraemer in the psychiatric interview. The basis of the objection was that there was no showing that Kraemer had been warned that he might remain silent, or that he knowingly and voluntarily waived his right to remain silent. The board, through its

chairman, ruled that Miranda-type warnings needed to be given to the patient and refused to permit the witness to testify as to statements made by Kraemer in the psychiatric interview. The witness was permitted to testify from the balance of the report and to give his diagnosis.

The doctor's opinion was as indicated by the following responses to questions put: " 'The patient exhibits all the classic symptoms of a schizophrenic illness. The disorganized thinking, the marked delusional system, the inappropriate effect, as well as circumstantiality, all point towards a psychotic illness. There is very little evidence of neurosis. And there is no evidence of an organic brain syndrome.' . . . A psychotic (sic) is a major mental illness in which the patient exhibits the things which I have referred to, the disorganized thinking, the delusional system, inappropriate effect, et cetera. . . . Schizophrenia, Paranoid Type." The witness further stated the patient had no insight into his illness and did not recognize that anything was wrong. The doctor also recommended a treatment plan which included confinement in the security unit and medication.

A second psychiatrist, Edwin A. Coats, M. D., also employed by the Lincoln Regional Center, testified. He had contact with Kraemer only after his admission to the center in May of 1975. He described the medication being given as part of the treatment. The purpose of the medication was to reduce psychotic thinking, agitation, and tension on the part of the patient. He was present at the recommitment hearing and heard the testimony there presented. He diagnosed Kraemer's illness as paranoid schizophrenia and expressed the expert opinion that the patient was then a dangerous individual; that he was dangerous to Professor Puderbaugh and to those persons who had testified adversely to him; and that his animosity toward Puderbaugh still remained and

was part of the psychosis. He furter stated that Kraemer had not been violent since his confinement on May 22, 1975, but on occasion had refused medication and was at times agitated, restless, hostile, and angry. Upon objection, the witness was not permitted to relate anything that he had been told by Kraemer. There were no objections to the balance of the witness' testimony. The witness predicted slow progress for the patient and long hospitalization. Kraemer's mental status is periodically reviewed during his confinement.

Kraemer applied for a rehearing before the State Board of Mental Health pursuant to the applicable section of the statute. Rehearing was denied. The appeal from that denial raises no issues different from those contained in the assignments of error.

At the hearing Kraemer did not take the stand to testify on his own behalf. He did not offer any medical testimony to contradict that of the State's doctors although he was entitled to such expert assistance at state expense if indigent. § 83-1052, R. R. S. 1943. Whether or not he availed himself of his statutory rights under the act to consult medical experts is not shown by the record.

We now consider the assigned errors. The claim that the statements made by the patient during a psychiatric interview violated the Fifth and Fourteenth Amendment right not to incriminate oneself is bottomed on the provisions of section 83-1059, R. R. S. 1943. That section provides: "The rules of evidence applicable in civil proceedings shall be followed at all preliminary, final, and other judicial hearings held under this act. In no event shall evidence be considered which is inadmissible in criminal proceedings." The plaintiff's argument seems to be that the last sentence in the statute in some way incorporates every exclusionary rule which might be applicable in any criminal proceeding and

that in this case it embodies the giving of Miranda-type warnings to assure evidence of voluntariness.

The last sentence of that statute is on its face an apparently simple declarative sentence. It seemingly ought to offer no interpretational problems. However, when one begins to think about how it can be applied to proceedings involving determination of mental health issues, it immediately becomes apparent that its application is ambiguous and, depending upon its meaning, may conflict with the first sentence.

The first thought that comes to mind, of course, is that several things influence what evidence is admissible in a criminal proceeding. The first is the nature of the crime involved. The substantive evidence must be material and relevant to the proof of the elements of the crime charged. The second is that the evidence must be competent under the rules regarding admissibility. The third consideration concerns pertinent constitutional requirements arising under due process or other constitutional provisions, an example of which, of course, would be the voluntariness of a confession or admission of guilt.

Kraemer was not in this case charged with the commission of a crime. Any confinement which might be the result of the hearing was not punishment for a crime committed. The Fifth Amendment to the Constitution of the United States, among other things, provides: "No person shall be held to answer for a . . . crime . . .; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." The constitutional right not to be a witness against oneself applies only to admissions which might be used against the witness in some criminal prosecution. The Miranda rule applies to custodial interrogations by law enforcement officers of persons suspected of or charged

with crime. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

Let us now return to the statutory provision. Section 83-1059, R. R. S. 1943, makes the provisions of Chapter 27, R. R. S. 1943, which codify the general rules of evidence, applicable to proceedings under the act insofar as they may be pertinent. They apply both in the preliminary and final hearings before the board of mental health and in any judicial hearings. In mental health proceedings, medical diagnosis is involved and is, of course, material. This is also true in criminal proceedings in some cases, such as those where the defense of insanity is raised. In the latter case the burden of proving the sanity of the accused is on the State. See NJI No. 14.30 and cases there cited. In the case before us the burden of proof is upon the State to prove that Kraemer was and is a mentally ill dangerous person within the statutory definition. In this case Kraemer was not charged with a crime, or even suspected of a crime. He was not being interrogated by a law enforcement officer, but by a doctor and the purpose was to determine, by medical diagnosis, his mental status. Treatment or incarceration or both could result from that determination. The evidence in question would be admissible under the applicable statutory rules where, as here, the issue of the party's mental status or sanity is the issue. The opinion of the medical expert was admissible unless barred by some statutory rule or constitutional requirement.

Section 27-703, R. R. S. 1943, provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." The solidity of the facts on which the expert relies for his opinion may

be determined in cross-examination of the expert. § 27-705, R. R. S. 1943. It is apparent that a conflict may exist between the first and last sentences of section 83-1059, R. R. S. 1943, when one attempts to apply them to particular sets of facts and that such a conflict does exist in this case. It is claimed that the last sentence embodies every possible exclusionary rule.

We feel constrained to construe the statutes so that they make some reasonable sense. Let us examine some of the problems which would arise if examining and treating psychiatrists were not permitted to testify as to the basis of their opinions. Persons who are the subject of possible commitment under the act are granted many rights, including those enumerated by sections 83-1046 to 83-1064, R. R. S. 1943. Section 83-1046, R. R. S. 1943, grants the right to immediate discharge when need for confinement no longer exists. Under the provisions of section 83-1066 (9), R. R. S. 1943, the person has the right to a writ of habeas corpus for purposes of challenging the legality of confinement and treatment. It would be anomalous if the treating psychiatrists were not permitted to testify in such proceedings. This could be the consequence if Miranda-type warnings were a condition precedent to every conversation between the psychiatrist and the patient. Under subsection (3) of section 83-1066, R. R. S. 1943, the confined patient has, with exceptions, the right to refuse treatment. Adverse effects both to the patient and to the State could result if the facts with reference thereto could not be shown because the Miranda warnings were not given each time the doctor converses with his patient.

Kraemer recites and relies upon Lessard v. Schmidt, 349 F. Supp. 1078, vacated 414 U. S. 473, affirmed on rehearing 379 F. Supp. 1376. In that case the three-judge Federal District Court, after discussing In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed.

2d 527, which, as is well known, related to juvenile proceedings, pointed out that the privilege against self-incrimination applies irrespective of the type of proceeding at which the witness is testifying. The court then discussed self-incrimination and mental illness commitment cases, saying: "On the other hand, the prospect of a seriously ill individual being prevented from obtaining needed treatment, in a situation in which treatment is possible and will actually be given, on the basis of counsel's advice to refuse to make any statements to a psychiatrist appears ludicrous. As the majority stated in Tippett v. Maryland, 436 F. 2d 1153, 1158 (4th Cir. 1971), cert. dismissed sub nom., Murel v. Baltimore City Criminal Court, 407 U. S. 355, 92 S. Ct. 2091, 32 L. Ed. 2d 791 (1972), '[i]t is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that.' . . . The conflicting interests are thus difficult to reconcile." In Lessard the court nonetheless adopted the view of Mr. Justice Douglas advanced in a concurring opinion in McNeil v. Director, Patuxent Institution, 407 U. S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719, to the effect that the Fifth Amendment applies to examinations by a psychiatrist and that such interrogation must be preceded by a warning. In Doremus v. Farrell, *supra,* the court seems to have adopted the view of Lessard, but it is not clear from the opinion whether its expression was dicta or holding. The court listed eight specific reasons for holding the predecessor statute to the present act unconstitutional. Those eight items do not specifically include the failure to give warnings of the right not to "incriminate" oneself in the course of a psychiatric interview.

In any event, the United States Supreme Court has not spoken on the point and we prefer to follow our

statute as we construe it and we do not accept the view of the two Federal District Courts on this particular point.

As we have already noted, the board struck from the report and did not permit the psychiatrist to testify as to his conversation with Kraemer and did not permit Kraemer's statements to him to come into evidence. Nonetheless it is clear enough that the diagnosis was in part based upon the conversations with Kraemer and that if the view of Lessard is to be followed, the doctor's opinion in this case was probably inadmissible.

Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. We prefer to follow the views expressed in the following cases: In re Beverly (Fla.), 342 S. 2d 481; State v. O'Neill, 274 Ore. 59, 545 P. 2d 97. These cases, however, did not involve statutory provisions such as section 83-1059, R. R. S. 1943. These cases point out that constitutional protection against self-incrimination does apply if the psychiatric interview should be offered in a criminal trial. We do not wish to say, however, that the second sentence of section 83-1059, R. R. S. 1943, is totally without meaning. Offhand, it would seem that it might clearly have the effect contended for if physical evidence seized in an illegal search were offered at the hearing before the board.

The essence of Kraemer's second assignment is that the record shows no *recent* violent act, or threat of violence, or the placing of a person in reasonable fear of harm. We have earlier reviewed the evidence. We hold that the incident of May 1975 was sufficiently recent to conform to the meaning of the

statute. Any other view would require, as to those already committed when the enforcement of the former act was enjoined and who were entitled to a new hearing under section 83-1072, R. R. S. 1943, the discontinuance of treatment and release in order to afford an opportunity for a more recent act of violence before any rehearing and further confinement could take place. Such would be contrary to the evident and expressed purposes of section 83-1072, R. R. S. 1943, when read in conjunction with the entire act.

We hold that a mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was declared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm.

The third assignment contends that the opinion of the psychiatrist was inadmissible because in part founded upon "hearsay" testimony. The record supports the conclusion that this is true. However, the provisions of the Code of Evidence, which we have already discussed and which were adopted by this act, permit it. The assignment is not meritorious.

As to the fourth assignment and the finding of noncooperation in treatment, our reading of the act fails to disclose that the statute requires such a finding. Accordingly that assignment requires no further consideration.

We also find that the fifth assignment, which asserts that the act is unconstitutional because it does not require "proof beyond a reasonable doubt," is not meritorious. That contention is founded upon the holding in Lessard v. Schmidt, *supra*. In

Doremus v. Farrell, *supra,* the court held that "clear and convincing proof" is sufficient. For a purely pragmatic reason, if no other, we follow Doremus. Presumably if a three-judge Federal District Court for Nebraska is called upon to review the present act, the composition of the court is likely to be the same, at least in part, and so it is probable that the same standard would be adhered to. The evidence we have previously set forth was sufficient for the board to make its findings by the standard prescribed by the statute.

AFFIRMED.

DUANE H. MENKE ET AL., APPELLANTS, V. NORMAN C. FOOTE ET AL, APPELLEES.

261 N. W. 2d 635

Filed January 18, 1978. No. 41315.

1. **Specific Performance: Trial: Appeal and Error.** An action for specific performance is triable de novo on appeal to this court.
2. **Trial: Appeal and Error.** In a trial de novo in the Supreme Court, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Sales: Property: Contracts: Time.** In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances.
4. **Specific Performance: Contracts: Proof.** A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him.
5. **Specific Performance: Contracts.** A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

E. Dean Hascall, for appellants.

Philip H. Robinson, Jr., for appellees.

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

SPENCER, J.

This is an action for specific performance of a contract for the sale of real estate. The District Court dismissed the action. It found time was of the essence and plaintiffs failed to perform within the time specified. We affirm.

The parties stipulated that sometime during the first 2 weeks of August 1973, plaintiffs and defendants Foote entered into an agreement over the telephone for the sale of the land in question by Footes to plaintiffs. The purchase price was $18,000 net to the Footes.

On August 15, 1973, plaintiffs sent Footes a uniform purchase agreement which they signed on August 18. It had the provision: "Seller agrees to furnish to Purchaser or his agent within 45 days from date of the acceptance of this offer or loan approval, a complete abstract of title, certified to date by a bonded abstracter, or a title insurance commitment (binder). * * * Purchaser agrees to close said purchase within 120 days after delivery of said abstract of title or title commitment, or in the event defects are found in said title, within ten (10) days after such defects are cured." The parties stipulated the contract was orally modified by plaintiffs' agreement to pay all expenses related to the abstract or obtaining title insurance. Plaintiffs were to prepare the deed of transfer and the $18,000 was net to the Footes.

Plaintiffs received the abstract on August 20, 1973, accompanied by a letter from Mrs. Foote stating:

"We hope it doesn't take 120 days to clear this up!" There was no further communication between the parties until after December 18, 1973, which was stipulated to be the 120th day after the delivery of the abstract.

It was stipulated the abstract was in the possession of plaintiffs' attorney from August 25, 1973, to January 9, 1974, and that the Footes had a marketable title from August 15, 1973, on. Although plaintiffs' attorney told plaintiffs the title was clean, no attempt was made to have the abstract extended until January 9, 1974, when it was delivered to an abstracter. The abstract was brought up to date and certified on January 10, 1974.

In late November 1973, Earl Faust, Jr., an officer and stockholder of defendant Avery Rents, Inc., telephoned the Footes in an attempt to purchase the real estate involved in this action. He was told someone else had an option on the property until December 18, 1973. He called again on December 21, 1973. He was then advised the other prospective purchaser had not bought the property. Footes agreed to sell it to him for $18,000. He mailed a check for $7,500 on December 22, 1973. The balance was paid by a check for $10,000 dated January 25, 1974, and a check for $500 dated January 28, 1974. The deed from the Footes to Avery Rents, Inc., was recorded February 6, 1974.

Mrs. Foote testified when Faust called her in November she informed him of the purchase agreement although she did not tell him who the purchaser was. Duane Menke, one of the plaintiffs, testified he called Mrs. Foote on December 21, 1973, after learning of the contract with Avery Rents, Inc. He at that time offered to complete the transaction, but she refused. Mrs. Foote denied receiving any call directly from the plaintiffs. It was stipulated plaintiffs' attorney did telephone the Footes' attorney on December 21, 1973. He made a notation con-

cerning the call. It is as follows: "Re: N. Foote Dean Haskell — 291-8900 (Nebraska Attorney) called regarding real estate transaction between N. Foote and his clients. Said closing was held November 30, subject to Sellers providing abstract or title insurance. He has not received either as of 12/21/73. He said money is being held in escrow for the purchase."

On December 26, 1973, Footes' attorney wrote plaintiffs' attorney advising the abstracting had been plaintiffs' responsibility. He further stated that because there had been no communication from plaintiffs since August, the Footes believed they had abandoned the purchase. In any event, plaintiffs had failed to perform by closing within 120 days.

Plaintiffs' attorney replied on December 31, 1973, regretting that there had been a misunderstanding. He stated the language in the contract would control. He further advised Footes' attorney that in the event Footes refused to close, plaintiffs would have no alternative but to go the specific performance route.

In a letter dated January 15, 1974, to Footes' attorney, plaintiffs' attorney stated he was enclosing a form deed and a certified check for $17,500 which with the previous $500 was intended to be a tender of payment under the contract accepted by his clients August 18, 1973. He further stated it was his clients' contention the Footes had made him their agent for the purpose of securing an updating of the abstract or necessary title insurance, and that he was allowed 45 days to do so. He further contended plaintiffs were entitled not only to 120 days after delivery of the abstract but also an additional 45 days for completing work on the abstract. In this letter he enclosed a copy of the bill for the extension of the abstract and requested payment.

The plaintiffs and the Fausts had discussions about the property in January and February 1974,

but were unable to work out any agreement. There was no further communication by the plaintiffs with any of the parties after February 25, 1974. This action was filed December 29, 1975.

Several issues, including misrepresentations and laches, were presented in the trial court. Although briefed, they will not be discussed herein. The trial court found time was of the essence by the intent of the parties outside the written terms of the contract, and that defendants did not refuse or fail to conform to the terms of the contract during the time it was in effect. This is the only issue presented by this appeal.

An action for specific performance is triable de novo on appeal to this court. § 25-1925, R. R. S. 1943; Friehe Farms, Inc. v. Haberman, 191 Neb. 292, 214 N. W. 2d 916 (1974). In a trial de novo in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617 (1974).

In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances. Dowd Grain Co., Inc. v. Pflug, 193 Neb. 483, 227 N. W. 2d 610 (1975).

The purchase agreement did not provide that time was of the essence. The question, therefore, is whether that fact is clearly manifested when the agreement is construed in the light of the surrounding circumstances. There is no question the Footes expected the transaction to be closed within 120 days. It was covered in the telephone conversation as indicated by the fact the purchase agreement, which the plaintiffs drew, provided for closing within 120 days after the delivery of the abstract. This is

further indicated by Mrs. Foote's letter of August 18, 1973, forwarding the abstract. In it she stated, using an exclamation point: "We hope it doesn't take 120 days to clear this up!" When asked if Mr. Menke had indicated to her when closing could be had, she stated: "My understanding was that it could be completed very rapidly. However, we did agree that we would — he could make the contract out for 120 days, but we expected it to be fulfilled much earlier."

When the uniform purchase agreement was forwarded to the Footes, it was accompanied by the following note: " 'Mrs. Foote, on these forms all that is necessary for you to do is to read it, sign your name and your husband sign his name on back of form where X'd. Also please date the form when you sign it. We'll be waiting for your reply and the abstract. Thank you, Duane and Pate Menke.' "

The trial court specifically found that, although not mentioned in the purchase agreement, time was of the essence in the transaction. On the record presented we cannot say that conclusion is clearly wrong. In any event, the plaintiffs were very dilatory after the abstract was forwarded to them. The Footes could well have concluded that plaintiffs had lost interest in the transaction.

The parties agree the expense to bring the abstract up to date or provide title insurance was to be borne by the plaintiffs and not the defendants. Yet demand was made on the Footes by plaintiffs' attorney on December 21, 1973, for the delivery of a complete abstract. This was 3 days after the 120 days had expired. The abstract had been in the possession of the attorney making the demand since at least August 25, 1973. It had been received by the plaintiffs August 20, 1973.

On January 15, 1974, plaintiffs' attorney forwarded a certified check for the payment of the balance on the purchase price. He also enclosed an abstracter's

bill for payment by the defendants Foote. It was not until February 5, 1974, that plaintiffs' attorney wrote advising that if the abstracting bill was the cause of the hangup the plaintiffs would pay it. The Footes had conveyed the property to Avery Rents, Inc., February 4, 1974.

In Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728 (1966), we said: "A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him."

It is evident to us, as it must have been to the trial court, that the plaintiffs did not move on the contract until they learned someone else was interested in the land. They got interested too late. This was more than 120 days after the delivery of the abstract. Yet, even at that time, plaintiffs did not offer to perform in strict accordance with the agreement made. It was not until after the land had actually been conveyed to someone else that plaintiffs finally offered to perform the contract in accordance with its terms.

As we said in Lacy v. Deyle, *ante* p. 365, 258 N. W. 2d 826, (1977): "A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court."

Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and

governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. Schommer v. Bergfield, 178 Neb. 140, 132 N. W. 2d 345 (1965).

In the exercise of his discretion, on the evidence presented, the trial court has denied specific performance. We find there has been no abuse of discretion herein and affirm.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE A. BEANS, APPELLANT.

261 N. W. 2d 749

Filed January 25, 1978. No. 41265.

New Trial: Appeal and Error. While this court may have jurisdiction, it will not ordinarily 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.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

John T. Tarrell and James M. Kelley, 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.

SPENCER, J.

Defendant is appealing his conviction for first degree murder. This conviction was entered following a plea of guilty. He received a sentence of life im-

prisonment. No motion for a new trial was filed. We affirm.

Defendant assigns as error the finding that he was competent to stand trial; lack of a sufficient factual basis to support the plea of guilty to first degree murder; ineffective assistance of counsel; and the involuntariness of his guilty plea. Beans, by failing to file a motion for new trial, is precluded from raising in this appeal any of the questions he seeks to raise.

In State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976), we determined that a motion for a new trial in a criminal case must be filed within 10 days after the verdict is rendered. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction. The motion for a new trial must be filed within 10 days thereafter. § 29-2103, R. R. S. 1943.

While this court may have jurisdiction, it will not ordinarily 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, 198 Neb. 229, 252 N. W. 2d 165 (1977). That rule is applicable herein, and the assignments defendant attempts to raise are not available on an appeal. This is not to suggest the defendant is without remedy. Any assignments reaching constitutional dimensions are available in a post-conviction proceeding.

The judgment of the District Court is affirmed.

AFFIRMED.

CLIFFORD A. BIGGERSTAFF ET AL., APPELLANTS, V. ALICE OSTRAND ET AL., APPELLEES.

261 N. W. 2d 750

Filed January 25, 1978. No. 41285.

1. **Deeds: Undue Influence: Conveyances.** The mere existence of a

confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her.

2. **Deeds: Undue Influence: Evidence.** To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence.
3. _____: _____: _____. The undue influence must be such as controls the will of the grantor.
4. **Trusts: Words and Phrases.** A resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
5. **Trusts: Proof.** A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence.
6. **Trusts: Words and Phrases.** Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust.

Appeal from the District Court for Custer County: LLOYD W. KELLY, JR., Judge. Affirmed.

Tedd C. Huston, for appellants.

David B. Smith for Smith & Smith, for appellees.

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

WHITE, C. J.

This is an action in equity brought by the plaintiffs, coadministrators of the estate of Inez J. Ryan, deceased, on behalf of themselves and other heirs of Inez J. Ryan against Alice Ostrand in her capacities as administratrix of the estate of Earl H. Sharp, deceased, the conservator of the estate of Christina Sharp, and Christina Sharp, individually, seeking: (1) To set aside two deeds executed in 1959 by Inez J. Ryan conveying property to Earl H. Sharp on the

grounds that the deeds were without consideration and were executed as the result of undue influence by Earl H. Sharp upon Inez J. Ryan and to find a constructive trust in connection therewith; (2) to require an accounting of the rents and profits received by Earl H. Sharp from the properties conveyed to him in 1959 by Inez J. Ryan on the grounds that these rents and profits were the property of Inez J. Ryan and were converted by Earl H. Sharp to his use by being placed in a joint savings account in the names of Earl H. Sharp, Inez J. Ryan, and Christina Sharp, and to find a constructive trust in connection therewith; and (3) to have a resulting or constructive trust placed upon certain funds which were realized from the sale of real property owned by Inez J. Ryan and placed in a joint savings account in the names of Earl H. Sharp, Inez J. Ryan, and Christina Sharp.

The case was tried to the District Court. On October 5, 1976, at the close of plaintiffs' evidence, the District Court found, upon defendants' motion, that there was insufficient evidence to establish undue influence or conversion, and that plaintiffs' first and second causes of action should be dismissed. Defendants' motion to dismiss plaintiffs' third cause of action was overruled and trial continued. Following the presentation of their evidence, defendants renewed their motion to dismiss plaintiffs' third cause of action and that motion was taken under advisement. On October 8, 1976, the District Court found that there was insufficient evidence to establish a constructive or resulting trust and dismissed plaintiffs' third cause of action. Plaintiffs filed a motion for a new trial which was overruled and now appeal. We affirm the judgment of the District Court.

On appeal, plaintiffs contend that the District Court was in error when it dismissed their three causes of action on the basis that there was insufficient evidence to establish these causes of action. In an appeal in an equity action, it is the duty of this

court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Marfisi v. Spagnola, 197 Neb. 211, 248 N. W. 2d 24 (1976). However, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. Pinney v. Hill, 191 Neb. 844, 218 N. W. 2d 212 (1974).

The record discloses the following: Inez J. Ryan was a widow. Her husband, Andrew, died in 1940. Her only son, Russell, died in 1956. Her closest relative was Earl Sharp, her brother, who was approximately 8 years younger than she. Earl lived with her and her husband until Earl married his wife, Christina, some time in the late 1940's. Earl and Christina married later in life and had no children. They lived in a house next door to Inez.

Inez' health deteriorated as she grew older. In 1967, an application was made for her to receive housebound benefits from the Veterans Administration. According to a doctor's report, dated October 30, 1967, accompanying the application, Inez was 82 years old, obese, and unable to stand straight unless she hung onto something. She was unable to feed, dress, or bathe herself without assistance. She was unable to climb steps or get in and out of a car without help. "Loss of memory varies, but has quite a bit of recent loss" the report indicated. In the late 1960's her eyesight started to fail until she could hardly see. Exhibit 32 was a diary made by her in 1966. This diary contains entries in which she complained of poor vision, bowel trouble, and various other aches and pains such as might be expected from an elderly person. She stopped coming into

the bank to conduct her banking business personally in 1966 or 1967.

As her health deteriorated, Inez relied more upon Earl to transact her business and upon Earl and his wife to take care of her. Christina cooked and laundered for her, and bathed and nursed her. A strong brother and sister relationship existed between Earl and Inez. Many nights Earl would stay at Inez' house, rather than his own, to tend to her needs. His care for Inez was such that it could even be said that he neglected his own wife in caring for Inez. Alice Ostrand testified that Earl was much more hesitant about placing Inez in a rest home that he was his own wife. Despite a few references in her diary about being "called down" now and then, the record reflects a good relationship between Earl, Inez, and Christina. Minnie Elliott, who occupied an upstairs apartment in Inez' home from 1946 until 1972, testified that there was "nothing but was good" between Christina and Inez. She testified that she never heard an argument between Earl and Inez or Inez and Christina. Alice Ostrand testified that, in her opinion, it was because of Christina's efforts that Inez was able to stay in her home as long as she did without having to go to a home. Earl died on January 5, 1973, and Inez died on February 4, 1973.

The two deeds in question were dated September 28, 1959, and recite consideration of "one dollar, love and affection." Gerald Thurman, a realtor in Broken Bow, testified that he prepared these deeds for Inez Ryan. He stated that he did considerable work for Mrs. Weiss, a relative of Inez, and that Inez would always come into his office with Mrs. Weiss. One day Inez asked if he could draw up some deeds for her and he said "yes." He asked her to bring in some old deeds in order to get the names and description correct. Inez said that this would be fine and returned about 2 weeks later with the old deeds.

Thurman stated that he prepared the deeds, he ac-

knowledged them, they were signed in his presence, and he gave them to her. Thurman testified that when they were fully executed, Inez made it clear to him what she wanted and there was nothing to suggest that she was mentally incompetent. At no time was Earl Sharp present during this transaction.

On April 15, 1971, a check was written in the sum of $10,000 to the Custer Federal Savings and Loan Association. On May 26, 1971, a check was written in the sum of $9,000 to the Custer Federal Savings and Loan Association. Both checks were from the joint account with rights of survivorship of Inez Ryan and Earl Sharp at the Nebraska State Bank and were typewritten and signed by Inez Ryan. These checks were used to purchase two savings certificates which were placed in the names of Inez Ryan, Earl Sharp, and Christina Sharp as joint tenants with rights of survivorship. Wayne Schmitz, secretary-treasurer of the Custer Federal Savings and Loan Association, testified that the signature cards on these two accounts, numbers 643-12 and 669-12, had the names of the three joint tenants typed out at the top, were given to Earl Sharp and were returned when properly signed. He stated that Earl Sharp handled the account and that he never dealt directly with Inez Ryan concerning this.

Introduced into evidence was a holographic will dated May 5, 1957, written by Inez Ryan, in which she directed that all of her worldly goods should go to "my only brother and sole heir Earl H. Sharp and to him alone." In 1967, she made another will, also placed in evidence, again giving all her property to Earl and appointing him executor of her will.

Earl C. Johnson, an attorney formerly in private practice in Broken Bow, testified by deposition that he handled Inez' legal business from 1967 until 1973. He did her 1967 will and income tax returns. He testified that he would see Inez professionally and socially from time to time. He stated that during

the period he knew her she had a sharp mind and was cognizant of what her brother was doing with the properties. He believed she had her own will, was resolute to do what she wanted, and was aware of current events and what was going on in the world.

Despite her physical disabilities, there was testimony by a number of witnesses, in addition to Johnson, who observed her and felt she never gave any indication of being mentally incompetent. Rather, she was sharp, not easily swayed, and knew what was going on at all times. The record contains testimony by various witnesses who stated they never observed anything which led them to believe Earl was trying to take control of his sister's property or assets.

There was ample testimony about the kind of man Earl Sharp was. Johnson testified that Earl was "a very honorable person." Fredrick Kottmeyer stated he never heard anything derogatory touching upon Earl's integrity, honesty, or fair dealing. Wayne Schmitz stated Earl had an exceptional reputation on all scores with the business community. Charles Giles testified Earl was honest and very much respected. Dr. Loren H. Jacobson said he never heard of anyone who did not think a lot of Earl Sharp. Pastor Richard C. Gayley testified Earl was an honest man. Ivan Coleman stated he had a high regard for Earl and that he conducted his and Inez' affairs in a good, business-like fashion.

Plaintiff Biggerstaff admitted the plaintiffs had withdrawn, from their amended petition, allegations relating to fraud by Earl Sharp because they did not want to cast any reflections upon Earl Sharp's name and their investigations disclosed none. Biggerstaff further stated that plaintiffs, after their examinations and investigations, found no evidence that Earl Sharp converted or appropriated, to his own per-

sonal use, funds belonging to his sister during her lifetime.

"To permit a finding of undue influence, it must appear by clear and satisfactory evidence that: (1) The grantor was subject to such influence; (2) the opportunity to exercise it existed; (3) there was a disposition to exercise it; and (4) the result appears to be the effect of such influence." Golgert v. Smidt, 197 Neb. 667, 250 N. W. 2d 628 (1977). The undue influence must be such as controls the will of the grantor. Guill v. Wolpert, 191 Neb. 805, 218 N. W. 2d 224 (1974). The plaintiff has the burden of proof to establish undue influence. McGowan v. McGowan, 197 Neb. 596, 250 N. W. 2d 234 (1977).

The mere existence of a confidential relationship does not void a conveyance. As a general rule the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. See Gaeth v. Newman, 188 Neb. 756, 199 N. W. 2d 396 (1972).

"A constructive trust arises from actual or constructive fraud * * * committed by one party on another. It arises if one person obtains the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds towards the owner of the legal title * * *. When one of the foregoing situations is shown to exist by clear, satisfactory, and convincing evidence, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. And, also, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience hold and enjoy the benefits, a court of equity will

raise a trust by construction and convert the holder into a trustee of the legal title. Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172." Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885 (1955). See, also, 76 Am. Jur. 2d, Trusts, § 221, p. 446.

" * * * a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance." Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792 (1976). "A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence." Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899 (1948). Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430 (1967).

On a thorough review of the record, we conclude that the plaintiffs have failed to sustain their burden of proof on their three causes of action.

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

AFFIRMED.

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

261 N. W. 2d 755

Filed January 25, 1978. No. 41337.

1. **Criminal Law: Sexual Assault: Statutes: Age.** An essential element of the crime of sexual assault in the first degree under section 28-408.03 (1) (c), R. R. S. 1943, is that the defendant was more than 18 years of age at the time he or she subjected a person less than 16 years of age to sexual penetration, and the State has the burden of proving this element beyond a reasonable doubt.

2. **Criminal Law: Evidence: Age.** A defendant's physical appearance may be considered by the jury in determining his or her age, although the jury may not fix the age of the defendant by merely observing him or her during the trial without the benefit of other relevant evidence.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, 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.

BRODKEY, J.

Robert Lauritsen, defendant and appellant herein, was charged with kidnapping and sexual assault in the first degree under sections 28-417 and 28-408.03, R. R. S. 1943, both charges arising out of related incidents involving the same victim. Defendant was found guilty on both charges by a jury, and was sentenced to a term of imprisonment of 3 years on the kidnapping conviction and to a consecutive term of 1 to 3 years on the sexual assault conviction. He has appealed to this court only from his conviction of sexual assault in the first degree, his sole assignment of error being that the District Court committed reversible error in overruling his motion for a directed verdict because the State failed to prove one of the essential elements of that crime. We affirm the judgment of the District Court.

In the information the State charged that the defendant "did subject (the prosecutrix), a person less than sixteen years of age, to sexual penetration while the said defendant was a person more than eighteen years of age." Section 28-408.03, R. R. S. 1943, provides that a "person shall be guilty of sexual assault in the first degree when such person sub-

jects another person to sexual penetration and * * * the actor is more than eighteen years of age and the victim is less than sixteen years of age." The State acknowledges that an essential element of the crime charged was that the defendant was more than 18 yeas of age, and that it had the burden of proving this element beyond a reasonable doubt. See, Christiancy v. State, 106 Neb. 822, 184 N. W. 948 (1921); Hubert v. State, 74 Neb. 220, 104 N. W. 276 (1905). In a prosecution for what was formerly known as statutory rape, the evidence must show beyond a reasonable doubt that the defendant committed the act charged, and that he did so under such circumstances that every element of the offense existed. Where the evidence fails to meet this test it is insufficient to support a conviction. Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627 (1943). See, also, Fulton v. State, 163 Neb. 759, 81 N. W. 2d 177 (1957); Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897 (1947).

Defendant contends that the State failed to prove that he was more than 18 years of age, and that therefore the evidence was insufficient to support his conviction and the trial court should have sustained his motion to dismiss the charge. It is undisputed that the State made no specific attempt to prove by direct evidence that the defendant was older than 18 years of age. Although the defendant testified on his own behalf, the State did not ask him his age on cross-examination. Despite the lack of direct evidence, however, the State argues that there was nevertheless sufficient circumstantial evidence of the defendant's age to permit the jury to conclude beyond a reasonable doubt that he was more than 18 years of age. Although the State was undoubtedly careless in presenting its case, we conclude that the evidence was sufficient for the following reasons:

First, the defendant was present in court, was identified by witnesses at trial, and testified on his own behalf. Therefore, his physical appearance

was open to view by the jurors, whose attention was unquestionably drawn to the defendant when he testified and at various times during the trial. It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age. See, II Wigmore On Evidence, § 222, pp. 5, 6 (3d Ed., 1940); Torres v. State, 521 P. 2d 386 (Alas., 1974); State v. Hemmenway, 80 S. D. 153, 120 N. W. 2d 561 (1963); State v. Fries, 246 Wis. 521, 17 N. W. 2d 578 (1945). It has been held, however, that the jury may not fix the age of the defendant by merely observing him during the trial; and that there must be some other evidence in conjunction with the appearance of the defendant. See, Slocum v. People, 120 Colo. 86, 207 P. 2d 970 (1949); People v. Grizzle, 381 Ill. 278, 44 N. E. 2d 917 (1942); Commonwealth v. Hines, 282 Ky. 791, 140 S. W. 2d 386 (1940).

In addition to the defendant's appearance, there was evidence that the defendant was purchasing and drinking beer in a tavern on the day of the alleged crime, and that he purchased a case of beer in a grocery store after he met the prosecutrix. The defendant testified that he had frequented the tavern, where he met the prosecutrix, for 3 or 4 weeks prior to the day of the alleged crime, and often went there after work with a fellow employee. We take judicial notice of the fact that under Nebraska law a person must be at least 19 years of age in order to purchase alcoholic beverages. See, §§ 53-180 and 53-103 (23), R. R. S. 1943. Although the fact that the defendant purchased alcoholic beverages, in and of itself, is not sufficient to prove that he was more than 19 years of age, evidence that he frequented a tavern for several weeks and purchased alcoholic beverages on numerous occasions is relevant to the issue of age, when such evidence is considered in conjunction with the appearance of the defendant and other relevant evidence. See State v. Fries, *supra*.

Other relevant evidence is that witnesses referred

to the defendant as a "man" when they identified him. Although the word can be used in the generic sense, it also reflects an opinion regarding the maturity of the person it describes. Although we place minimal weight on this factor, we note that a witness' reference to a defendant as a "man" or an "adult" has in some cases been viewed as circumstantial evidence that the defendant was older than 18 years of age. See, People v. D'Angelo, 30 Ill. App. 3d 86, 333 N. E. 2d 525 (1975); Rich v. State, 266 P. 2d 476 (Okla. Crim. App., 1954); State v. Fries, *supra*; c. f. Torres v. State, *supra*.

Further significant evidence was testimony relating to the defendant's membership in the Ku Klux Klan and his alleged status as a "Wizard" in that organization. According to one witness testifying on behalf of the defendant, the prosecutrix asked the defendant how to join the Klan, and he advised her that one requirement was that a person had to be 18 years of age. It could be inferred from this evidence that since the defendant was a member of the Klan, he was more than 18 years of age.

Finally, we note the jury was instructed that it must find beyond a reasonable doubt the defendant was more than 18 years of age before it could return a verdict of guilty. The jury was clearly instructed that the State had the burden of proving this element of the crime. Obviously the jurors reached the conclusion from their observations and from the evidence that the defendant was over 18 years of age.

We conclude that the appearance of the defendant at trial, taken in conjunction with the other evidence described above, was sufficient to permit the jurors, under proper instructions, to conclude that the defendant was more than 18 years of age. See, Torres v. State, *supra*; State v. Fries, *supra*; People v. D'Angelo, *supra*. Although it is doubtful that any one of the factors set forth above, in and of itself, would have been sufficient to prove the defendant

older than 18 years of age, the combination of relevant circumstantial evidence was sufficient to permit the jury to reach that conclusion in the present case.

We have examined the evidence and find the defendant's contention to be without merit. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

The State had the burden of proving beyond a reasonable doubt the age of the defendant, which was an essential element of the crime charged. The record discloses that no evidence was offered to prove this element. As the majority opinion concedes, there is no doubt the State was careless in presenting its case. The majority opinion agrees with the State that this oversight may be remedied by gleaning random evidence from the record, from which references to the defendant's age can be indirectly inferred.

In Watson v. State, 236 Ind. 329, 140 N. E. 2d 109, the court was faced with a case with facts analogous to those in the present case. Despite the fact that the age of the defendant was an essential element of the crime charged, no direct testimony was given at trial concerning his age. The record disclosed that witnesses had referred to the defendant as a "man"; and there was also testimony that the defendant had been seen in a tavern, buying and drinking beer. The jurors were instructed that they could observe the defendant and draw upon their observations of him in determining whether or not the defendant was a person over 16 years of age.

The court, in Watson, found the evidence presented was insufficient to allow a jury to conclude the defendant was above the statutory age. The court noted that while the appearance of the defendant was evidence which could be considered by the jury, the defendant had not been pointed out for that pur-

pose nor had there been opinion testimony of age. The court discounted the reference to the defendant as a "man" as being relevant to an age determination. "Man," like "boy," "girl," or "woman," is a generic term and does not designate whether a person is above or below a certain age. "Age can be proved without difficulty. The proof of a crime should not be left to a game of guessing." It is clear the court in Watson did not consider this fact as adding to the sufficiency of the evidence.

As in Watson, the testimony here referred to the defendant as a "man" and to the defendant's drinking of beer. It is commonly known that persons under 18 years of age frequently purchase and drink beer. The majority opinion finds additional evidence, not present in Watson, which it feels reflects on age. The mention of defendant's belonging to the Ku Klux Klan, and a reference to an age requirement of 18 for membership in that organization, are, like the rest of the evidence, tenuous. The cumulative effect of such tenuous evidence does not render the evidence sufficient when measured by the standard "beyond a reasonable doubt." Nor was the defect in the State's case cured by the giving of proper jury instructions. An instruction to the jury is not evidence and cannot be a factor to be considered in determining sufficiency of the evidence.

In light of the State's failure to prove an essential element of the crime, I would reverse the conviction.

STATE OF NEBRASKA, APPELLEE, V. MARK SCHROEDER, APPELLANT.

261 N. W. 2d 759

Filed January 25, 1978. No. 41356.

1. **Criminal Law: Sexual Assault: Statutes: Self-Defense.** The use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. § 28-836 (4), R. R. S. 1943.

2. **Criminal Law: Prisoners: Self-Defense.** A prisoner who is confined in a cell is excused from the duty to retreat before using force to defend his person.
3. **Criminal Law: Statutes: Self-Defense.** The use of force may be justifiable if the actor believes that such force is immediately necessary to protect himself against the use of unlawful force by another person on the present occasion. § 28-836 (1), R. R. S. 1943.
4. **Criminal Law: Self-Defense.** A belief that the use of force is necessary, which is founded upon only threats, is not sufficient to justify the use of force in self-defense.

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

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, 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.

BOSLAUGH, J.

The defendant, Mark Schroeder, appeals from a sentence to imprisonment for 2 to 3 years for assault with intent to inflict great bodily injury. The defendant has assigned as error the trial court's refusal to instruct on the defense of justification, or choice of evils, as provided in section 28-834, R. R. S. 1943.

The assault took place in a cell at the Reformatory Unit near Lincoln, Nebraska. The defendant was confined in the cell with three other prisoners, one of whom was Gary Riggs, the victim.

The defendant was 19 years of age at the time of the offense. Riggs was 24 years of age. Riggs had a reputation among the other prisoners for sex and violence and the defendant was afraid of Riggs. In its brief the State concedes that Riggs had unquestionably placed the defendant in a position of general subservience.

The evidence shows that the defendant and Riggs had been gambling and that the defendant owed Riggs approximately $3,000. Riggs had threatened to make a "punk" out of the defendant by selling the debt to some other prisoner. A punk is defined in the record as a prisoner who commits homosexual acts with other prisoners.

The defendant testified that he did not want to gamble with Riggs but Riggs made the defendant continue to play cards and gamble. On the day before the incident, the defendant and the other two prisoners in the cell submitted a written request that Riggs be moved to another cell.

On the night the assault occurred the defendant and Riggs played cards until about 10 p.m. The defendant testified Riggs said that he might walk in his sleep that night and "collect some of this money I got owed to me tonight."

The defendant went to bed about 10 p.m. but, apparently, was unable to sleep because of what Riggs had said. The defendant got up about 1 a.m., and stabbed Riggs in the back with a knife made from a table knife. Riggs was asleep at the time but awakened when he was stabbed. When Riggs tried to remove the knife from his back, the defendant struck Riggs in the face several times with a metal ashtray. The guard was called and Riggs was taken to the hospital.

Section 28-834, R. R. S. 1943, which is a part of the self-defense statute enacted in 1972, provides as follows: "(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

"(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

"(b) Neither sections 28-833 to 28-843 nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

"(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

"(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."

The defendant submitted a requested instruction based upon section 28-834, R. R. S. 1943, and NJI No. 14.33, as revised, which the trial court refused. The defendant contends the refusal was erroneous. The State contends the request was properly refused because the harm or evil sought to be avoided was not greater than that sought to be prevented and there was no specific and imminent threat or injury to the defendant's person at the time he stabbed Riggs.

The defendant was charged with stabbing with intent to kill, wound, or maim but the jury found the defendant guilty of the lesser offense of assault with intent to inflict great bodily injury. The State argues that the determination as to which harm or evil is greater is to be made by a comparison of the punishment prescribed by law for the acts in question. This does not appear to be a correct interpretation of the statute.

Under section 28-836 (4), R. R. S. 1943, the use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. The defendant's evidence was such that the jury could have found that the defendant believed he would be forced by Riggs to submit to sodomy if he did not kill or disable Riggs that night.

The circumstance of confinement is an important factor in this case. Under ordinary circumstances the actor has a duty to retreat if he can with complete safety avoid the necessity of using force by re-

treating. § 28-836 (4) (b), R. R. S. 1943. The duty to retreat was not applicable here because the defendant could not retreat.

The State further contends that the defense was not applicable because there was no specific and imminent threat of injury to the defendant. Riggs was asleep when the defendant stabbed him and Riggs had made no overt act or assault upon the defendant. Section 28-836 (1), R. R. S. 1943, provides that the use of force may be justifiable if the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

The rule in this state has been that in order to excuse or justify a killing in self-defense the defendant must have reasonably believed that his life was in imminent danger or that he was in imminent danger of suffering great bodily harm. State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258; State v. Archbold, 178 Neb. 433, 133 N. W. 2d 601; State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422; Barr v. State, 45 Neb. 458, 63 N. W. 856; Housh v. State, 43 Neb. 163, 61 N. W. 571.

The present statutory requirement is that the actor believe such force is immediately necessary to protect himself against the use of unlawful force by the other person on the present occasion. Although the term "present occasion" may have relaxed somewhat the former requirement of imminent danger, the present statutory requirement is essentially the same requirement as existed prior to the enactment of section 28-836, R. R. S. 1943.

The problem in this case is that there was no evidence to sustain a finding that the defendant could believe an assault was imminent except the threat that Riggs had made before he went to bed. The general rule is that words alone are not sufficient justification for an assault. Grebe v. State, 112 Neb. 759, 201 N. W. 142. See, also, Commonwealth v. Cropper, 463 Pa. 529, 345 A. 2d 645.

There is a very real danger in a rule which would legalize preventive assaults involving the use of deadly force where there has been nothing more than threats. We conclude that the trial court did not err in refusing to instruct the jury as requested by the defendant.

This is a difficult case and we are of the opinion there are extenuating circumstances which justify a reduction in the sentence. The judgment is modified by reducing the term of imprisonment to 1 year, the statutory minimum. As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., dissenting.

I respectfully dissent because I believe the defendant was entitled to an instruction under the provisions of section 28-834 (1) (a), R. R. S. 1943, which provides: "(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

"(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged"; insofar as that such an instruction would relate to the lesser-included offense of assault with intent to commit great bodily harm. That is the offense of which the defendant was found guilty. I do not believe he was entitled to such an instruction insofar as the offense of stabbing with intent to kill was concerned.

Section 28-834 (1) (a) and section 28-836 (1), R. R. S. 1943, must be read together. Section 28-836 (1), R. R. S. 1943, provides that the use of force may be justifiable if the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person "on the present occasion."

The comments to section 3.04 of the Model Penal Code, from which section 28-836, R. R. S. 1943, was taken, contain the following: "Nor does the draft

limit the privilege of using defensive force to cases where the danger of unlawful violence is 'imminent', as many formulations of the rule now do. The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be immediately used. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given belief and reason to believe that it is necessary to disable him to prevent an attack by overwhelming numbers — so long as the attack is apprehended on the 'present occasion.' The latter words are used in preference to 'imminent' or 'immediate' to introduce the necessary latitude for the attainment of a just result in cases of this kind."

In this case the defendant was faced with a threat by Riggs that he would "collect some of this money I got owed to me tonight." The defendant could not be expected to remain awake all night, every night, waiting for the attack that Riggs had threatened to make. The defendant's evidence here was such that the jury could have found the defendant was justified in believing the use of force was necessary to protect himself against an attack by Riggs "on the present occasion."

Under the evidence in this case, which the majority opinion fairly states, I think that a factual question was presented for the jury to determine whether evil of forcible sodomy was greater than the evil of the assault with intent to commit great bodily harm, where the assault was made to avoid a forcible sexual attack by Riggs. Forcible sodomy is surely a great wrong to the victim. Our statute recognizes the common law rule that one may use deadly force to protect oneself from a forcible sexual assault. § 28-836 (4), R. R. S. 1943. The evidence would justify the conclusion and permit the jury to find that de-

fendant could not have waited and protected himself by the use of deadly force. With the weapon which was available to him, he seemingly could not have exercised such deadly force had he waited. Without much doubt, the jury, in finding the defendant guilty of the lesser crime considered the nature of the weapon which he had available and which he used. That weapon may have been inadequate to protect him had he waited until the actual assault commenced.

I would remand for a new trial.

WHITE, C. THOMAS, J., dissenting.

I join in the dissent of Clinton, J., except for that portion which suggests that the instruction was not required to be given with respect to the charge of assault with intent to kill. As stated in the dissent, "one may use deadly force to protect oneself from a forcible sexual assault." § 28-836 (4), R. R. S. 1943.

STATE OF NEBRASKA, APPELLANT, V. MARK A. GILLETT, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. JAMES T. GASTON, APPELLEE.

261 N. W. 2d 763

Filed January 25, 1978. Nos. 41406, 41407.

Appeals from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Appeals dismissed.

F. A. Gossett, III, for appellant.

Neil W. Schilke, for appellees.

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

WHITE, C. THOMAS, J.

These are appeals from orders of the District Court for Dodge County, Nebraska, holding section 39-669, R. R. S. 1943, the careless driving statute, un-

constitutional. For reasons set our hereafter, we dismiss the appeals.

In State v. Knoles, *ante* p. 211, 256 N. W. 2d 873, we determined that a prosecution for a traffic infraction under the Nebraska rules of the road is a criminal offense within the meaning of the double jeopardy provision of Article I, section 12, Constitution of the State of Nebraska. The opinion discussed in some detail the arrest provisions, the custody provisions, the references to guilt, and the possibility of the imposition of a jail sentence as factors in determining that offenses under the Nebraska rules of the road were, in fact, criminal and not civil.

Here the county attorney filed motions for new trials which were overruled by the trial court. From the overruling of the motions, the appeals were docketed in this court as ordinary civil matters. Section 29-2315.01, R. R. S. 1943, recites in part: "The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket error proceedings which the county attorney intends to make to the Supreme Court with reference to the rulings or decisions of which complaint is made. * * * Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, and upon presentation, if the trial court finds it is in conformity with the truth he shall sign the same, and shall further indicate thereon whether in his opinion the part of the record which the county attorney proposes to present to the Supreme Court is adequate for a proper consideration of the matter."

As the error procedure outlined in section 29-2315.01, R. R. S. 1943, was not followed, this court has not acquired jurisdiction of the appeals. Appeals dismissed.

APPEALS DISMISSED.

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

261 N. W. 2d 764

Filed January 25, 1978. No. 41670.

1. **Statutes: Criminal Law: Sentences.** Under section 83-1,105, R. R. S. 1943, where a trial court imposes an indeterminate sentence, the minimum term may not exceed one-third the maximum term provided by law.
2. **Criminal Law: Sentences.** This court on appeal will not disturb a sentence within the statutorily prescribed limitations unless the trial court has abused its discretion.

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

Gary B. Thompson, 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.

Defendant was charged with obtaining goods by false pretenses under section 28-1207, R. R. S. 1943, which provides, upon conviction, a penalty of imprisonment for not more than 5 years nor less than 1 year. Defendant pled guilty, and was sentenced to imprisonment for not more than 5 years nor less than 2 years. The sentence imposed was ordered to run concurrently with a sentence of imprisonment for 1 to 2 years the defendant was serving after his conviction of a related crime in Lancaster County. Defendant contends on appeal that the sentence imposed was excessive. We reduce defendant's minimum sentence to 1 year, 8 months, and affirm, as modified, the judgment of the District Court.

In 1974, the defendant and his family moved to Nebraska from California to be closer to relatives and to begin a farming operation. The defendant became indebted to various creditors, and in February

1977, initiated a scheme to defraud persons by buying purebred hogs with bad checks. Defendant's scheme was to open a checking account under an alias, purchase the hogs from producers with a bad check written on the account, and then resell the hogs and use the proceeds to pay his debts. Defendant was successful in this scheme on three occasions, once in Lancaster County, Nebraska, and twice in Kansas. The fourth time, involving the incident at issue in this case, defendant was caught. All four incidents occurred within a short period of time.

Charges were not filed with respect to one of the incidents in Kansas, and defendant was convicted and received a sentence of probation in the other Kansas case. Defendant was convicted in Lancaster County with respect to the crime committed therein, and was sentenced to imprisonment for not less than 1 nor more than 2 years. The record indicates that the defendant has made restitution to the victims in these three cases, and that at the time of sentencing in the present case, he was in the process of making restitution to the victim in this case. The amount of money involved in the incident was significant. In the present case the bad check the defendant wrote was in the amount of $3,450.

It must first be noted that the minimum sentence imposed in this case exceeds that which is permissible under sections 28-1207 and 83-1,105, R. R. S. 1943. Section 28-1207, R. R. S. 1943, permits a sentence of not more than 5 years nor less than 1 year upon conviction of obtaining goods by false pretenses. Section 83-1,105, R. R. S. 1943, provides that the minimum sentence imposed by a trial court may not exceed one-third the maximum term provided by law. See State v. Ford, 194 Neb. 400, 231 N. W. 2d 515 (1975). The trial court, in this case, imposed a sentence of 2 to 5 years. Obviously, the minimum term imposed exceeded one-third of the maximum

term provided by section 28-1207, R. R. S. 1943. The State acknowledges in its brief that the minimum term imposed under section 28-1207, R. R. S. 1943, may not exceed 1 year, 8 months. Therefore, it is beyond dispute that this court must at least reduce defendant's minimum term to a term of 1 year, 8 months.

Defendant argues generally that he should have received, at most, a sentence of 1 to 2 years, which should run concurrently with the sentence he is serving for the crime committed in Lancaster County. Defendant argues that such a sentence would be sufficient in light of his good employment record, lack of a criminal record, family ties, and prior law-abiding conduct. See State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498 (1972).

Although it is true that there are factors present in this case which support defendant's arguments, the crime committed by the defendant was of a serious nature. The trial court noted the defendant had committed repeated offenses. It stated that it believed there was a substantial risk the defendant might be involved in additional crime if he were placed on probation, that defendant was in need of correctional treatment, and that a lesser sentence would depreciate the seriousness of the crime. It is the rule that this court on appeal will not disturb a sentence within the statutorily prescribed limitations unless the trial court has abused its discretion. See State v. Garland, *ante* p. 459, 259 N. W. 2d 481 (1977).

We conclude that a sentence of imprisonment is appropriate in this case, but modify the minimum term imposed by the trial court to a term of 1 year, 8 months, so that the sentence is within the statutorily prescribed limitations. As ordered by the trial court, the sentence shall be served concurrently with the sentence imposed in the Lancaster County case, and the defendant shall be given credit on the

sentence in this case for the time he has served under the sentence in the Lancaster County case. With the exception of reducing the minimum term to 1 year, 8 months, we affirm the judgment of the District Court.

AFFIRMED AS MODIFIED.

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Adjudication.

All claims or causes of action arising while the patient and the health care provider were subject to the terms and provisions of an act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain subject to it as to that cause of action until its determination. Prendergast v. Nelson 97

Administrative Law.

1. Under the Motor Vehicle Safety Responsibility Act the issue before the Director is not whether the operator was at fault in the accident but whether the evidence supports the finding that there is a reasonable possibility of a judgment being rendered against the operator involved in the accident. Berg v. Pearson 390
2. Upon a petition for review of an order of suspension of an operator's license the issue is the same as that which was before the Director but the District Court must consider any additional facts developed in the hearing in the District Court. Berg v. Pearson 390
3. The doctrine of equitable estoppel ordinarily cannot be invoked against a governmental entity in the exercise of governmental functions. Exceptions to the rule are made only where right and justice so demand; and the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice. Warren v. Papillion School Dist. No. 27 410
4. "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the [Nebraska Liquor Control] commission." § 53-116, R. R. S. 1943. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission ... 729
5. The policy of a municipality limiting the number of liquor licenses to be issued is not binding on the Nebraska Liquor Control Commission. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
6. Without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Ne-

braska Liquor Control Commission, the court does not exercise independent judgment on fact and policy. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the 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. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

8. The recommendation of the city council founded upon a policy limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

9. Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

10. Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. Kraemer v. Mental Health Board of the State of Nebraska 784

Adultery.

Sexual misconduct does not automatically disqualify a mother from obtaining custody of her minor children. Greenfield v. Greenfield 648

Adverse Possession.

In order to establish title by adverse possession, such possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership. Bailey v. Mahr 29

Affidavits.

1. An affidavit for a search warrant may be based upon hearsay information and need not reflect the direct observations of the affiant. State v. Davis 165
2. Affidavits for search warrants must be tested in a commonsense and realistic fashion by the courts, and courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner. State v. Davis 165

Age.

1. An essential element of the crime of sexual assault in the first degree under section 28-408.03 (1) (c), R. R. S. 1943, is that the defendant was more than 18 years of age at the time he or she subjected a person less than 16 years of age to sexual penetration, and the State has the burden of proving this element beyond a reasonable doubt. State v. Lauritsen 816
2. A defendant's physical appearance may be considered by the jury in determining his or her age, although the jury may not fix the age of the defendant by merely observing him or her during the trial without the benefit of other relevant evidence. State v. Lauritsen 816

Aggravating and Mitigating Circumstances.

1. In determining whether the sentence shall be fixed either at death or life imprisonment, such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death; or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances. State v. Peery 656
2. Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts. State v. Peery 656
3. Under aggravating circumstance (1) (c) of section 29-2523, R. R. S. 1943, a murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Peery 656
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5. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Peery 656

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2. The Nebraska Public Service Commission lacks jurisdiction over commuter air carriers engaged in interstate commerce, since the federal government has preempted the field. Pioneer Airways, Inc. v. City of Kearney 12

Alimony.

1. When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children. Brown v. Brown 394
2. In an action for dissolution of marriage, alimony may be ordered in addition to a property settlement award. Brown v. Brown 394
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2. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr 29
3. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Merten v. Pedersen 34
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struction of section 77-202.04, R. R. S. 1943, it is overruled. United Way of the Midlands v. Douglas County Board of Equalization 323
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23. Upon a petition for review of an order of suspension of an operator's license the issue is the same as that which was before the Director but the District Court must consider any additional facts developed in the hearing in the District Court. Berg v. Pearson 390
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26. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Stitt Constr. Co. v. Canine's Cupid, Inc. 400
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28. The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429
29. A defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure. State v. Bartlett 471
30. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett 471
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33. An order is final when the substantial rights of the parties to the action are determined even though the cause is retained for the determination of matters incidental thereto. Evans v. Evans 480
34. Whether the decision was to grant a new trial or deny one, the issues in the Supreme Court are whether the alleged error or errors appear in the record and were called to the attention of the trial court by the motion; and whether they constitute prejudicial error to the party complaining. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489
35. A judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the District Court may be reversed, vacated, or modified by the District Court. § 25-1901, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513
36. Appeals may be taken from the action of the county board of equalization to the District Court in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. § 77-1510, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513
37. Sections 77-1510 and 77-1511, R. R. S. 1943, are no longer applicable to the appeal from the granting of exemptions from taxation by a county board of equalization. The only person entitled to appeal from a decision of the county board of equalization on a tax exemption determination is the applicant for the exemption. Ross v. The Governors of Knights of Ak-Sar-Ben 513
38. A petition in error is limited to a review of the transcript and the evidence below as may be contained in the bill of exceptions. Ross v. The Governors of Knights of Ak-Sar-Ben 513
39. A resident taxpayer of a city and county where property is declared exempt by the county board of equalization is a sufficiently aggrieved party to file a petition in error. Ross v. The Governors of Knights of Ak-Sar-Ben 513
40. Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. State v. Tiff 519
41. Under section 29-611, R. R. S. 1943, when notice of appeal has been given and proper bond filed by the de-

fendant as required by the statute, it is the duty of the county court or the municipal court to prepare, certify, and file the transcript, bill of exceptions, and other required documents in the District Court. State v. Benson 549

42. Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions. State v. Benson 549

43. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong. State ex rel. Goetz v. Lundak 585

44. Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions. Pedersen v. Lambert 595

45. Evidence which does not appear in the record cannot be considered by this court on appeal. Pedersen v. Lambert 595

46. 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. Pedersen v. Lambert 595

47. Where instructions to the jury correctly state the law, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Failure to object to instructions after they are submitted to counsel for review precludes raising an objection to the instructions on appeal. Krehnke v. Farmers Union Co-Op. Assn. 632

48. The trial court's findings will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Greenfield v. Greenfield 648

49. Failure to declare a mistrial when the prosecutor indicated a desire to give testimony is not prejudical error where the trial judge unequivocally sustained the defendant's objection and instructed the jury to disregard the prosecutor's remark. State v. Peery 656

50. This court will give consideration to the fact that the trial court inspected the premises. Paasch v. Brown 683

51. Without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Nebraska Liquor Control Commission, the court does not

exercise independent judgment on fact and policy. 72nd Street Pizza, Inc. v. Nebrska Liquor Control Commission 729

52. An appellant in an appeal to this court following an appeal to the District Court pursuant to section 24-541, R. R. S. 1943, is required to file a motion for a new trial in the District Court if this court is to review the question of the sufficiency of the evidence and other assignments of error. Christensen v. Eastern Nebraska Equipment Co., Inc. 741
53. Defenses not raised or litigated in the trial court cannot be urged for the first time on appeal. Smith v. Wrehe 753
54. An order of the District Court which vacates a judgment of the county court and remands the cause to the county court for a new trial is not a final order from which an appeal may be taken to this court. Martin v. Zweygardt 770
55. An action for specific performance is triable de novo on appeal to this court. Menke v. Foote 800
56. In a trial de novo in the Supreme Court, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Menke v. Foote 800
57. While this court may have jurisdiction, it will not ordinarily 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. Beans 807

Arrest.

1. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Donald 70
2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Donald 70

3. The offering of a preliminary test of the breath under section 39-669.08(3), R. R. S. 1943, is not a condition precedent to the making of a valid arrest "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943. State v. Orosco 532
4. The authority of an officer to make arrests "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor," § 39-669.08 (2), R. R. S. 1943, depends not upon the terms of the implied consent statute, but exists by virtue of the common law as codified in the statutes of the State of Nebraska, to wit, sections 29-401 and 29-404.02, R. R. S. 1943. State v. Orosco 532
5. The language "or any person in legal custody" is interpreted to apply to anyone taken into custody for transportation to the place of confinement. State v. Reeves 725
6. The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. State v. Wilson 765
7. An officer may arrest without warrant if he has probable cause to believe that the person arrested has committed a felony. State v. Wilson 765
8. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer would warrant a prudent man in believing that the offense has been committed and that the person arrested committed it. State v. Wilson 765

Arson.

1. The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning. State v. Keeton 405
2. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible. State v. Keeton 405

Assignments.

A contracting party cannot, by an assignment of the contract, relieve himself of his obligations thereunder, even where the contract is expressly made assignable and contains a provision that it is binding on the as-

signee of a party. Accordingly, except where a party to the contract expressly agrees to accept the responsibility of the other party's assignee in the stead and place of that of the assignor, making a new contract by way of novation, the assignor remains bound by his obligations under the contract and is liable if the assignee defaults. Smith v. Wrehe 753

Attorney and Client.

1. The Legislature was within its authority in requiring that fee arrangements be subject to review by the courts. Prendergast v. Nelson 97
2. Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interest of his client. State v. Bartlett 471
3. Prejudice is an essential element of a claim of ineffectiveness of counsel. State v. Bartlett 471
4. Effectiveness of counsel is not to be judged by hindsight. State v. Bartlett 471

Attorneys at Law.

Ordinarily, the division of attorneys' fees rests in the sound judicial discretion of the trial court. Evans v. Evans 480

Attorney's Fees.

1. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74-715, R. R. S. 1943. Humphrey Feed & Grain, Inc. v. Union P. R. R. Co. 189
2. In an action for dissolution of marriage, the award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Brown v. Brown 394
3. An appellate court will interfere with a trial court's allowance of attorneys' fees only to correct a patent injustice where the allowance is clearly excessive or insufficient. Krauter v. Lower Big Blue Nat. Resources Dist. 431

Automatic Review in Supreme Court.

This court will, upon automatic review in capital cases, compare the case under consideration with other capi-

tal cases and determine in each instance whether the death penalty is disproportionate. State v. Peery 656

Banks and Banking.

1. A bank is bound to know the genuine signature of its customers, and may not charge a customer's account without receiving a valid order to do so. § 4-401, U. C. C. It may not properly charge a customer's account on the basis of a forged withdrawal slip. Maddox v. First Westroads Bank 81
2. Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check. Maddox v. First Westroads Bank 81
3. Under section 4-207, U. C. C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. Maddox v. First Westroads Bank 81
4. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective. Maddox v. First Westroads Bank 81
5. Under sections 1-201 and 3-302, U. C. C., a collecting bank receiving a check bearing a forged endorsement is not a holder in due course of the item. Maddox v. First Westroads Bank 81
6. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox v. First Westroads Bank 81

Bills of Lading.

Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier. Humphrey Feed & Grain, Inc. v. Union P. R. R. Co. 189

Blood, Breath, and Urine Tests.

1. If a person charged under the provisions of section 39-669.07, R. R. S. 1943, requests that he have a physician of his choice evaluate his condition and perform, or have performed, laboratory tests he deems appropriate following the test administered at the direction of the arresting officer and is denied such opportunity, the results of the test made by the State are, if objected to by the defendant, inadmissible. State v. Wahrman 337
2. Section 39-669.09, R. R. S. 1943, which provides that if the office directs that the test shall be of the person's blood or urine, such person may choose whether the test shall be of blood or urine, but does not require the officer to notify the person of his option, and if the person takes one or the other of these tests, then he has waived his right to insist that the test to be made by the State be the one of his choice. State v. Wahrman 337
3. Before the result of a chemical test of the blood, urine, or breath for the purpose of ascertaining the amount of alcoholic content in the body fluid may be introduced in evidence under section 39-669.11, R. R. S. 1943, it must be shown that the test was performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. State v. Jablonski 341
4. Section 39-669.07, R. R. S. 1943, defines but one offense which can be the result of being under the influence of alcoholic liquor, being under the influence of any drug, or having ten-hundredths of one percent or more by weight of alcohol in the body fluid. State v. Jablonski 341
5. The offering of a preliminary test of the breath under section 39-669.08(3), R. R. S. 1943, is not a condition precedent to the making of a valid arrest "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943. State v. Orosco 532
6. The authority of an officer to make arrests "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor," § 39-669.08 (2), R. R. S. 1943, depends not upon the terms of the implied consent statute, but exists by virtue of the common law as codified in the statutes of the State of Nebraska, to wit, sections 29-401 and 29-404.02, R. R. S. 1943. State v. Orosco 532

Board of Pardons.

1. It was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975. Johnson & Cunningham v. Exon 154
2. All prisoners need approval of the Board of Pardons before the provisions of Laws 1975, L. B. 567, may be applied retroactively. Johnson & Cunningham v. Exon 154
3. The provisions of Laws 1975, L. B. 567, do have retroactive application if they are approved by the Board of Pardons. Gamron v. Parratt 163

Board of Parole.

Where the statutory penalty for a crime is imprisonment in the Nebraska Penal and Correctional Complex for not more than a specific maximum term of years, and no minimum term is specified by law, a sentence imposed for a definite period of time becomes an indeterminate sentence in which the term imposed by the court becomes the maximum term and the minimum term is subject to the action of the Board of Parole. State v. Blazek 466

Board of Regents.

1. Article VII, section 10, of the Constitution of Nebraska, requires the Legislature to enact legislation vesting the general government of the University of Nebraska in the Board of Regents. Board of Regents v. Exon 146
2. Although the Legislature may prescribe the duties and powers of the Board of Regents the general government of the University must remain vested in the Board of Regents and the powers and duties of the Board of Regents can not be delegated to other officers or agencies. Board of Regents v. Exon 146
3. A statute prescribing the powers and duties of the Board of Regents must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed. Board of Regents v. Exon 146
4. University funds which are derived from operation of the University or received from the federal government or private donors are subject to the control of the Board of Regents without an annual legislative appropriation. Board of Regents v. Exon 146
5. The determination of salary schedules and compensation to be paid to employees of the Board of Regents is an integral part of the general government of the University and the Legislature may not fix and determine

the manner in which raises may be given to the employees of the Board of Regents. Board of Regents v. Exon 146

Bonds.

1. The right of a subcontractor or materialman to recover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Where the construction contract is referred to or incorporated in the bond, however, the contract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond. Dealers Electrical Supply v. United States F. & G. Co. 269
2. A subcontractor or materialman is entitled to recover on a surety's bond where the construction contract requires the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond is conditioned on performance of the contract by the contractor. This rule is applicable in regard to both public and private construction contracts. Dealers Electrical Supply v. United States F. & G. Co. 269

Brokers.

1. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Fleming Realty & Ins., Inc. v. Evans 440
2. As a general rule where the amount of the broker's commission is certain, or can be made certain by computation, he is entitled to interest thereon from the time it became due. Fleming Realty & Ins., Inc. v. Evans 440
3. The liability of a proposed borrower to a mortgage broker for securing a loan commitment in the absence of a special agreement to the contrary depends upon his production of a customer who is able, ready, and willing to make the desired loan upon terms satisfactory to the principal. Don J. McMurray Co. v. Wiesman 494
4. The unjustified failure or refusal of the principal to complete a transaction does not ordinarily defeat the right of the broker to his commission as called for by the contract. Don J. McMurray Co. v. Wiesman 494
5. If the actual closing of the loan is a contractual condition of the broker's right to a fee, then the failure to

close forecloses the right to a fee. Don J. McMurray Co. v. Wiesman 494

Burden of Proof.

1. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. Facts must be alleged which, if proven, would constitute an infringement of constitutional rights. State v. Bartlett 471
2. When a defendant collaterally attacks a judgment of conviction, the burden is upon him to show the grounds of the claimed invalidity if it does not show upon the face of the record. State v. Orosco 532
3. In an action in mandamus the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act. State ex rel. Goetz v. Lundak 585

Carriers.

1. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
2. The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
3. A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
4. Where a claim by a shipper involves the questions of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, the doctrine of "primary jurisdiction" applies. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Case Overruled.

Insofar as there may be language in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N. W. 2d 855 (1975), which conflicts with this opinion on the construction of section 77-202.04, R. R. S. 1943, it is overruled. United Way of the Midlands v. Douglas County Board of Equalization 323

Charities.

The possibility that a charitable organization might share in the assets of another charity is not a sufficient interest to support intervention as a matter of right in a proceeding to liquidate the charity and distribute its assets. Colman v. Colman Foundation, Inc. 263

Checks, Drafts, and Notes.

1. Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check. Maddox v. First Westroads Bank 81
2. Under section 4-207, U.C.C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. Maddox v. First Westroads Bank 81
3. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective. Maddox v. First Westroads Bank 81
4. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox v. First Westroads Bank 81

Claims.

1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Fleming Realty & Ins., Inc. v. Evans 440
2. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion

or discretion. Fleming Realty & Ins., Inc. v. Evans 440

Colleges and Universities.

1. Article VII, section 10, of the Constitution of Nebraska, requires the Legislature to enact legislation vesting the general government of the University of Nebraska in the Board of Regents. Board of Regents v. Exon 146
2. Although the Legislature may prescribe the duties and powers of the Board of Regents the general government of the University must remain vested in the Board of Regents and the powers and duties of the Board of Regents can not be delegated to other officers or agencies. Board of Regents v. Exon 146
3. A statute prescribing the powers and duties of the Board of Regents must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed. Board of Regents v. Exon 146
4. University funds which are derived from operation of the University or received from the federal government or private donors are subject to the control of the Board of Regents without an annual legislative appropriation. Board of Regents v. Exon 146
5. The determination of salary schedules and compensation to be paid to employees of the Board of Regents is an integral part of the general government of the University and the Legislature may not fix and determine the manner in which raises may be given to the employees of the Board of Regents. Board of Regents v. Exon 146
6. The term "financial exigency," as used in the contract of employment herein, may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole. Scheuer v. Creighton University 618

Commissions.

As a general rule where the amount of the broker's commission is certain, or can be made certain by computation, he is entitled to interest thereon from the time it became due. Fleming Realty & Ins., Inc. v. Evans 440

Confinement.

1. There are differing purposes for incarceration under the habitual offender law and sexual sociopath law. For the habitual offender, the purpose is punishment only; for the sexual sociopath, the purpose is treatment, if possible, and punishment is only incidental.

State v. Little 772
2. The Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime. State v. Little 772
3. A status offense is one where there is no actus reus present and the imposition of any punishment for such an offense violates the cruel and unusual punishment prohibition of the Eighth Amendment. State v. Little 772
4. Upon the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, a sexual sociopath is confined in the Nebraska Penal and Correctional Complex indefinitely without treatment. State v. Little 772
5. Indefinite confinement under the Sexual Sociopath Act may well be a life sentence. State v. Little 772
6. A proceeding for investigation and for commitment of an alleged sexual sociopath is civil in nature. State v. Little 772
7. The nature and duration of civil commitment must bear some reasonable relation to the purpose for which an individual is committed. State v. Little 772
8. Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature. State v. Little 772
9. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths. State v. Little 772
10. An annual evaluation by qualified professional personnel must be made of each sexual sociopath housed in the penal complex and an annual review of treatability be made by the District Court from which such individual was originally committed. State v. Little 772

Constitutional Law.

1. The control of the Legislature over school districts and their powers is plenary, subject only to constitutional provisions. Lentz v. Saunders 3
2. The constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters. Lentz v. Saunders 3
3. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207,

R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43

4. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Donald 70

5. General proscription of the Fourth Amendment is against unreasonable, not warrantless, searches. State v. Donald 70

6. A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. State v. Donald 70

7. Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt. State v. Donald 70

8. It is incumbent on this court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. Prendergast v. Nelson 97

9. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Prendergast v. Nelson 97

10. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Prendergast v. Nelson 97

11. The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination. Prendergast v. Nelson 97
12. The Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions. Prendergast v. Nelson 97
13. The Supreme Court will not set aside a statutory discrimination if any state of facts reasonably exists to justify it. Prendergast v. Nelson 97
14. The Nebraska Hospital-Medical Liability Act in no way may be construed to grant or impair the credit of the state. Prendergast v. Nelson 97
15. All persons are charged with knowledge of the provisions of statutes. They must take note of the procedure adopted by them. When that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. Prendergast v. Nelson 97
16. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. Prendergast v. Nelson 97
17. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. Prendergast v. Nelson 97
18. Article VII, section 10, of the Constitution of Nebraska, requires the Legislature to enact legislation vesting the general government of the University of Nebraska in the Board of Regents. Board of Regents v. Exon 146
19. In construing a statute, it is the duty of this court to give that statute an interpretation which meets constitutional requirements if it can reasonably be done. Johnson & Cunningham v. Exon 154
20. A prosecution for a "traffic infraction" under the "Nebraska Rules of the Road" is a criminal offense within the meaning of the double jeopardy provisions of Article I, section 12, of the Constitution of the State of Nebraska. State v. Knoles 211
21. Where the standard of review is limited to error on the record, oral argument on appeal is not an essential ele-

ment of the right to be heard under the federal or state Constitution where the standard of review is limited to the record. State v. Smith 368
22. A defendant has no constitutional right to be present on appeal. State v. Smith 368
23. When the Legislature makes a determination that the use of some substance is harmful and that the use, act, or possession must be prohibited in the interest of the public welfare, the equal protection clause of the Constitution does not require that the State must choose between attacking every aspect of the problem, or not attacking the problem at all. It is enough that the State's action has a rational basis. State v. Kells 374
24. In the area of economics and social welfare, a state does not violate the equal protection clause of the Constitution merely because a classification made by its laws is imperfect. If the classification bears a rational relationship to the legitimate purposes of the legislation, it is not in violation of the equal protection clause. Warren v. Papillion School Dist. No. 27 410
25. Generally, the determination of whether an individual, under a given set of circumstances, has been afforded due process of law is a determination for the court, and not one within the province of the jury. McGreevy v. Bremers 448
26. In the absence of violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Svoboda 452
27. Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for post conviction relief. State v. Svoboda 452
28. There is no constitutional right to a trial before a 12-member jury on a complaint charging a petit offense. State v. Soester 477
29. Under the provisions of Article XI, section 2, Constitution of Nebraska, a home rule charter must be consistent with and subject to the Constitution and laws of this state. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507
30. Section 24-536, R. R. S. 1943, provides that either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. State v. Nielsen 597

31. When there is no statutory classification drawn on the basis of suspect criteria, there is no denial of equal protection if the challenged statute bears some rational relationship to legitimate state ends. State v. Infante 601
32. One, whose conduct a statute clearly governs, may not challenge its constitutionality on the ground it is vague because it is not clear whether it applies to others. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
33. A statute which prohibits active law enforcement officers from participating in any manner in the management or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, for it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
34. The Equal Protection Clause does not prohibit a state from classifying the sex offender in a special category and providing special procedures for dealing with a person in this group. State v. Little 772
35. Equal protection does not require that all persons be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made. State v. Little 772
36. A status offense is one where there is no actus reus present and the imposition of any punishment for such an offense violates the cruel and unusual punishment prohibition of the Eighth Amendment. State v. Little 772
37. A mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was declared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm. Kraemer v. Mental Health Board of the State of Nebraska 784
38. The Nebraska Mental Health Commitment Act is not unconstitutional because the standard of proof it prescribes is that of clear and convincing evidence rather

than proof beyond a reasonable doubt. Kraemer v. Mental Health Board of the State of Nebraska 784

Contempt.

1. The power to punish for contempt of court is a power inherent in all courts of general jurisdiction such as the District Court of this state. Paasch v. Brown 683
2. By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court. Paasch v. Brown 683
3. As contempt proceedings are in their nature criminal, no intendments or presumptions will be indulged in to support a conviction. Paasch v. Brown 683
4. The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Paasch v. Brown 683
5. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Paasch v. Brown 683

Continuances.

1. A motion for a continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. State v. Davis 165
   Yunghans v. O'Toole 317
2. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is properly overruled when a request for a continuance on that ground was not made at or prior to trial. State v. Mills 295

Contractors.

1. The general rule is that one who causes work to be done is not liable for injuries that result to an adjoining owner from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. Merten v. Pedersen 34
2. The right of a subcontractor or materialman to recover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Where the construction contract is referred to or incorporated in the bond, however, the con-

tract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond. Dealers Electrical Supply v. United States F. & G. Co. 269

3. A subcontractor or materialman is entitled to recover on a surety's bond where the construction contract requires the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond is conditioned on performance of the contract by the contractor. This rule is applicable in regard to both public and private construction contracts. Dealers Electrical Supply v. United States F. & G. Co. 269

Contracts.

1. 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. Welcome Wagon International, Inc. v. Hostesses, Inc. 27
2. There is no impairment of the obligation of contract. The purpose of this provision is to eliminate possible windfalls resulting from double recovery of damages. Prendergast v. Nelson 97
3. The right of a subcontractor or materialman to recover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Where the construction contract is referred to or incorporated in the bond, however, the contract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond. Dealers Electrical Supply v. United States F. & G. Co. 269
4. A subcontractor or materialman is entitled to recover on a surety's bond where the construction contract requires the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond is conditioned on performance of the contract by the contractor. This rule is applicable in regard to both public and private construction contracts. Dealers Electrical Supply v. United States F. & G. Co. 269
5. A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court. Lacy v. Deyle 365
   Menke v. Foote 800
6. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to

compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Fleming Realty & Ins., Inc. v. Evans 440
7. A prospective purchaser is financially able if he has capability to make the downpayment and all deferred payments required under the proposed contract of sale. Fleming Realty & Ins., Inc. v. Evans 440
8. As a general rule where the amount of the broker's commission is certain, or can be made certain by computation, he is entitled to interest thereon from the time it became due. Fleming Realty & Ins., Inc. v. Evans 440
9. The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence, or on a choice among reasonable inferences from extrinsic evidence. Don J. McMurray Co. v. Wiesman 494
10. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties to it are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. Don J. McMurray Co. v. Wiesman 494
11. The liability of a proposed borrower to a mortgage broker for securing a loan commitment in the absence of a special agreement to the contrary depends upon his production of a customer who is able, ready, and willing to make the desired loan upon terms satisfactory to the principal. Don J. McMurray Co. v. Wiesman 494
12. In the absence of an express stipulation to the contrary, the right to a commission is not dependent on the consummation of a loan. Don J. McMurray Co. v. Wiesman 494
13. The unjustified failure or refusal of the principal to complete a transaction does not ordinarily defeat the right of the broker to his commission as called for by the contract. Don J. McMurray Co. v. Wiesman 494
14. If an integrated contract is clear and unambiguous there is no need, nor is it permissible, to consider extrinsic evidence for the purpose of contradicting or varying the terms of a written contract. Don J. McMurray Co. v. Wiesman 494
15. If the actual closing of the loan is a contractual condition of the broker's right to a fee, then the failure to close forecloses the right to a fee. Don J. McMurray Co. v. Wiesman 494
16. If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is

to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed. Raymond International, Inc. v. Realbanc, Inc. 607

17. In interpreting the intention of the parties, a contractual provision must be interpreted in the light of other provisions of the contract. Scheuer v. Creighton University 618

18. The term "financial exigency," as used in the contract of employment herein, may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole. Scheuer v. Creighton University 618

19. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. Hansen v. Circle Lake Development Corp. 678

20. In trying to determine the meaning of ambiguous terms in a contract the court may, in an attempt to ascertain the intent of the parties to the contract, look to the preliminary negotiations of the parties or to the interpretation placed on the contract by the parties during the period of performance. Hansen v. Circle Lake Development Corp. 678

21. Under section 2-315, U.C.C., a warranty of fitness for a particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Whether or not the warranty of fitness for a particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

22. A contracting party cannot, by an assignment of the contract, relieve himself of his obligations thereunder, even where the contract is expressly made assignable and contains a provision that it is binding on the assignee of a party. Accordingly, except where a party to the contract expressly agrees to accept the responsibility of the other party's assignee in the stead and place of that of the assignor, making a new contract by way of novation, the assignor remains bound by his obligations under the contract and is liable if the assignee defaults. Smith v. Wrehe 753

23. Where a provision in a written contract is not ambigu-

ous, the trial court must determine its meaning as a matter of law, and not submit the issue to the jury. Smith v. Wrehe 753

24. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more than one sense. Smith v. Wrehe 753

25. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances. Menke v. Foote 800

26. A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him. Menke v. Foote 800

Controlled Substances.

1. It is within the prerogative of the Legislature to determine whether the possession of marijuana, including possession for personal use, is to be decriminalized. State v. Kells 374

2. When the Legislature makes a determination that the use of some substance is harmful and that the use, act, or possession must be prohibited in the interest of the public welfare, the equal protection clause of the Constitution does not require that the State must choose between attacking every aspect of the problem, or not attacking the problem at all. It is enough that the State's action has a rational basis. State v. Kells 374

3. Under section 28-4,115 (14), R. R. S. 1943, where the weight of marijuana is referred to in the Uniform Controlled Substances Act it shall mean its weight at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time. State v. Infante 601

Conveyances.

1. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with deter-

mining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Rule v. Roth 746

2. The mere existence of a confidential relationship does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Rule v. Roth 746
Biggerstaff v. Ostrand 808

Counties.

A declaratory judgment action is not an appropriate remedy to attack an act of the county board of equalization where the plaintiff has an adequate remedy at law by direct appeal from the act of the board of equalization by virtue of the provisions of section 77-1510, R. R. S. 1943. Ryan v. Douglas County Board of Equalization 291

Courts.

1. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Miller 19
2. 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, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Miller 19
3. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Miller 19
4. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen 34
5. The power of a court to try an accused is not impaired

by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Costello 43

6. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. Prendergast v. Nelson 97

7. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses. In the absence of obvious error, we are bound by that determination. Reed v. County of Hall 134

8. The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

9. A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment. Paine v. United States Nat. Bank of Omaha 248

10. When a cause is remanded by this court to the District Court with directions for its disposition, the District Court must obey and perform the mandate of this court. Marksbury & Washington v. Board of Education 283

11. In a civil action for money judgment in a court of limited jurisdiction, it is the amount claimed by the plaintiff which determines the jurisdiction of the court over the subject matter. Bruno v. Kelly 334

12. Where the sum in question is not specified in the petition or the summons, the court has jurisdiction, but may not render judgment for a sum in excess of the jurisdictional amount even though damages in excess of that amount might be proved. Bruno v. Kelly 334

13. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that: (1) The court

acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the court do not support the order or award. Fite v. Ammco Tools, Inc. 353

14. The review in the District Court of a judgment of the municipal court in a civil action is de novo upon the record together with any additional evidence that may be received in the District Court. Stitt Constr. Co. v. Canine's Cupid, Inc. 400

15. It is the duty of the District Court to reach an independent conclusion and consider the matter as if there had not been a prior determination in the municipal court. Stitt Constr. Co. v. Canine's Cupid, Inc. 400

16. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Stitt Constr. Co. v. Canine's Cupid, Inc. 400

17. An appellate court will interfere with a trial court's allowance of attorneys' fees only to correct a patent injustice where the allowance is clearly excessive or insufficient. Krauter v. Lower Big Blue Nat. Resources Dist. 431

18. Generally, the determination of whether an individual, under a given set of circumstances, has been afforded due process of law is a determination for the court, and not one within the province of the jury. McGreevy v. Bremers 448

19. The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489

20. A judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the District Court may be reversed, vacated, or modified by the District Court. § 25-1901, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513

21. Appeals may be taken from the action of the county board of equalization to the District Court in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. § 77-1510, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513

22. The trier of fact must make a specific finding as to the value of the property stolen, before an order of restitu-

tion can be made under section 28-512, R. R. S. 1943. State v. Frandsen 546

23. Under section 29-611, R. R. S. 1943, when notice of appeal has been given and proper bond filed by the defendant as required by the statute, it is the duty of the county court or the municipal court to prepare, certify, and file the transcript, bill of exceptions, and other required documents in the District Court. State v. Benson 549

24. Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions. State v. Benson 549

25. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Bishop v. Bockoven, Inc. 613

26. It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. State v. Henggeler 651

27. Great latitude is allowed the trial judge in ruling on the admissibility of a hypothetical question. State v. Henggeler 651

28. The power to punish for contempt of court is a power inherent in all courts of general jurisdiction such as the District Court of this state. Paasch v. Brown 683

29. Without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Nebraska Liquor Control Commission, the court does not exercise independent judgment on fact and policy. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

30. In the absence of proof of the common law or statutory law of another jurisdiction, this court, in reviewing the matter, will presume that they are the same as the law of Nebraska. State v. Wilson 765

Criminal Law.

1. The constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters. Lentz v. Saunders 3
2. A defendant is not denied a fair trial because persons who are 19 and 20 years of age and over 70 years of age are excluded from serving on the jury. State v. Schwartz 17
3. An instruction which directs the jury to apply community standards without specifying what community is not erroneous. State v. Schwartz 17
4. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Miller 19
5. 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, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Miller 19
6. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Miller 19
7. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary. State v. Javins 38
8. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Javins 38
   State v. Hatridge 142
   State v. Donohue 254
   State v. Williams 256
   State v. Haley 258
   State v. Carey 288
   State v. Comer 762
9. Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court.

State v. Costello 43
10. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43
11. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Costello 43
12. A trial judge's overruling of a motion for change of 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. Costello 43
13. The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary examination. State v. Costello 43
14. A contention that a mistrial should have been granted because the prosecutor argued law before the jury cannot be reviewed on appeal where the remarks of the prosecutor were not recorded in the bill of exceptions. State v. Costello 43
15. It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and not to inflame the prejudices or excite the passions of the jury against the accused. State v. Costello 43
16. Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. State v. Costello 43
17. Under section 27-1003, R. R. S. 1943, a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original. State v. Costello 43
18. Evidence of other crimes than that with which the accused is charged is generally not admissible in a criminal prosecution, but such evidence is admissible to show motive, intent, or guilty knowledge; or if it establishes a course of conduct, scheme, design, or intent. State v.

Costello 43
19. A new trial on the ground of newly discovered evidence may be granted when the evidence is competent, material, and credible, and so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Costello 43
20. The trial court is entitled to consider all relevant evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. State v. Costello 43
21. 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. Costello 43
22. It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury. State v. Andrews 60
23. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Andrews 60
State v. Infante 601
24. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony. State v. Donald 70
25. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Donald 70
26. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Donald 70
27. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trust-

worthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Donald 70
28. General proscription of the Fourth Amendment is against unreasonable, not warrantless, searches. State v. Donald 70
29. A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. State v. Donald 70
30. Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was harmless beyond a reasonable doubt. State v. Donald 70
31. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case for error as to any matter of procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Donald 70
32. Generally, 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. Hatridge 142
33. Habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally held and habeas corpus is a proper remedy. Gamron v. Parratt 163
34. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. Gamron v. Parratt 163
35. An affidavit for a search warrant may be based upon hearsay information and need not reflect the direct observations of the affiant. State v. Davis 165
36. Affidavits for search warrants must be tested in a commonsense and realistic fashion by the courts, and courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a

commonsense manner. State v. Davis 165
37. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. State v. Metzger 186
38. Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Metzger 186
39. A prosecution for a "traffic infraction" under the "Nebraska Rules of the Road" is a criminal offense within the meaning of the double jeopardy provisions of Article I, section 12, of the Constitution of the State of Nebraska. State v. Knoles 211
40. In the absence of an abuse of discretion on the part of the trial court, this court will not overturn an order which denies probation, or disturb a sentence imposed within statutory limits. State v. Trout 236
State v. Schmidtline 242
41. 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. Wesoloweski 238
42. 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. Roubideaux 251
43. The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. State v. Haley 258
44. At the time of pronouncing sentence a trial court may reserve for determination at a later date the matter of fixing the amount of restitution to be made by the defendant. State v. Betts 277
45. It is an abuse of discretion for the trial court to deny defendant or his counsel access to that part of the presentence investigation report relating to prior arrests and convictions. State v. Carey 288
46. The discretion of the trial court in denying a request to examine the presentence report is reviewable in this court, but the record must show that a request to examine the report was made and that the defendant or his attorney were denied an opportunity to examine the presentence report. State v. Carey 288

47. A silent record does not create a presumption that a defendant has not had an opportunity to inspect the presentence report, much less that he has affirmatively requested inspection and had the request denied. State v. Carey 288

48. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Mills 295
State v. Partee 305
State v. Tiff 519
State v. Peery 656

49. In a prosecution for uttering a forged instrument under section 28-601, R. R. S. 1943, knowledge that the instrument is forged, and intent to prejudice, damage, or defraud another person may be inferred from the nature of the act of cashing a forged instrument and the circumstances surrounding it. State v. Mills 295

50. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. State v. Mills 295

51. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is properly overruled when a request for a continuance on that ground was not made at or prior to trial. State v. Mills 295

52. Authenticated judicial records establishing prior convictions of a defendant with the same name are prima facie sufficient to establish identity for the purpose of enhancing punishment under section 29-2221, R. R. S. 1943, and, in the absence of any denial or contradictory evidence, are sufficient to support a finding by the trial court that the accused has prior convictions. State v. Mills 295

53. Certified copies of official records showing fingerprints may be received in evidence in a habitual criminal proceeding, and an expert may compare such fingerprints with the known prints of the defendant to establish identity. State v. Mills 295

54. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the

body, the nature and extent of wounds or injuries, the mechanism of death, and to establish malice or intent. The probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted. State v. Partee 305

55. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Partee 305

56. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction, is whether the offense charged in one count involves any different elements than an offense charged in another count. State v. Hardin 314

57. Under section 29-2261, R. R. S. 1943, the use of a presentence report is only required for sentencing if the offense is a felony. State v. Jablonski 341

58. The standard of review of criminal cases in the District Court is limited to an examination of the record presented for error or abuse of discretion. § 29-613, R. R. S. 1943. State v. Smith 368

59. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Smith 368

60. A defendant has no constitutional right to be present on appeal. State v. Smith 368

61. It is within the prerogative of the Legislature to determine whether the possession of marijuana, including possession for personal use, is to be decriminalized. State v. Kells 374

62. Where the sentence imposed together with the time spent in custody prior to sentencing is less than the maximum authorized by statute, the trial court may consider the time spent in custody prior to sentencing and deny credit for that time. Eutzy v. State 384

63. Section 83-1,106, R. R. S. 1943, held constitutional. Eutzy v. State 384

64. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent

with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Keeton 405

65. After a jury has considered the evidence in the light of the rule concerning circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Keeton 405

66. Age is a factor meriting consideration in reducing a sentence. State v. Davis 424

67. When the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Davis 424

68. Under current statutes, all sentences of imprisonment in the Nebraska Penal and Correctional Complex are indeterminate sentences, except a sentence for life imprisonment. State v. Blazek 466

69. Under the provisions of section 83-1,105(2), R. R. S. 1943, a sentence for a definite term of years is an indeterminate sentence in which the maximum term of the sentence is the term imposed by the court and the minimum term is the minimum sentence provided by law. State v. Blazek 466

70. Where the statutory penalty for a crime is imprisonment in the Nebraska Penal and Correctional Complex for not more than a specific maximum term of years, and no minimum term is specified by law, a sentence imposed for a definite period of time becomes an indeterminate sentence in which the term imposed by the court becomes the maximum term and the minimum term is subject to the action of the Board of Parole. State v. Blazek 466

71. Ordinarily a defendant should be given credit for time spent in jail prior to sentencing. Where the maximum term of the sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. State v. Blazek 466

72. Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interest of his client. State v. Bartlett 471

73. If an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of

which the victim may have been brought in the prosecution of the offense or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Tiff 519

74. Where a defendant has voluntarily waived his right to counsel at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Tiff 519

75. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Marlenee 543

76. A conviction may rest upon circumstantial evidence if it is substantial. State v. Frandsen 546

77. In a larceny case the jury should be instructed to ascertain and declare in its verdict the value of the property stolen. State v. Frandsen 546

78. An instruction that a material element of the crime of petit larceny is that the defendant stole property of value is not erroneous. State v. Frandsen 546

79. A plea of guilty or nolo contendere must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea knowingly and voluntarily. State v. Benson 549

80. Under section 28-4,115 (14), R. R. S. 1943, where the weight of marijuana is referred to in the Uniform Controlled Substances Act it shall mean its weight at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time. State v. Infante 601

81. When there is no statutory classification drawn on the basis of suspect criteria, there is no denial of equal protection if the challenged statute bears some rational relationship to legitimate state ends. State v. Infante 601

82. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any rea-

sonable hypothesis of innocence. State v. Peery 656
83. In determining whether the sentence shall be fixed either at death or life imprisonment, such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death; or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances. State v. Peery 656
84. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Peery 656
85. Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts. State v. Peery 656
86. Under aggravating circumstance (1) (c) of section 29-2523, R. R. S. 1943, a murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Peery 656
87. Aggravating circumstance (1) (d) of section 29-2523, R. R. S. 1943, exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Peery 656
88. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Peery 656
89. Knowledge and intent may be proved by circumstantial evidence. State v. Caradori 691
90. If the facts are such that a man of the age, intelligence, and experience of the defendant would know that property was stolen, then the evidence is sufficient to sustain a finding of guilty knowledge. State v. Caradori 691
91. A prior conviction of the defendant offered for the purpose of impeachment may be proved only by an admission of the defendant or the public record of the conviction. State v. Caradori 691

92. The language "or any person in legal custody" is interpreted to apply to anyone taken into custody for transportation to the place of confinement. State v. Reeves 725
93. It is the departure from custody rather than the departure from a place of confinement which is the essential element of the offense of escape from legal custody. State v. Reeves 725
94. The crime of escape from legal custody is committed when a prisoner escapes from the custody of an arresting officer while being taken to the place of confinement. State v. Reeves 725
95. The principal distinction between the terms "lawful" and "legal" is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden by law. To say that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner. State v. Reeves 725
96. Guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from legal custody. State v. Reeves 725
97. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Comer 762
98. The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. State v. Wilson 765
99. The Sexual Sociopath Act, sections 29-2901 to 29-2910, R. R. S. 1943, proceeds on the premise that the sexual sociopath is neither normal nor legally insane and on the idea that the commission of sex crimes is evidence of a mental disorder which should be treated, if found treatable. State v. Little 772
100. There are differing purposes for incarceration under the habitual offender law and sexual sociopath law. For the habitual offender, the purpose is punishment only; for the sexual sociopath, the purpose is treatment, if possible, and punishment is only incidental. State v. Little 772
101. The significant factor operating to permit differing treatment of those classified as mentally ill dangerous persons and those classified as sexual sociopaths, is the criminal conviction of the latter class. State v. Little 772
102. A status offense is one where there is no actus reus present and the imposition of any punishment for such an offense violates the cruel and unusual punishment

prohibition of the Eighth Amendment. State v. Little 772
103. The punitive aspect of the Sexual Sociopath Act is not merely limited to punishment for a status, but relates to an affirmative act or actus reus. State v. Little 772
104. Upon the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, a sexual sociopath is confined in the Nebraska Penal and Correctional Complex indefinitely without treatment. State v. Little 772
105. Indefinite confinement under the Sexual Sociopath Act may well be a life sentence. State v. Little 772
106. A proceeding for investigation and for commitment of an alleged sexual sociopath is civil in nature. State v. Little 772
107. Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature. State v. Little 772
108. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths. State v. Little 772
109. An essential element of the crime of sexual assault in the first degree under section 28-408.03 (1) (c), R. R. S. 1943, is that the defendant was more than 18 years of age at the time he or she subjected a person less than 16 years of age to sexual penetration, and the State has the burden of proving this element beyond a reasonable doubt. State v. Lauritsen 816
110. A defendant's physical appearance may be considered by the jury in determining his or her age, although the jury may not fix the age of the defendant by merely observing him or her during the trial without the benefit of other relevant evidence. State v. Lauritsen 816
111. The use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. § 28-836 (4), R. R. S. 1943. State v. Schroeder 822
112. A prisoner who is confined in a cell is excused from the duty to retreat before using force to defend his person. State v. Schroeder 822
113. The use of force may be justifiable if the actor believes that such force is immediately necessary to protect himself against the use of unlawful force by another person on the present occasion. § 28-836 (1), R. R. S. 1943. State v. Schroeder 822
114. A belief that the use of force is necessary, which is founded upon only threats, is not sufficient to justify the

use of force in self-defense. State v. Schroeder 822
115. Under section 83-1,105, R. R. S. 1943, where a trial court imposes an indeterminate sentence, the minimum term may not exceed one-third the maximum term provided by law. State v. Shepard 831
116. This court on appeal will not disturb a sentence within the statutorily prescribed limitations unless the trial court has abused its discretion. State v. Shepard 831

Crops.

A lessee of school land may recover the value of fall-seeded grain crops as of the date of the expiration of the lease. In determining the value of such crops, the appraisers should consider all the factors which would normally enter into the determination of the value of a growing crop and are not limited to the cost of putting in the crop and fertilizing it. Freihe v. State 504

Damages.

1. The verdict of a jury will not be set aside on appeal as inadequate unless it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake. Merten v. Pedersen 34
2. There is no impairment of the obligation of contract. The purpose of this provision is to eliminate possible windfalls resulting from double recovery of damages. Prendergast v. Nelson 97
3. Nothing in the Nebraska Hospital-Medical Liability Act in any way implies the state is to be obligated with respect to the Excess Liability Fund or liable for any other amounts due pursuant to the act. Prendergast v. Nelson 97
4. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
5. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74-715, R. R. S. 1943. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
6. To make a skillful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer

therefor. Galonka v. Gatewood 216
7. An owner of property which does not abut upon a street proposed to be vacated by action of the city is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large, and the fact that the property owner or others who must enter or leave the property must take a more roundabout way to reach the property does not constitute special or peculiar injury different in kind from that suffered by the public at large. Rossitto v. City of Omaha 260
8. A landowner has no vested interest in the flow of traffic past his property and damage caused by diversion of traffic is not normally compensable. Rossitto v. City of Omaha 260
9. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Fleming Realty & Ins., Inc. v. Evans 440
10. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. Fleming Realty & Ins., Inc. v. Evans 440
11. It is the duty of the trial court to instruct the jury on the proper basis and measure of damages. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489
12. Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach. Such damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
13. Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be recovered under section 2-715, U.C.C., if the evidence is such that damages can be ascertained with a reasonable degree of certainty. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
14. The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
15. The value of property includes its value for any reasonable use to which it may be put. Reller v. Consumers

Public Power Dist. 720
16. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. Reller v. Consumers Public Power Dist. 720
17. To maintain or defend an action on the ground of false representation, the pleader must allege and prove what representation was made, that it was false and so known by the party making it or was made without knowledge as a positive statement of known fact, that the pleader believed the representation to be true, and that he relied on and acted upon it and was thereby injured. Smith v. Wrehe 753

Death Penalty.

1. In determining whether the sentence shall be fixed either at death or life imprisonment, such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death; or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances. State v. Peery 656
2. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Peery 656
3. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Peery 656

Decedents' Estates.

An action for the wrongful death of a stillborn fetus may not be maintained under section 30-809, R. R. S. 1943. Egbert v. Wenzl 573

Declaratory Judgments.

A declaratory judgment action is not an appropriate remedy to attack an act of the county board of equalization where the plaintiff has an adequate remedy at law by direct appeal from the act of the board of equalization by virtue of the provisions of section 77-1510, R. R. S. 1943. Ryan v. Douglas County Board of Equalization 291

Deeds.

1. To sustain a finding of undue influence in the case of a deed it must be shown by clear and satisfactory evidence: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Rule v. Roth 746
   Biggerstaff v. Ostrand 808
2. The court in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Rule v. Roth 746
3. The mere existence of a confidential relationship does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Rule v. Roth 746
   Biggerstaff v. Ostrand 808
4. The undue influence must be such as controls the will of the grantor. Biggerstaff v. Ostrand 808

Discrimination.

1. A charge of unlawful discrimination on the part of a common carrier may be predicated upon the furnishing to some patrons of services or facilities which are unjustifiably denied to others. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
2. Where a claim by a shipper involves the questions of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, the doctrine of "primary jurisdiction" applies. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Divorce.

1. 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. Schinkel v. Schinkel 1
2. The determination of the trial court on the granting or changing of custody of minor children will not ordi-

narily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Schinkel v. Schinkel 1

3. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Liebsack v. Liebsack 266
4. When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children. Brown v. Brown 394
5. In an action for dissolution of marriage, alimony may be ordered in addition to a property settlement award. Brown v. Brown 394
6. In an action for dissolution of marriage, the award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Brown v. Brown 394
7. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Hansen v. Hansen 462
8. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal. Hansen v. Hansen 462
9. A division of property which is not patently unfair will not be disturbed by this court on appeal. Edwards v. Edwards 581
10. In child custody cases, this court gives great weight to the findings of the trial court in determining the best interests of a minor child. Greenfield v. Greenfield 648

Double Jeopardy.

The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction, is whether the offense charged in one count involves any different

elements than an offense charged in another count. State v. Hardin 314

Due Process.

1. A defendant is not denied a fair trial because persons who are 19 and 20 years of age and over 70 years of age are excluded from serving on the jury. State v. Schwartz 17
2. A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. State v. Donald 70
3. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Prendergast v. Nelson 97
4. Generally, the determination of whether an individual, under a given set of circumstances, has been afforded due process of law is a determination for the court, and not one within the province of the jury. McGreevy v. Bremers 448
5. Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Eminent Domain.

1. The power of condemnation may not be used to condemn property in excess of that needed for public pur-

poses. Krauter v. Lower Big Blue Nat. Resources Dist. 431

2. The power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature, and statutes conferring and circumscribing such power must be strictly construed. Krauter v. Lower Big Blue Nat. Resources Dist. 431

3. A natural resources district, in exercising the power of eminent domain, must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. Krauter v. Lower Big Blue Nat. Resources Dist. 431

4. In a condemnation action, under the power of eminent domain, the condemner must allege the specific public purposes for which the condemner seeks to acquire and use the property sought to be taken. Krauter v. Lower Big Blue Nat. Resources Dist. 431

5. In order for the provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisition of land by the United States for the purposes named in the statute must have been the cause, or a substantial part of the cause, of the existence of the conditions described in the statute under which the county superintendent is directed to attach the territory of the school district affected to an adjoining district or districts. State ex rel. Goetz v. Lundak 585

6. The value of property includes its value for any reasonable use to which it may be put. Reller v. Consumers Public Power Dist. 720

7. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. Reller v. Consumers Public Power Dist. 720

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. Welcome Wagon International, Inc. v. Hostesses, Inc. 27

Equity.

Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr 29

Escape.

1. It is the departure from custody rather than the departure from a place of confinement which is the essential element of the offense of escape from legal custody. State v. Reeves 725
2. The crime of escape from legal custody is committed when a prisoner escapes from the custody of an arresting officer while being taken to the place of confinement. State v. Reeves 725
3. Guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from legal custody. State v. Reeves 725

Estoppel.

1. The doctrine of equitable estoppel ordinarily cannot be invoked against a governmental entity in the exercise of governmental functions. Exceptions to the rule are made only where right and justice so demand; and the doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice. Warren v. Papillion School Dist. No. 27 410
2. Estoppel is not a cause of action, nor does it give rise to one. Its purpose is to preserve rights already acquired and not to create new ones. Warren v. Papillion School Dist. No. 27 410

Evidence.

1. 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, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Miller 19
2. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr 29
3. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen 34
4. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Merten v. Pedersen 34

Fleming Realty Ins., Inc. v. Evans 440
5. Under section 27-1003, R. R. S. 1943, a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original. State v. Costello 43
6. Evidence of other crimes than that with which the accused is charged is generally not admissible in a criminal prosecution, but such evidence is admissible to show motive, intent, or guilty knowledge; or if it establishes a course of conduct, scheme, design, or intent. State v. Costello 43
7. A new trial on the ground of newly discovered evidence may be granted when the evidence is competent, material, and credible, and so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Costello 43
8. The trial court is entitled to consider all relevant evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. State v. Costello 43
9. It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury. State v. Andrews 60
State v. Stephenson 362
10. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Andrews 60
State v. Infante 601
11. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony. State v. Donald 70
12. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Donald 70
13. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incrimi-

nating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Donald 70

14. A party moving for a new trial on the ground of newly discovered evidence must show that the evidence came to him since the trial and was not equally available to him previous to the trial, and was not simply discovered by exercise of belated diligence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. Maddox v. First Westroads Bank 81

15. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses. In the absence of obvious error, we are bound by that determination. Reed v. County of Hall 134

16. Generally, 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. Hatridge 142

17. Where the fact of insurance is relevant to some issue in a case, it cannot be properly excluded, but where not relevant to any issue, evidence of the existence of insurance coverage is inadmissible. Swartz v. Peterson 171

18. A litigant is entitled to have the jury instructed upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swartz v. Peterson 171

19. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Swartz v. Peterson 171

20. Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Metzger 186

21. Where the bill of lading reflects the shipper's weight and load count, the weight listed on the bill of lading is not, in and of itself, sufficient evidence of the quantity of goods delivered by the shipper to the carrier. In such a case the shipper must produce further evidence of the quantity of goods delivered to the carrier. Humphrey

Feed & Grain, Inc. v. Union P. R.R. Co. 189
22. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Galonka v. Gatewood 216
23. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Mills 295
State v. Partee 305
State v. Tiff 519
State v. Peery 656
24. In a prosecution for uttering a forged instrument under section 28-601, R. R. S. 1943, knowledge that the instrument is forged, and intent to prejudice, damage, or defraud another person may be inferred from the nature of the act of cashing a forged instrument and the circumstances surrounding it. State v. Mills 295
25. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. State v. Mills 295
26. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, the mechanism of death, and to establish malice or intent. The probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted. State v. Partee 305
27. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Partee 305
28. If a person charged under the provisions of section 39-669.07, R. R. S. 1943, requests that he have a physician of his choice evaluate his condition and perform, or have performed, laboratory tests he deems appropriate following the test administered at the direction of the arresting officer and is denied such opportunity, the results of the test made by the State are, if objected to by

the defendant, inadmissible. State v. Wahrman 337

29. Before the result of a chemical test of the blood, urine, or breath for the purpose of ascertaining the amount of alcoholic content in the body fluid may be introduced in evidence under section 39-669.11, R. R. S. 1943, it must be shown that the test was performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. State v. Jablonski 341

30. The purpose of the nonapplicability of the Nebraska Rules of Evidence to the Workmen's Compensation Court was to allow the compensation court to make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190. Fite v. Ammco Tools, Inc. 353

31. The Workmen's Compensation Court must permit the introduction of evidence which is admissible in the trial courts of this state. Fite v. Ammco Tools, Inc. 353

32. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition such as intent, plan, motive, design, mental feeling, pain, and bodily health is not excluded by the hearsay rule. Fite v. Ammco Tools, Inc. 353

33. The statement of intent related to the destination and purpose of a journey is admissible only if it is made at or about the time of the act of departure. Fite v. Ammco Tools, Inc. 353

34. When the condition of the record and the form of question itself shows that it is relevant and competent, no offer of proof is necessary. Fite v. Ammco Tools, Inc. 353

35. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown error may not be predicated thereon. State v. Stephenson 362

36. A photograph proved to be a true representation of what it depicts may properly be received in evidence if a proper foundation is laid. State v. Stephenson 362

37. Rights of parties are determined by appellate courts solely on the record made by the tribunal whose action is being reviewed, and no new facts or evidence can enter into consideration of the court. State v. Smith 368

38. The credibility of the testimony of an expert witness is peculiarly for the trier of fact to determine. State v. Kells 374

39. Under the Motor Vehicle Safety Responsibility Act the issue before the Director is not whether the operator was at fault in the accident but whether the evidence supports the finding that there is a reasonable possibility of a judgment being rendered against the operator involved in the accident. Berg v. Pearson 390
40. In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible. State v. Keeton 405
41. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Keeton 405
42. After a jury has considered the evidence in the light of the rule concerning circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Keeton 405
43. Official public records of governmental agencies which are not ambiguous ordinarily may not be modified by parol testimony in a collateral proceeding. Warren v. Papillion School Dist. No. 27 410
44. Evidence may be introduced resulting from knowledge legally obtained by agents of the government, although in the course of obtaining such knowledge, there was an unlawful seizure. State v. Bartlett 471
45. If a search is illegal and an order suppressing the evidence is granted, the State cannot avoid the consequence of the order by introducing testimony as to what was found and not the object itself. State v. Bartlett 471
46. The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence, or on a choice among reasonable inferences from extrinsic evidence. Don J. McMurray Co. v. Wiesman 494
47. If an integrated contract is clear and unambiguous there is no need, nor is it permissible, to consider extrinsic evidence for the purpose of contradicting or varying the terms of a written contract. Don J. McMurray Co. v. Wiesman 494
48. Evidence of prior sexual activity between a sexual as-

sault victim and any person other than the defendant may be admitted in evidence under section 28-408.05, R. R. S. 1943, when consent by the victim is at issue, and where it is established that such activity shows a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent. State v. Tiff 519

49. The operation or actual physical control of a motor vehicle, under the provisions of section 39-669.07, R. R. S. 1943, may be established by circumstantial evidence. State v. Orosco 532

50. A conviction may rest upon circumstantial evidence if it is substantial. State v. Frandsen 546

51. Evidence which does not appear in the record cannot be considered by this court on appeal. Pedersen v. Lambert 595

52. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Where, however, different minds may reasonably draw different conclusions or inferences from the evidence, or if there is a conflict therein, the issues of negligence and contributory negligence are for the jury. Krehnke v. Farmers Union Co-Op. Assn. 632

53. Where there is a conflict in the evidence, this court will presume that the controverted facts were decided in favor of the successful party, and the judgment will not be disturbed on appeal unless it is clearly wrong. Krehnke v. Farmers Union-Co-Op. Assn. 632

54. The violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Krehnke v. Farmers Union Co-Op. Assn. 632

55. The trial court's findings will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Greenfield v. Greenfield 648

56. The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling. State v. Henggeler 651

57. Photographs are properly admissible as evidence if it be shown that they are true and correct representa-

tions of the place or subject they purport to represent at a time pertinent to the inquiry. State v. Henggeler 651
58. Great latitude is allowed the trial judge in ruling on the admissibility of a hypothetical question. State v. Henggeler 651
59. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Peery 656
60. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. Hansen v. Circle Lake Development Corp. 678
61. Knowledge and intent may be proved by circumstantial evidence. State v. Caradori 691
62. If the facts are such that a man of the age, intelligence, and experience of the defendant would know that property was stolen, then the evidence is sufficient to sustain a finding of guilty knowledge. State v. Caradori 691
63. Evidence of a juvenile adjudication is not admissible for the purpose of impeachment. State v. Caradori 691
64. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. 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. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
65. Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach. Such damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
66. Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be

recovered under section 2-715, U.C.C., if the evidence is such that damages can be ascertained with a reasonable degree of certainty. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

67. The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

68. To sustain a finding of undue influence in the case of a deed it must be shown by clear and satisfactory evidence: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Rule v. Roth 746
Biggerstaff v. Ostrand 808

69. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Rule v. Roth 746

70. Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. Kraemer v. Mental Health Board of the State of Nebraska 784

71. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." § 27-703, R. R. S. 1943. This statute is applicable to expert testimony presented in proceedings under the Nebraska Mental Health Commitment Act. Kraemer v. Mental Health Board of the State of Nebraska 784

72. The undue influence must be such as controls the will of

the grantor. Biggerstaff v. Ostrand 808
73. A defendant's physical appearance may be considered by the jury in determining his or her age, although the jury may not fix the age of the defendant by merely observing him or her during the trial without the benefit of other relevant evidence. State v. Lauritsen 816

Ex Post Facto.

The constitutional prohibition against the passage of ex post facto laws applies only to penal or criminal matters. Lentz v. Saunders 3

Fees.

1. The Legislature was within its authority in requiring that fee arrangements be subject to review by the courts. Prendergast v. Nelson 97
2. Ordinarily, the division of attorneys' fees rests in the sound judicial discretion of the trial court. Evans v. Evans 480
3. An order fixing fees in a partition action is a final, appealable order. Evans v. Evans 480
4. In the absence of an express stipulation to the contrary, the right to a commission is not dependent on the consummation of a loan. Don J. McMurray Co. v. Wiesman 494
5. The unjustified failure or refusal of the principal to complete a transaction does not ordinarily defeat the right of the broker to his commission as called for by the contract. Don J. McMurray Co. v. Wiesman 494
6. If the actual closing of the loan is a contractual condition of the broker's right to a fee, then the failure to close forecloses the right to a fee. Don J. McMurray Co. v. Wiesman 494

Firemen.

The right of a fireman to educational bonus points on promotional examinations in accordance with a program adopted and announced by the city vests upon completion of the work as provided in the program. Barbee v. City of Omaha 644

Forgery.

1. A bank is bound to know the genuine signature of its customers, and may not charge a customer's account without receiving a valid order to do so. § 4-401, U. C. C. It may not properly charge a customer's account on the basis of a forged withdrawal slip. Maddox v. First Westroads Bank 81

2. Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check. Maddox v. First Westroads Bank 81
3. Under section 4-207, U. C. C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. Maddox v. First Westroads Bank 81
4. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective. Maddox v. First Westroads Bank 81
5. Under sections 1-201 and 3-302, U. C. C., a collecting bank receiving a check bearing a forged endorsement is not a holder in due course of the item. Maddox v. First Westroads Bank 81
6. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox v. First Westroads Bank 81
7. In a prosecution for uttering a forged instrument under section 28-601, R. R. S. 1943, knowledge that the instrument is forged, and intent to prejudice, damage, or defraud another person may be inferred from the nature of the act of cashing a forged instrument and the circumstances surrounding it. State v. Mills 295

Fraud.

1. To maintain or defend an action on the ground of false representation, the pleader must allege and prove what representation was made, that it was false and so known by the party making it or was made without knowledge as a positive statement of known fact, that the pleader believed the representation to be true, and that he relied on and acted upon it and was thereby injured. Smith v. Wrehe 753
2. The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless

such representations as to future acts are falsely and fraudulently made with an intent to deceive. Smith v. Wrehe 753

Grain.

In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Habeas Corpus.

1. Habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally held and habeas corpus is a proper remedy. Gamron v. Parratt 163
2. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. Gamron v. Parratt 163

Habitual Criminals.

There are differing purposes for incarceration under the habitual offender law and sexual sociopath law. For the habitual offender, the purpose is punishment only; for the sexual sociopath, the purpose is treatment, if possible, and punishment is only incidental. State v. Little 772

Hearings.

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. Svoboda 452

Homicide.

1. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, the mechanism of death, and to establish malice or intent. The probative value of such evidence should be weighed

against its possible prejudicial effect before it is admitted. State v. Partee 305

2. In determining whether the sentence shall be fixed either at death or life imprisonment, such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death; or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances. State v. Peery 656
3. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate. State v. Peery 656
4. Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts. State v. Peery 656
5. Under aggravating circumstance (1) (c) of section 29-2523, R. R. S. 1943, a murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Peery 656
6. Aggravating circumstance (1) (d) of section 29-2523, R. R. S. 1943, exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Peery 656
7. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Peery 656

Impeachment.

1. A prior conviction of the defendant offered for the purpose of impeachment may be proved only by an admission of the defendant or the public record of the conviction. State v. Caradori 691
2. Evidence of a juvenile adjudication is not admissible for the purpose of impeachment. State v. Caradori 691

Indictments and Informations.

1. Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court. State v. Costello 43
2. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43
3. The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary examination. State v. Costello 43

Infants.

1. 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. Schinkel v. Schinkel 1
2. The determination of the trial court on the granting or changing of custody of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Schinkel v. Schinkel 1

Injunction

The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Paasch v. Brown 683

Instructions.

1. An instruction which directs the jury to apply community standards without specifying what community is not erroneous. State v. Schwartz 17
2. A litigant is entitled to have the jury instructed upon those theories of the case which are presented by the pleadings and which are supported by competent evi-

dence. Swartz v. Peterson 171
3. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. Galonka v. Gatewood 216
4. The giving of a technically incorrect instruction is not ground for reversal where it could not have prejudiced the rights of the losing party. Fleming Realty & Ins., Inc. v. Evans 440
5. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself, and other instructions given, that the jury was not confused or misled by the error. Fleming Realty & Ins., Inc. v. Evans 440
6. A request that the jury be instructed that it is the sole judge of both the law and the facts is properly refused. State v. Soester 477
7. It is the duty of the trial court to instruct the jury on the proper basis and measure of damages. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489
8. In a larceny case the jury should be instructed to ascertain and declare in its verdict the value of the property stolen. State v. Frandsen 546
9. An instruction that a material element of the crime of petit larceny is that the defendant stole property of value is not erroneous. State v. Frandsen 546
10. Where instructions to the jury correctly state the law, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Failure to object to instructions after they are submitted to counsel for review precludes raising an objection to the instructions on appeal. Krehnke v. Farmers Union Co-Op. Assn. 632
11. Where a general charge fairly presents the case to the jury, it is not error for the trial court in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Smith v. Wrehe 753

Insurance.

Where the fact of insurance is relevant to some issue in a case, it cannot be properly excluded, but where not relevant to any issue, evidence of the existence of insurance coverage is inadmissible. Swartz v. Peterson 171

Intent.

1. Intent is seldom capable of direct proof. It may, however, be inferred from the words and acts of the defendant, and from the facts and circumstances surrounding

his conduct. State v. Keeton 405
2. When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties to it are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law. Don J. McMurray Co. v. Wiesman 494
3. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507
4. Knowledge and intent may be proved by circumstantial evidence. State v. Caradori 691

Interest.

1. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Fleming Realty & Ins., Inc. v. Evans 440
2. Prejudgment interest may be allowed only on claims where the amount to be recovered may be computed without reliance upon opinion or discretion. Freihe v. State 504

Interstate Commerce.

1. The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make appropriate the attainment of a legitimate aim of Congress. Pioneer Airways, Inc. v. City of Kearney 12
2. The power of Congress to regulate interstate commerce is not limited by the fact that intrastate transactions have become so interwoven therewith that the effective control of interstate commerce by Congress incidentally controls intrastate commerce. Pioneer Airways, Inc. v. City of Kearney 12
3. Congress has preempted the field of interstate air transportation in regard to the routes and points to be served by commuter air carriers to the exclusion of conflicting regulation by the states. Pioneer Airways, Inc. v. City of Kearney 12
4. The Nebraska Public Service Commission lacks jurisdiction over commuter air carriers engaged in interstate commerce, since the federal government has preempted the field. Pioneer Airways, Inc. v. City of Kearney 12
5. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recov-

ered under section 74-715, R. R. S. 1943. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Interstate Commerce Commission.

1. The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
2. Under the doctrine of "primary jurisdiction," preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters, and when uniformity can only be secured if determination is made by the Interstate Commerce Commission. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
3. The Interstate Commerce Commission must make the initial determination as to whether rail service provided by an interstate carrier is reasonable. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Intervention.

1. The interest required for intervention as a matter of right is a direct and immediate legal interest of such a character that the intervener will either lose or gain by the direct operation and legal effect of the judgment. Colman v. Colman Foundation, Inc. 263
2. The possibility that a charitable organization might share in the assets of another charity is not a sufficient interest to support intervention as a matter of right in a proceeding to liquidate the charity and distribute its assets. Colman v. Colman Foundations, Inc. 263

Intoxicating Liquors.

1. In order that a defendant may be punished as a third offender under section 39-669.07 (3), R. R. S. 1943, it is necessary only that he be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor and it is not necessary that he previously have been charged and punished as a second offender under the provisions of section 39-669.07 (2), R. R. S. 1943. State v. Orosco 532

2. The word "operates" as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor refers to the actual physical handling of the controls while under the influence of intoxicating liquor. State v. Nielsen 597
3. "No law enforcement officer shall have any interest in an establishment or place of business which has a liquor license. This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-194.01, R. R. S. 1943. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
4. A statute which prohibits active law enforcement officers from participating in any manner in the management or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, or it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
5. "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the [Nebraska Liquor Control] commission." § 53-116, R. R. S. 1943. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
6. The policy of a municipality limiting the number of liquor licenses to be issued is not binding on the Nebraska Liquor Control Commission. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the 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. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
8. The recommendation of the city council founded upon a policy limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

9. Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Intrastate Commerce.

1. The power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce or the exercise of the power of Congress over it as to make appropriate the attainment of a legitimate aim of Congress. Pioneer Airways, Inc. v. City of Kearney 12
2. The power of Congress to regulate interstate commerce is not limited by the fact that intrastate transactions have become so interwoven therewith that the effective control of interstate commerce by Congress incidentally controls intrastate commerce. Pioneer Airways, Inc. v. City of Kearney 12
3. Congress has preempted the field of interstate air transportation in regard to the routes and points to be served by commuter air carriers to the exclusion of conflicting regulation by the states. Pioneer Airways, Inc. v. City of Kearney 12
4. The Nebraska Public Service Commission lacks jurisdiction over commuter air carriers engaged in interstate commerce, since the federal government has preempted the field. Pioneer Airways, Inc. v. City of Kearney 12

Inviter and Invitee.

1. When foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. Williams v. Bedford Market, Inc. 577
2. When a hazardous condition on the floor of a store results from conduct of the public, a storekeeper is liable only for negligent omission on his part to remove the hazard after he knows of it, or by the exercise of reasonable care, should have known of it. Williams v. Bedford Market, Inc. 577
3. The duty of a storekeeper to an invitee is to use reason-

able care to keep the premises reasonably safe for the use of the invitee, but this does not make him an insurer against accident or of safety of customers. Williams v. Bedford Market, Inc. 577

Joint Tenancy.

1. Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition. Yunghans v. O'Toole 317
   Cofer v. Perkins 327
2. A joint tenant's act which destroys one or more of the coexisting unities necessary to existence of joint tenancy operates as a severance of the joint tenancy and extinguishes the right of survivorship. Yunghans v. O'Toole 317
   Cofer v. Perkins 327

Judges.

A trial judge's overruling of a motion for change of 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. Costello 43

Judgments.

1. A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment. Paine v. United States Nat. Bank of Omaha 248
2. A supersedeas does not operate against the judgment itself but rather against its enforcement. Marksbury & Washington v. Board of Education 283
3. In the absence of a supersedeas, a judgment or final order shall retain its vitality and be capable of execution during the pendency of an appeal. Marksbury & Washington v. Board of Education 283
4. Where the sum in question is not specified in the petition or the summons, the court has jurisdiction, but may not render judgment for a sum in excess of the jurisdictional amount even though damages in excess of that amount might be proved. Bruno v. Kelly 334
5. The review in the District Court of a judgment of the municipal court in a civil action is de novo upon the record together with any additional evidence that may be received in the District Court. Stitt Constr. Co. v. Canine's Cupid, Inc. 400
6. It is the duty of the District Court to reach an independ-

ent conclusion and consider the matter as if there had not been a prior determination in the municipal court. Stitt Constr. Co. v. Canine's Cupid, Inc. 400

7. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Stitt Constr. Co. v. Canine's Cupid, Inc. 400

8. Prejudgment interest may be allowed only on claims where the amount to be recovered may be computed without reliance upon opinion or discretion. Freihe v. State 504

9. A judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the District Court may be reversed, vacated, or modified by the District Court. § 25-1901, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513

10. A judgment of conviction may be proved by a certified copy therefor. §§ 27-902, 27-1005, R. R. S. 1943. State v. Orosco 532

11. When a defendant collaterally attacks a judgment of conviction, the burden is upon him to show the grounds of the claimed invalidity if it does not show upon the face of the record. State v. Orosco 532

12. A conviction founded upon a plea of nolo contendere may be used to support an enhanced sentence. State v. Orosco 532

13. A conviction may rest upon circumstantial evidence if it is substantial. State v. Frandsen 546

14. The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. State v. Godboldt 561

15. Where there is a conflict in the evidence, this court will presume that the controverted facts were decided in favor of the successful party, and the judgment will not be disturbed on appeal unless it is clearly wrong. Krehnke v. Farmers Union Co-Op. Assn. 632

16. The judgment of the trial court in an action at law when a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Hansen v. Circle Lake Development Corp. 678

17. Where trial is to the court, 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. Hansen v. Circle Lake Development Corp. 678

18. An order of the District Court which vacates a judgment of the county court and remands the cause to the county court for a new trial is not a final order from which an appeal may be taken to this court. Martin v. Zweygardt 770

Juries.

1. It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury. State v. Andrews 60
   State v. Stephenson 362
2. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Andrews 60
3. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself, and other instructions given, that the jury was not confused or misled by the error. Fleming Realty & Ins., Inc. v. Evans 440
4. There is no constitutional right to a trial before a 12-member jury on a complaint charging a petit offense. State v. Soester 477
5. A request that the jury be instructed that it is the sole judge of both the law and the facts is properly refused. State v. Soester 477
6. Section 24-536, R. R. S. 1943, provides that either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. State v. Nielsen 597
7. It is not the province of this court to resolve the issue of credibility of witnesses, as such matters are for the jury. State v. Infante 601
8. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Where, however, different minds may reasonably draw different conclusions or inferences from the evidence, or if there is a conflict therein, the issues of negligence and contributory negligence are for the jury. Krehnke v. Farmers Union Co-Op. Assn. 632

Jurisdiction.

1. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Costello 43
2. All claims or causes of action arising while the patient and the health care provider were subject to the terms and provisions of an act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain subject to it as to that cause of action until its determination. Prendergast v. Nelson 97
3. The Interstate Commerce Commission and the federal courts do not have exclusive jurisdiction of claims against interstate carriers. The Interstate Commerce Act did not supersede the jurisdiction of state courts in cases where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
4. Under the doctrine of "primary jurisdiction," preliminary resort to the Interstate Commerce Commission is required where the inquiry is essentially one of fact and of discretion in technical matters, and when uniformity can only be secured if determination is made by the Interstate Commerce Commission. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
5. In a civil action for money judgment in a court of limited jurisdiction, it is the amount claimed by the plaintiff which determines the jurisdiction of the court over the subject matter. Bruno v. Kelly 334
6. Where the sum in question is not specified in the petition or the summons, the court has jurisdiction, but may not render judgment for a sum in excess of the jurisdictional amount even though damages in excess of that amount might be proved. Bruno v. Kelly 334
7. If an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of which the victim may have been brought in the prosecution of the offense or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Tiff 519

8. Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions. State v. Benson 549

Jurors.

1. A defendant is not denied a fair trial because persons who are 19 and 20 years of age and over 70 years of age are excluded from serving on the jury. State v. Schwartz 17
2. It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and not to inflame the prejudices or excite the passions of the jury against the accused. State v. Costello 43

Larceny.

1. In a larceny case the jury should be instructed to ascertain and declare in its verdict the value of the property stolen. State v. Frandsen 546
2. An instruction that a material element of the crime of petit larceny is that the defendant stole property of value is not erroneous. State v. Frandsen 546

Legislature.

1. The control of the Legislature over school districts and their powers is plenary, subject only to constitutional provisions. Lentz v. Saunders 3
2. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Prendergast v. Nelson 97
3. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative

to the subject of the legislation which render appropriate its enactment. Prendergast v. Nelson 97
4. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Prendergast v. Nelson 97
5. Article VII, section 10, of the Constitution of Nebraska, requires the Legislature to enact legislation vesting the general government of the University of Nebraska in the Board of Regents. Board of Regents v. Exon 146
6. Although the Legislature may prescribe the duties and powers of the Board of Regents the general government of the University must remain vested in the Board of Regents and the powers and duties of the Board of Regents can not be delegated to other officers or agencies. Board of Regents v. Exon 146
7. It was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975. Johnson & Cunningham v. Exon 154
8. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Holmgren v. City of Lincoln 178
9. It is within the prerogative of the Legislature to determine whether the possession of marijuana, including possession for personal use, is to be decriminalized. State v. Kells 374
10. When the Legislature makes a determination that the use of some substance is harmful and that the use, act, or possession must be prohibited in the interest of the public welfare, the equal protection clause of the Constitution does not require that the State must choose between attacking every aspect of the problem, or not attacking the problem at all. It is enough that the State's action has a rational basis. State v. Kells 374
11. The power of eminent domain may be exercised only on the occasion and in the mode or manner prescribed by the Legislature, and statutes conferring and circumscribing such power must be strictly construed. Krauter v. Lower Big Blue Nat. Resources Dist. 431
12. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Wang v. Board of Education 564
13. Where, because a statute is ambiguous, it is necessary

to construe it, the principal objective is to determine legislative intent. Wang v. Board of Education 564
14. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. Wang v. Board of Education 564
15. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. Wang v. Board of Education 564
16. The Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime. State v. Little 772

Lesser-Included Offenses.

A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Comer 762

Licenses and Permits.

1. "No law enforcement officer shall have any interest in an establishment or place of business which has a liquor license. This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-194.01, R. R. S. 1943. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
2. A statute which prohibits active law enforcement officers from participating in any manner in the management or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, for it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
3. "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic

liquors, except as specifically delegated in this act, is hereby vested exclusively in the [Nebraska Liquor Control] commission." § 53-116, R. R. S. 1943. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

4. The policy of a municipality limiting the number of liquor licenses to be issued is not binding on the Nebraska Liquor Control Commission. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
5. The recommendation of the city council founded upon a policy limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
6. Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Liens.

If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed. Raymond International, Inc. v. Realbanc, Inc. 607

Limitations of Actions.

The statute of limitations is tolled during the period the matter of medical liability is subject to consideration by the medical review panel and for a period of 90 days following its opinion. Prendergast v. Nelson 97

Malpractice.

1. The statute of limitations is tolled during the period the matter of medical liability is subject to consideration by the medical review panel and for a period of 90 days following its opinion. Prendergast v. Nelson 97
2. All claims or causes of action arising while the patient and the health care provider were subject to the terms

and provisions of an act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain subject to it as to that cause of action until its determination. Prendergast v. Nelson 97

3. There is no impairment of the obligation of contract. The purpose of this provision is to eliminate possible windfalls resulting from double recovery of damages. Prendergast v. Nelson 97
4. The Legislature was within its authority in requiring that fee arrangements be subject to review by the courts. Prendergast v. Nelson 97
5. The Nebraska Hospital-Medical Liability Act in no way may be construed to grant or impair the credit of the state. Prendergast v. Nelson 97
6. Nothing in the Nebraska Hospital-Medical Liability Act in any way implies the state is to be obligated with respect to the Excess Liability Fund or liable for any other amounts due pursuant to the act. Prendergast v. Nelson 97
7. Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment. Galonka v. Gatewood 216
8. To make a skillful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor. Galonka v. Gatewood 216

Mandamus.

1. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong. State ex rel. Goetz v. Lundak 585
2. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. State ex rel. Goetz v. Lundak 585
3. In an action in mandamus the relator has the burden of proof and must show clearly and conclusively that he is entitled to the particular thing he asks and that the respondent is legally obligated to act. State ex rel. Goetz v. Lundak 585

4. The writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. State ex rel. Goetz v. Lundak 585
5. Although mandamus is denominated a law action, it is largely controlled by equitable principles. State ex rel. Goetz v. Lundak 585
6. Where the issuance of a writ of mandamus would disturb official action, or create disorder or confusion, it may be denied, and this is so even when the petitioner has a clear legal right for which mandamus would be an appropriate remedy. State ex rel. Goetz v. Lundak 585

Master and Servant.

Where there is no substantial change in the condition of a person from the date of an accidental injury to the date of certification of total and permanent disability, the person is totally and permanently disabled from the date of the accident and is not within the terms of a pension contract which conditions eligibility on becoming totally and permanently disabled after a specified date if injury occurred prior to that date. Farr v. Fruehauf Corp. 349

Mental Health.

1. Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. Kraemer v. Mental Health Board of the State of Nebraska 784
2. A mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was declared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm. Kraemer v. Mental Health Board of the State of Nebraska 784
3. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those per-

ceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." § 27-703, R. R. S. 1943. This statute is applicable to expert testimony presented in proceedings under the Nebraska Mental Health Commitment Act. Kraemer v. Mental Health Board of the State of Nebraska 784

4. The Nebraska Mental Health Commitment Act is not unconstitutional because the standard of proof it prescribes is that of clear and convincing evidence rather than proof beyond a reasonable doubt. Kraemer v. Mental Health Board of the State of Nebraska 784

Mental Illness.

1. The significant factor operating to permit differing treatment of those classified as mentally ill dangerous persons and those classified as sexual sociopaths, is the criminal conviction of the latter class. State v. Little 772
2. The Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime. State v. Little 772

Minors.

1. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Liebsack v. Liebsack 266
2. The determination as to whether the name of a minor child should be changed rests within the sound discretion of the trial court. Spatz v. Spatz 332
3. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. Spatz v. Spatz 332
4. As a general rule a change of name should be granted only when the substantial welfare of the child requires that the name be changed. Spatz v. Spatz 332
5. The court may terminate all parental rights between the parents and a child when the court finds such action to be in the best interests of the child and it appears by the evidence that the following condition exists: The parents have abandoned the child for 6 months or more

immediately prior to the filing of the petition. State v. Hernandez 386

6. Findings of the trial court as to the evaluation of evidence to have children adjudged to be neglected and dependent, and to terminate parental rights as well as determining the question of custody, will not be disturbed on appeal absent a showing of clear abuse of discretion. State v. Hernandez 386

7. A bare assertion of parental natural right cannot prevail against the clear best interests of the children and overwhelming evidence of disinterest and abandonment. State v. Hernandez 386

Mistrial.

Failure to declare a mistrial when the prosecutor indicated a desire to give testimony is not prejudicial error where the trial judge unequivocally sustained the defendant's objection and instructed the jury to disregard the prosecutor's remark. State v. Peery 656

Mortgages.

If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed. Raymond International, Inc. v. Realbanc, Inc. 607

Motions, Rules, and Orders.

1. A trial judge's overruling of a motion for change of 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. Costello 43

2. A motion for a continuance is addressed to the sound discretion of the court, and, in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Yunghans v. O'Toole 317

3. The grant or denial of a motion to amend the pleadings in the furtherance of justice rests in the sound discretion of the trial judge. Yunghans v. O'Toole 317

4. In the absence of some mitigating factors which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a mo-

tion to amend pleadings. Yunghans v. O'Toole 317
5. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order. Evans v. Evans 480
6. An order is final when the substantial rights of the parties to the action are determined even though the cause is retained for the determination of matters incidental thereto. Evans v. Evans 480
7. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of the purposes for which the order was entered. Paasch v. Brown 683
8. An order of the District Court which vacates a judgment of the county court and remands the cause to the county court for a new trial is not a final order from which an appeal may be taken to this court. Martin v. Zweygardt 770

Motor Vehicles.

1. Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. Swartz v. Peterson 171
2. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Swartz v. Peterson 171
3. A prosecution for a "traffic infraction" under the "Nebraska Rules of the Road" is a criminal offense within the meaning of the double jeopardy provisions of Article I, section 12, of the Constitution of the State of Nebraska. State v. Knoles 211
4. If a person charged under the provisions of section 39-669.07, R. R. S. 1943, requests that he have a physician of his choice evaluate his condition and perform, or have performed, laboratory tests he deems appropriate following the test administered at the direction of the arresting officer and is denied such opportunity, the results of the test made by the State are, if objected to by the defendant, inadmissible. State v. Wahrman 337
5. Section 39-669.09, R. R. S. 1943, which provides that if

the officer directs that the test shall be of the person's blood or urine, such person may choose whether the test shall be of blood or urine, does not require the officer to notify the person of his option, and if the person takes one or the other of these tests, then he has waived his right to insist that the test to be made by the State be the one of his choice. State v. Wahrman 337

6. Before the result of a chemical test of the blood, urine, or breath for the purpose of ascertaining the amount of alcoholic content in the body fluid may be introduced in evidence under section 39-669.11, R. R. S. 1943, it must be shown that the test was performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. State v. Jablonski 341

7. Under the Motor Vehicle Safety Responsibility Act the issue before the Director is not whether the operator was at fault in the accident but whether the evidence supports the finding that there is a reasonable possibility of a judgment being rendered against the operator involved in the accident. Berg v. Pearson 390

8. Upon a petition for review of an order of suspension of an operator's license the issue is the same as that which was before the Director but the District Court must consider any additional facts developed in the hearing in the District Court. Berg v. Pearson 390

9. The operation or actual physical control of a motor vehicle, under the provisions of section 39-669.07, R. R. S. 1943, may be established by circumstantial evidence. State v. Orosco 532

10. The offering of a preliminary test of the breath under section 39-669.08(3), R. R. S. 1943, is not a condition precedent to the making of a valid arrest "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08 (2), R. R. S. 1943. State v. Orosco 532

11. The authority of an officer to make arrests "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor," § 39-669.08 (2), R. R. S. 1943, depends not upon the terms of the implied consent statute, but exists by virtue of the common law as codified in the statutes of the State of Nebraska, to wit, sections 29-401 and 29-404.02, R. R. S. 1943. State v. Orosco 532

12. In order that a defendant may be punished as a third

offender under section 39-669.07 (3), R. R. S. 1943, it is necessary only that he be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor and it is not necessary that he previously have been charged and punished as a second offender under the provisions of section 39-669.07 (2), R. R. S. 1943. State v. Orosco 532

13. The word "operates" as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor refers to the actual physical handling of the controls while under the influence of intoxicating liquor. State v. Nielsen 597

Municipal Corporations.

1. Zoning regulations shall be designed to secure safety from fire, flood, and other dangers and to promote the public health, safety, and general welfare, and shall be made with consideration having been given to the character of the various parts of the area zoned and their peculiar suitability for particular uses and types of development, and with a view to conserving property values and encouraging the most appropriate use of land throughout the area zoned, in accordance with a comprehensive plan. § 15-902, R. R. S. 1943. Holmgren v. City of Lincoln 178
2. A comprehensive plan is a guide to community development. Holmgren v. City of Lincoln 178
3. An owner of property which does not abut upon a street proposed to be vacated by action of the city is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large, and the fact that the property owner or others who must enter or leave the property must take a more roundabout way to reach the property does not constitute special or peculiar injury different in kind from that suffered by the public at large. Rossitto v. City of Omaha 260
4. A landowner has no vested interest in the flow of traffic past his property and damage caused by diversion of traffic is not normally compensable. Rossitto v. City of Omaha 260
5. Under the provisions of Article XI, section 2, Constitution of Nebraska, a home rule charter must be consistent with and subject to the Constitution and laws of this state. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507
6. The right of a fireman to educational bonus points on promotional examinations in accordance with a pro-

gram adopted and announced by the city vests upon completion of the work as provided in the program. Barbee v. City of Omaha 644
7. An ordinance which provides that promotional examinations shall take into consideration the length of service of employees is binding on the city. Barbee v. City of Omaha 644
8. The policy of a municipality limiting the number of liquor licenses to be issued is not binding on the Nebraska Liquor Control Commission. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
9. The recommendation of the city council founded upon a policy limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Names.

1. The determination as to whether the name of a minor child should be changed rests within the sound discretion of the trial court. Spatz v. Spatz 332
2. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. Spatz v. Spatz 332
3. As a general rule a change of name should be granted only when the substantial welfare of the child requires that the name be changed. Spatz v. Spatz 332

Natural Resources Districts.

A natural resources district, in exercising the power of eminent domain, must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. Krauter v. Lower Big Blue Nat. Resources Dist. 431

Negligence.

1. The general rule is that one who causes work to be done is not liable for injuries that result to an adjoining owner from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. Merten v. Pedersen 34
2. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox

v. First Westroads Bank 81
3. Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. Swartz v. Peterson 171
4. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. Swartz v. Peterson 171
5. To make a skillful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor. Galonka v. Gatewood 216
6. An action for the wrongful death of a stillborn fetus may not be maintained under section 30-809, R. R. S. 1943. Egbert v. Wenzl 573
7. When foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. Williams v. Bedford Market, Inc. 577
8. When a hazardous condition on the floor of a store results from conduct of the public, a storekeeper is liable only for negligent omission on his part to remove the hazard after he knows of it, or by the exercise of reasonable care, should have known of it. Williams v. Bedford Market, Inc. 577
9. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but this does not make him an insurer against accident or of safety of customers. Williams v. Bedford Market, Inc. 577
10. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Where, however, different minds may reasonably draw different conclusions or inferences from the evidence, or if there is a conflict therein, the issues of negligence and contributory negligence are for the jury. Krehnke v. Farmers Union Co-Op. Assn. 632
11. One who is capable of understanding and discretion,

who fails to exercise ordinary care and prudence to avoid open, obvious defects and dangers, is negligent or contributorily negligent. Negligence must be measured against the particular set of facts and circumstances which are present in each case. Krehnke v. Farmers Union Co-Op. Assn. 632

12. In using an elevator a person is required to exercise reasonable care for his own protection, and ordinarily the question of contributory negligence is for the jury. Krehnke v. Farmers Union Co-Op. Assn. 632

13. The violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Krehnke v. Farmers Union Co-Op. Assn. 632

Negotiable Instruments.

1. Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check. Maddox v. First Westroads Bank 81

2. Under section 4-207, U. C. C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. Maddox v. First Westroads Bank 81

3. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective. Maddox v. First Westroads Bank 81

4. Under sections 1-201 and 3-302, U. C. C., a collecting bank receiving a check bearing a forged endorsement is not a holder in due course of the item. Maddox v. First Westroads Bank 81

5. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox v. First Westroads Bank 81

New Trial.

1. A new trial on the ground of newly discovered evidence

may be granted when the evidence is competent, material, and credible, and so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Costello 43

2. A party moving for a new trial on the ground of newly discovered evidence must show that the evidence came to him since the trial and was not equally available to him previous to the trial, and was not simply discovered by exercise of belated diligence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. Maddox v. First Westroads Bank 81

3. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. State v. Mills 295

4. A motion for new trial on the ground of accident or surprise under section 29-2101, R. R. S. 1943, is properly overruled when a request for a continuance on that ground was not made at or prior to trial. State v. Mills 295

5. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett 471

6. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489

7. The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489

8. Whether the decision was to grant a new trial or deny one, the issues in the Supreme Court are whether the alleged error or errors appear in the record and were called to the attention of the trial court by the motion; and whether they constitute prejudicial error to the party complaining. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 489

9. An appellant in an appeal to this court following an appeal to the District Court pursuant to section 24-541, R. R. S. 1943, is required to file a motion for a new trial

in the District Court if this court is to review the question of the sufficiency of the evidence and other assignments of error. Christensen v. Eastern Nebraska Equipment Co., Inc. 741

10. An order of the District Court which vacates a judgment of the county court and remands the cause to the county court for a new trial is not a final order from which an appeal may be taken to this court. Martin v. Zweygardt 770

11. While this court may have jurisdiction, it will not ordinarily 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. Beans 807

Notice.

1. Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the last previous assessment. Reed v. County of Hall 134

2. Where an applicant has not had notice of and been afforded an opportunity before the Nebraska Liquor Control Commission to meet an issue relevant and material to the issuance of the license applied for, the appropriate remedy in the court is not to direct the issuance of a license, but to order a new hearing after proper notice of the issue. J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694, overruled in part. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Obstructing Justice.

By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court. Paasch v. Brown 683

Ordinances.

An ordinance which provides that promotional examinations shall take into consideration the length of service of employees is binding on the city. Barbee v. City of Omaha 644

Parent and Child.

1. 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. Schinkel v. Schinkel 1
2. The determination of the trial court on the granting or changing of custody of minor children will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Schinkel v. Schinkel 1
3. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Liebsack v. Liebsack 266
4. The determination as to whether the name of a minor child should be changed rests within the sound discretion of the trial court. Spatz v. Spatz 332
5. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. Spatz v. Spatz 332
6. As a general rule a change of name should be granted only when the substantial welfare of the child requires that the name be changed. Spatz v. Spatz 332
7. The court may terminate all parental rights between the parents and a child when the court finds such action to be in the best interests of the child and it appears by the evidence that the following condition exists: The parents have abandoned the child for 6 months or more immediately prior to the filing of the petition. State v. Hernandez 386
8. Findings of the trial court as to the evaluation of evidence to have children adjudged to be neglected and dependent, and to terminate parental rights as well as determining the question of custody, will not be disturbed on appeal absent a showing of clear abuse of discretion. State v. Hernandez 386
9. A bare assertion of parental natural right cannot prevail against the clear best interests of the children and overwhelming evidence of disinterest and abandonment. State v. Hernandez 386
10. Sexual misconduct does not automatically disqualify a mother from obtaining custody of her minor children. Greenfield v. Greenfield 648
11. In child custody cases, this court gives great weight to the findings of the trial court in determining the best interests of a minor child. Greenfield v. Greenfield 648

Partition.

1. Once joint title in real estate has been established, partition may be had as a matter of law. Yunghans v.

O'Toole 317
2. Joint tenancy may be terminated or severed by any act which destroys one or more of its unities, and may also be severed by the act of joint tenants in destroying unity of possession, as by partition. Yunghans v. O'Toole 317
Cofer v. Perkins 327
3. A joint tenant's act which destroys one or more of the coexisting unities necessary to existence of joint tenancy operates as a severance of the joint tenancy and extinguishes the right of survivorship. Yunghans v. O'Toole 317
Cofer v. Perkins 327
4. Partition, if well-founded, is an absolute right, and a conservator need not obtain a license to bring such a suit. Cofer v. Perkins 327
5. An action for partition is triable de novo on the record in the Supreme Court. Cofer v. Perkins 327
6. An order fixing fees in a partition action is a final, appealable order. Evans v. Evans 480

Pensions.

1. Where there is no substantial change in the condition of a person from the date of an accidental injury to the date of certification of total and permanent disability, the person is totally and permanently disabled from the date of the accident and is not within the terms of a pension contract which conditions eligibility on becoming totally and permanently disabled after a specified date if injury occurred prior to that date. Farr v. Fruehauf Corp. 349
2. Where a pension forms an inducement to an individual to enter and remain in the service, the pension is a part of the compensation paid for those services. If no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507

Physician and Client.

All claims or causes of action arising while the patient and the health care provider were subject to the terms and provisions of an act would be subject to adjudication in accordance with the provisions of the act. While each of the parties could change his or her status before a cause of action arose, if the cause of action arose while the parties were subject to the act, they remain

subject to it as to that cause of action until its determination. Prendergast v. Nelson 97

Physicians and Surgeons.

1. Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment. Galonka v. Gatewood 216
2. To make a skillful and careful diagnosis of the trouble from which the plaintiff is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor. Galonka v. Gatewood 216

Pleadings.

1. A litigant is entitled to have the jury instructed upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swartz v. Peterson 171
2. The trial court has discretion to permit or deny amendments of pleadings on motion to conform to the evidence at the close of all evidence. Swartz v. Peterson 171
3. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Galonka v. Gatewood 216
4. The grant or denial of a motion to amend the pleadings in the furtherance of justice rests in the sound discretion of the trial judge. Yunghans v. O'Toole 317
5. Failure to file a timely motion to suppress constitutes a waiver. State v. Bartlett 471
6. The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. State v. Godboldt 561
7. 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. Pedersen v. Lambert 595
8. To maintain or defend an action on the ground of false representation, the pleader must allege and prove what representation was made, that it was false and so known by the party making it or was made without knowledge as a positive statement of known fact, that the pleader believed the representation to be true, and that he relied on and acted upon it and was thereby injured. Smith v. Wrehe 753

Pleas.

1. A conviction founded upon a plea of nolo contendere may be used to support an enhanced sentence. State v. Orosco 532
2. A plea of guilty or nolo contendere must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea knowingly and voluntarily. State v. Benson 549

Politicial Subdivisions.

The provisions of section 79-420, R. R. S. 1943, which require that dissolution of school districts involving transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned, are substantially complied with where the order of dissolution is the order of both superintendents and based upon findings by both even though only one superintendent was present at the public hearing. Lentz v. Saunders 3

Post Conviction.

1. 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. Svoboda 452
2. In the absence of violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Svoboda 452
3. Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for post conviction relief. State v. Svoboda 452
4. 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. Svoboda 452
5. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. Facts must be alleged which, if proven, would constitute an infringement of constitutional rights. State v. Bartlett 471
6. A defendant who has appealed a conviction cannot secure a second review of the identical proposition examined in that appeal by resorting to a post conviction procedure. State v. Bartlett 471
7. In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records

that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Bartlett 471

Premises, View of.

This court will give consideration to the fact that the trial court inspected the premises. Paasch v. Brown 683

Presentence Reports.

1. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Miller 19
2. 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, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Miller 19
3. It is an abuse of discretion for the trial court to deny defendant or his counsel access to that part of the presentence investigation report relating to prior arrests and convictions. State v. Carey 288
4. The discretion of the trial court in denying a request to examine the presentence report is reviewable in this court, but the record must show that a request to examine the report was made and that the defendant or his attorney were denied an opportunity to examine the presentence report. State v. Carey 288
5. A silent record does not create a presumption that a defendant has not had an opportunity to inspect the presentence report, much less that he has affirmatively requested inspection and had the request denied. State v. Carey 288
6. Under section 29-2261, R. R. S. 1943, the use of a presentence report is only required for sentencing if the offense is a felony. State v. Jablonski 341

Principal and Agent.

Ordinarily one cannot accomplish through an agent that which he is prohibited from doing himself. Fraternal Order of Police v. Nebraska Liquor Control Commission 712

Principal and Surety.

1. The right of a subcontractor or materialman to re-

cover from the surety on a contractor's bond depends upon whether the language of the bond shows an intention of the parties to the bond to protect the subcontractor or materialman. Where the construction contract is referred to or incorporated in the bond, however, the contract and the bond must be read together in determining whether a subcontractor or materialman is afforded protection by the bond. Dealers Electrical Supply v. United States F. & G. Co. 269

2. A subcontractor or materialman is entitled to recover on a surety's bond where the construction contract requires the contractor to pay for the cost of labor and materials needed to fulfill the contract, and where the bond is conditioned on performance of the contract by the contractor. This rule is applicable in regard to both public and private construction contracts. Dealers Electrical Supply v. United States F. & G. Co. 269

Prisoners.

1. All prisoners need approval of the Board of Pardons before the provisions of Laws 1975, L. B. 567, may be applied retroactively. Johnson & Cunningham v. Exon 154
2. The provisions of Laws 1975, L. B. 567, do have retroactive application if they are approved by the Board of Pardons. Gamron v. Parratt 163
3. Habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally held and habeas corpus is a proper remedy. Gamron v. Parratt 163
4. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. Gamron v. Parratt 163
5. A prisoner who is confined in a cell is excused from the duty to retreat before using force to defend his person. State v. Schroeder 822

Probable Cause.

1. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a

reasonable basis for effecting a valid arrest. State v. Donald 70

2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Donald 70
3. An officer may arrest without warrant if he has probable cause to believe that the person arrested has committed a felony. State v. Wilson 765
4. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer would warrant a prudent man in believing that the offense has been committed and that the person arrested committed it. State v. Wilson 765

Probation and Parole.

1. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Miller 19
2. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary. State v. Javins 38
3. An order or sentence of the trial court which denies probation will not be overturned by this court on appeal unless there has been an abuse of discretion. State v. Hopper 403
   State v. Boden 423
4. A sentence imposed within the statutory limits and an order which denies probation will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. State v. Garland 459

Proof.

1. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. State v. Metzger 186

2. Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Metzger 186
3. The Nebraska Mental Health Commitment Act is not unconstitutional because the standard of proof it prescribes is that of clear and convincing evidence rather than proof beyond a reasonable doubt. Kraemer v. Mental Health Board of the State of Nebraska 784
4. A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him. Menke v. Foote 800
5. A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence. Biggerstaff v. Ostrand 808

Property.

1. In order to establish title by adverse possession, such possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership. Bailey v. Mahr 29
2. The general rule is that one who causes work to be done is not liable for injuries that result to an adjoining owner from carelessness in the performance of the work by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. Merten v. Pedersen 34
3. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations.

Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Prendergast v. Nelson 97

4. Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the last previous assessment. Reed v. County of Hall 134
5. After the repeal of section 77-1306, R. R. S. 1943, section 77-1315, R. R. S. 1943, is the only statute applicable to the taxing of improvements. Reed v. County of Hall 134
6. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74-715, R. R. S. 1943. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
7. An owner of property which does not abut upon a street proposed to be vacated by action of the city is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large, and the fact that the property owner or others who must enter or leave the property must take a more roundabout way to reach the property does not constitute special or peculiar injury different in kind from that suffered by the public at large. Rossito v. City of Omaha 260
8. A landowner has no vested interest in the flow of traffic past his property and damage caused by diversion of traffic is not normally compensable. Rossitto v. City of Omaha 260
9. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Hansen v. Hansen 462
10. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal. Hansen v. Hansen 462
11. A division of property which is not patently unfair will not be disturbed by this court on appeal. Edwards v. Edwards 581
12. The value of property includes its value for any reasonable use to which it may be put. Reller v. Consumers Public Power Dist. 720
13. The adaptability for uses which may be considered

must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. Reller v. Consumers Public Power Dist. 720

14. The mere existence of a confidential relationship does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Rule v. Roth 746

15. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances. Menke v. Foote 800

Prosecuting Attorneys.

1. A contention that a mistrial should have been granted because the prosecutor argued law before the jury cannot be reviewed on appeal where the remarks of the prosecutor were not recorded in the bill of exceptions. State v. Costello 43

2. It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and not to inflame the prejudices or excite the passions of the jury against the accused. State v. Costello 43

3. Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. State v. Costello 43
State v. Tiff 519

4. A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. State v. Donald 70

5. The law does not permit defendant or his counsel, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such misconduct a ground for new trial without regard to guilt although proved beyond a reasonable doubt. State v. Godboldt 561

6. Failure to declare a mistrial when the prosecutor indi-

cated a desire to give testimony is not prejudicial error where the trial judge unequivocally sustained the defendant's objection and instructed the jury to disregard the prosecutor's remark. State v. Peery 656

Public Funds.

University funds which are derived from operation of the University or received from the federal government or private donors are subject to the control of the Board of Regents without an annual legislative appropriation. Board of Regents v. Exon 146

Public Officers and Employees.

1. The determination of salary schedules and compensation to be paid to employees of the Board of Regents is an integral part of the general government of the University and the Legislature may not fix and determine the manner in which raises may be given to the employees of the Board of Regents. Board of Regents v. Exon 146
2. Where a pension forms an inducement to an individual to enter and remain in the service, the pension is a part of the compensation paid for those services. If no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507
3. The right of a fireman to educational bonus points on promotional examinations in accordance with a program adopted and announced by the city vests upon completion of the work as provided in the program. Barbee v. City of Omaha 644
4. An ordinance which provides that promotional examinations shall take into consideration the length of service of employees is binding on the city. Barbee v. City of Omaha 644
5. "No law enforcement officer shall have any interest in an establishment or place of business which has a liquor license. This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-194.01, R. R. S. 1943. Fraternal Order of Police v. Nebraska Liquor Control Commission 712
6. A statute which prohibits active law enforcement officers from participating in any manner in the manage-

ment or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, for it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors. Fraternal Order of Police v. Nebraska Liquor Control Commission 712

7. An officer may arrest without warrant if he has probable cause to believe that the person arrested has committed a felony. State v. Wilson 765
8. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer would warrant a prudent man in believing that the offense has been committed and that the person arrested committed it. State v. Wilson 765

Public Policy.

1. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment. Prendergast v. Nelson 97
2. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Prendergast v. Nelson 97
3. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Prendergast v. Nelson 97
4. The Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions. Prendergast v.

Nelson 97
5. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. Prendergast v. Nelson 97

Public Service Commissions.

1. The Nebraska Public Service Commission lacks jurisdiction over commuter air carriers engaged in interstate commerce, since the federal government has preempted the field. Pioneer Airways, Inc. v. City of Kearney 12
2. It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. Such duty is based on the railroad's obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
3. Whether or not a railroad has a duty to maintain a spur track or sidetrack depends on whether the track benefits only private interests, or whether the track has become part of the main line and is used to serve the public at large. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Quiet Title.

In order to establish title by adverse possession, such possession must not only have been actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership. Bailey v. Mahr 29

Railroads.

1. The Interstate Commerce Commission must make the initial determination as to whether rail service provided by an interstate carrier is reasonable. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
2. It is the general rule that a railroad has a duty under its state franchise to maintain and repair its lines and provide service thereon. Such duty is based on the railroad's obligation to properly provide services to the public impartially, without discrimination for or against persons demanding similar services. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
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fits only private interests, or whether the track has become part of the main line and is used to serve the public at large. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Rape.

Evidence of prior sexual activity between a sexual assault victim and any person other than the defendant may be admitted in evidence under section 28-408.05, R. R. S. 1943, when consent by the victim is at issue, and where it is established that such activity shows a relation to the conduct involved in the case and tends to establish a pattern of conduct of behavior on the part of the victim as to be relevant to the issue of consent. State v. Tiff 519

Real Property.

If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed. Raymond International, Inc. v. Realbanc, Inc. 607

Receiving Stolen Goods.

If the facts are such that a man of the age, intelligence, and experience of the defendant would know that property was stolen, then the evidence is sufficient to sustain a finding of guilty knowledge. State v. Caradori 691

Records.

1. A contention that a mistrial should have been granted because the prosecutor argued law before the jury cannot be reviewed on appeal where the remarks of the prosecutor were not recorded in the bill of exceptions. State v. Costello 43
2. Authenticated judicial records establishing prior convictions of a defendant with the same name are prima facie sufficient to establish identity for the purpose of enhancing punishment under section 29-2221, R. R. S. 1943, and, in the absence of any denial or contradictory evidence, are sufficient to support a finding by the trial court that the accused has prior convictions. State v. Mills 295
3. Certified copies of official records showing fingerprints

may be received in evidence in a habitual criminal proceeding, and an expert may compare such fingerprints with the known prints of the defendant to establish identity. State v. Mills 295
4. When the condition of the record and the form of question itself shows that it is relevant and competent, no offer of proof is necessary. Fite v. Ammco Tools, Inc. 353
5. Official public records of governmental agencies which are not ambiguous ordinarily may not be modified by parol testimony in a collateral proceeding. Warren v. Papillion School Dist. No. 27 410
6. A petition in error is limited to a review of the transcript and the evidence below as may be contained in the bill of exceptions. Ross v. The Governors of Knights of Ak-Sar-Ben 513
7. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Marlenee 543
8. Under section 29-611, R. R. S. 1943, when notice of appeal has been given and proper bond filed by the defendant as required by the statute, it is the duty of the county court or the municipal court to prepare, certify, and file the transcript, bill of exceptions, and other required documents in the District Court. State v. Benson 549
9. Where a defendant, within due time, has done all that he is legally required to do to perfect an appeal under section 29-611, R. R. S. 1943, and, without fault on his part, or that of his counsel, a bill of exceptions is missing or incomplete, the District Court does not lose jurisdiction of the appeal and may direct the county or municipal court to prepare and submit a proper bill of exceptions. State v. Benson 549
10. Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions. Pedersen v. Lambert 595
11. Evidence which does not appear in the record cannot be considered by this court on appeal. Pedersen v. Lambert 595
12. 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. Pedersen v. Lambert 595
13. A prior conviction of the defendant offered for the purpose of impeachment may be proved only by an admission of the defendant or the public record of the convic-

tion. State v. Caradori 691
14. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the 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. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729

Rehabilitation.

1. Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature. State v. Little 772
2. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths. State v. Little 772
3. An annual evaluation by qualified professional personnel must be made of each sexual sociopath housed in the penal complex and an annual review of treatability be made by the District Court from which such individual was originally committed. State v. Little 772

Restitution.

1. At the time of pronouncing sentence a trial court may reserve for determination at a later date the matter of fixing the amount of restitution to be made by the defendant. State v. Betts 277
2. The trier of fact must make a specific finding as to the value of the property stolen, before an order of restitution can be made under section 28-512, R. R. S. 1943. State v. Frandsen 546

Right to Counsel.

Where a defendant has voluntarily waived his right to counsel at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Tiff 519

Rules of Supreme Court.

Generally, a case in the Supreme Court on appeal will be limited to errors assigned and discussed and an assign-

ment of error not discussed will be considered waived. Cofer v. Perkins 327

Sales.

1. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Fleming Realty Ins., Inc. v. Evans 440
2. A prospective purchaser is financially able if he has capability to make the downpayment and all deferred payments required under the proposed contract of sale. Fleming Realty Ins., Inc. v. Evans 440
3. Under section 2-315, U.C.C., a warranty of fitness for a particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Whether or not the warranty of fitness for a particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
4. Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach. Such damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
5. The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages therefor is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
6. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances. Menke v. Foote 800

School Lands and Funds.

A lessee of school land may recover the value of fall-seeded grain crops as of the date of the expiration of

the lease. In determining the value of such crops, the appraisers should consider all the factors which would normally enter into the determination of the value of a growing crop and are not limited to the cost of putting in the crop and fertilizing it. Freihe v. State 504

Schools and School Districts.

1. The provisions of section 79-420, R. R. S. 1943, which require that dissolution of school districts involving transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned, are substantially complied with where the order of dissolution is the order of both superintendents and based upon findings by both even though only one superintendent was present at the public hearing. Lentz v. Saunders 3
2. The control of the Legislature over school districts and their powers is plenary, subject only to constitutional provisions. Lentz v. Saunders 3
3. The power to determine the means of providing transportation for school attendance is discretionary with the board of education of each school district. Warren v. Papillion School Dist. No. 27 410
4. In order for the provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisition of land by the United States for the purposes named in the statute must have been the cause, or a substantial part of the cause, of the existence of the conditions described in the statute under which the county superintendent is directed to attach the territory of the school district affected to an adjoining district or districts. State ex rel. Goetz v. Lundak 585

Searches and Seizures.

1. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Donald 70
2. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Donald 70
3. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable

cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Donald 70

4. General proscription of the Fourth Amendment is against unreasonable, not warrantless, searches. State v. Donald 70
5. An affidavit for a search warrant may be based upon hearsay information and need not reflect the direct observations of the affiant. State v. Davis 165
6. Affidavits for search warrants must be tested in a commonsense and realistic fashion by the courts, and courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner. State v. Davis 165
7. Evidence may be introduced resulting from knowledge legally obtained by agents of the government, although in the course of obtaining such knowledge, there was an unlawful seizure. State v. Bartlett 471
8. If a search is illegal and an order suppressing the evidence is granted, the State cannot avoid the consequence of the order by introducing testimony as to what was found and not the object itself. State v. Bartlett 471
9. A search pursuant to a warrant is presumed to be valid. State v. Bartlett 471

Self-Defense.

1. The use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. § 28-836 (4), R. R. S. 1943. State v. Schroeder 822
2. A prisoner who is confined in a cell is excused from the duty to retreat before using force to defend his person. State v. Schroeder 822
3. The use of force may be justifiable if the actor believes that such force is immediately necessary to protect himself against the use of unlawful force by another person on the present occasion. § 28-836 (1), R. R. S. 1943. State v. Schroeder 822
4. A belief that the use of force is necessary, which is founded upon only threats, is not sufficient to justify the use of force in self-defense. State v. Schroeder 822

Self-Incrimination.

1. A refusal to make any disclosure on a tax return consti-

tutes a complete failure to file a return. The privilege against compulsory self-incrimination is no defense against a complete failure to file a return. State v. Soester 477
2. A taxpayer who refuses to answer a question on a tax return and claims the privilege against compulsory self-incrimination must make some reasonable showing as to how the disclosure might incriminate him unless it is apparent on the face of the return. State v. Soester 477

Sentences.
1. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the observation of the sentencing judge as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Miller 19
2. The action of a trial court in denying probation and imposing a sentence in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Miller 19
3. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary. State v. Javins 38
4. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Javins 38
State v. Hatridge 142
State v. Donohue 254
State v. Williams 256
State v. Haley 258
State v. Carey 288
State v. Shay 348
State v. Stephenson 362
State v. Comer 762
5. The trial court is entitled to consider all relevant evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed. State v. Costello 43
6. 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. Costello 43
7. Habeas corpus will not lie to secure the release of a prisoner until the sentence imposed is served. If the petitioner has served his sentence he is being illegally

held and habeas corpus is a proper remedy. Gamron v. Parratt 163
8. In the absence of an abuse of discretion on the part of the trial court, this court will not overturn an order which denies probation, or disturb a sentence imposed within statutory limits. State v. Trout 236
State v. Schmidtline 242
9. 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. Wesoloweski 238
10. 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. Roubideaux 251
11. At the time of pronouncing sentence a trial court may reserve for determination at a later date the matter of fixing the amount of restitution to be made by the defendant. State v. Betts 277
12. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction, is whether the offense charged in one count involves any different elements than an offense charged in another count. State v. Hardin 314
13. Where the sentence imposed together with the time spent in custody prior to sentencing is less than the maximum authorized by statute, the trial court may consider the time spent in custody prior to sentencing and deny credit for that time. Eutzy v. State 384
14. An order or sentence of the trial court which denies probation will not be overturned by this court on appeal unless there has been an abuse of discretion. State v. Hopper 403
State v. Boden 423
15. Age is a factor meriting consideration in reducing a sentence. State v. Davis 424
16. When the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Davis 424
17. A sentence imposed within the statutory limits and an order which denies probation will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. State v. Garland 459
18. Under current statutes, all sentences of imprisonment in the Nebraska Penal and Correctional Complex are

indeterminate sentences, except a sentence for life imprisonment. State v. Blazek 466
19. Under the provisions of section 83-1,105(2), R. R. S. 1943, a sentence for a definite term of years is an indeterminate sentence in which the maximum term of the sentence is the term imposed by the court and the minimum term is the minimum sentence provided by law. State v. Blazek 466
20. Where the statutory penalty for a crime is imprisonment in the Nebraska Penal and Correctional Complex for not more than a specific maximum term of years, and no minimum term is specified by law, a sentence imposed for a definite period of time becomes an indeterminate sentence in which the term imposed by the court becomes the maximum term and the minimum term is subject to the action of the Board of Parole. State v. Blazek 466
21. Ordinarily a defendant should be given credit for time spent in jail prior to sentencing. Where the maximum term of the sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. State v. Blazek 466
22. A conviction founded upon a plea of nolo contendere may be used to support an enhanced sentence. State v. Orosco 532
23. Indefinite confinement under the Sexual Sociopath Act may well be a life sentence. State v. Little 772
24. Under section 83-1,105, R. R. S. 1943, where a trial court imposes an indeterminate sentence, the minimum term may not exceed one-third the maximum term provided by law. State v. Shepard 831
25. This court on appeal will not disturb a sentence within the statutorily prescribed limitations unless the trial court has abused its discretion. State v. Shepard 831

Sexual Assault.

1. Evidence of prior sexual activity between a sexual assault victim and any person other than the defendant may be admitted in evidence under section 28-408.05, R. R. S. 1943, when consent by the victim is at issue, and where it is established that such activity shows a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent. State v. Tiff 519
2. An essential element of the crime of sexual assault in the first degree under section 28-408.03 (1) (c), R. R. S. 1943, is that the defendant was more than 18 years of

age at the time he or she subjected a person less than 16 years of age to sexual penetration, and the State has the burden of proving this element beyond a reasonable doubt. State v. Lauritsen 816
3. The use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. § 28-836 (4), R. R. S. 1943. State v. Schroeder 822

Sexual Sociopaths.
1. The Equal Protection Clause does not prohibit a state from classifying the sex offender in a special category and providing special procedures for dealing with a person in this group. State v. Little 772
2. The Sexual Sociopath Act, sections 29-2901 to 29-2910, R. R. S. 1943, proceeds on the premise that the sexual sociopath is neither normal nor legally insane and on the idea that the commission of sex crimes is evidence of a mental disorder which should be treated, if found treatable. State v. Little 772
3. There are differing purposes for incarceration under the habitual offender law and sexual sociopath law. For the habitual offender, the purpose is punishment only; for the sexual sociopath, the purpose is treatment, if possible, and punishment is only incidental. State v. Little 772
4. The significant factor operating to permit differing treatment of those classified as mentally ill dangerous persons and those classified as sexual sociopaths, is the criminal conviction of the latter class. State v. Little 772
5. The Legislature could have reasonably determined that the public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime. State v. Little 772
6. The punitive aspect of the Sexual Sociopath Act is not merely limited to punishment for a status, but relates to an affirmative act or actus reus. State v. Little 772
7. Upon the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, a sexual sociopath is confined in the Nebraska Penal and Correctional Complex indefinitely without treatment. State v. Little 772
8. Indefinite confinement under the Sexual Sociopath Act may well be a life sentence. State v. Little 772
9. A proceeding for investigation and for commitment of

an alleged sexual sociopath is civil in nature. State v. Little 772
10. Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature. State v. Little 772
11. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths. State v. Little 772
12. An annual evaluation by qualified professional personnel must be made of each sexual sociopath housed in the penal complex and an annual review of treatability be made by the District Court from which such individual was originally committed. State v. Little 772

Shippers.

1. In actions by a shipper against a carrier for lost goods, a prima facie case is made out when the shipper shows delivery of a quantity of goods to the carrier; arrival at destination of a lesser quantity, taking into account normal losses inherent in goods such as grain due to loss of moisture; and the amount of damages. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
2. Where a claim by a shipper involves the questions of whether rail service and facilities provided by an interstate carrier were reasonable and nondiscriminatory, the doctrine of "primary jurisdiction" applies. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189

Specific Performance.

1. A purchaser's right to specific performance may be lost by his failure to perform the contract, and whether specific performance should be granted in a particular case rests within the sound discretion of the trial court. Lacy v. Deyle 365
Menke v. Foote 800
2. An action for specific performance is triable de novo on appeal to this court. Menke v. Foote 800
3. A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for non-

performance of the covenants incumbent upon him. Menke v. Foote 800

States.

1. The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. State v. Wilson 765
2. In the absence of proof of the common law or statutory law of another jurisdiction, this court, in reviewing the matter, will presume that they are the same as the law of Nebraska. State v. Wilson 765

Statutes.

1. Specific statutory provisions relating to a particular subject control over general provisions. Lentz v. Saunders 3
2. The provisions of section 79-420, R. R. S. 1943, which require that dissolution of school districts involving transfer of territory across county lines shall be acted upon jointly by the county superintendents of the counties concerned, are substantially complied with where the order of dissolution is the order of both superintendents and based upon findings by both even though only one superintendent was present at the public hearing. Lentz v. Saunders 3
3. Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court. State v. Costello 43
4. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43
5. Under section 27-1003, R. R. S. 1943, a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original. State v. Costello 43
6. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to

suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony. State v. Donald 70

7. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case for error as to any matter of procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Donald 70
8. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Prendergast v. Nelson 97
9. It is incumbent on this court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. Prendergast v. Nelson 97
10. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment. Prendergast v. Nelson 97
11. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Prendergast v. Nelson 97
12. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the

classification "is not made with mathematical nicety or because in practice it results in some inequality." Prendergast v. Nelson 97
13. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Prendergast v. Nelson 97
14. The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination. Prendergast v. Nelson 97
15. The Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions. Prendergast v. Nelson 97
16. The Supreme Court will not set aside a statutory discrimination if any state of facts reasonably exists to justify it. Prendergast v. Nelson 97
17. The Nebraska Hospital-Medical Liability Act in no way may be construed to grant or impair the credit of the state. Prendergast v. Nelson 97
18. Nothing in the Nebraska Hospital-Medical Liability Act in any way implies the state is to be obligated with respect to the Excess Liability Fund or liable for any other amounts due pursuant to the act. Prendergast v. Nelson 97
19. All persons are charged with knowledge of the provisions of statutes. They must take note of the procedure adopted by them. When that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. Prendergast v. Nelson 97
20. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. Prendergast v. Nelson 97
21. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains. Prendergast v. Nelson 97
22. Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the

last previous assessment. Reed v. County of Hall 134
23. After the repeal of section 77-1306, R. R. S. 1943, section 77-1315, R. R. S. 1943, is the only statute applicable to the taxing of improvements. Reed v. County of Hall 134
24. A statute prescribing the powers and duties of the Board of Regents must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed. Board of Regents v. Exon 146
25. In construing a statute, it is the duty of this court to give that statute an interpretation which meets constitutional requirements if it can reasonably be done. Johnson & Cunningham v. Exon 154
26. It was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975. Johnson & Cunningham v. Exon 154
27. All prisoners need approval of the Board of Pardons before the provisions of Laws 1975, L. B. 567, may be applied retroactively. Johnson & Cunningham v. Exon 154
28. The provisions of Laws 1975, L. B. 567, do have retroactive application if they are approved by the Board of Pardons. Gamron v. Parratt 163
29. In cases involving loss of property in interstate shipments, interest and attorney's fees may not be recovered under section 74-715, R. R. S. 1943. Humphrey Feed & Grain, Inc. v. Union P. R.R. Co. 189
30. Section 83-1,106, R. R. S. 1943, held constitutional. Eutzy v. State 384
31. In the area of economics and social welfare, a state does not violate the equal protection clause of the Constitution merely because a classification made by its laws is imperfect. If the classification bears a rational relationship to the legitimate purposes of the legislation, it is not in violation of the equal protection clause. Warren v. Papillion School Dist. No. 27 410
32. Section 25-1912, R. R. S. 1943, makes the filing of the notice of appeal and the payment of the docket fee within 1 month mandatory. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429
33. The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429

34. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys. 507
35. Sections 77-1510 and 77-1511, R. R. S. 1943, are no longer applicable to the appeal from the granting of exemptions from taxation by a county board of equalization. The only person entitled to appeal from a decision of the county board of equalization on a tax exemption determination is the applicant for the exemption. Ross v. The Governors of Knights of Ak-Sar-Ben 513
36. The operation or actual physical control of a motor vehicle, under the provisions of section 39-669.07, R. R. S. 1943, may be established by circumstantial evidence. State v. Orosco 532
37. The authority of an officer to make arrests "for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor," § 39-669.08 (2), R. R. S. 1943, depends not upon the terms of the implied consent statute, but exists by virtue of the common law as codified in the statutes of the State of Nebraska, to wit, sections 29-401 and 29-404.02, R. R. S. 1943. State v. Orosco 532
38. A judgment of conviction may be proved by a certified copy therefor. §§ 27-902, 27-1005, R. R. S. 1943. State v. Orosco 532
39. In order that a defendant may be punished as a third offender under section 39-669.07 (3), R. R. S. 1943, it is necessary only that he be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor and it is not necessary that he previously have been charged and punished as a second offender under the provisions of section 39-669.07 (2), R. R. S. 1943. State v. Orosco 532
40. The trier of fact must make a specific finding as to the value of the property stolen, before an order of restitution can be made under section 28-512, R. R. S. 1943. State v. Frandsen 546
41. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Wang v. Board of Education 564
42. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine legislative intent. Wang v. Board of Education 564
43. The reasons for the enactment of a statute and the pur-

poses and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. Wang v. Board of Education 564
44. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. Wang v. Board of Education 564
45. A court should avoid a statutory construction which leads to absurd, unjust, or unconscionable results. Wang v. Board of Education 564
46. Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated. Egbert v. Wenzl 573
47. Section 24-536, R. R. S. 1943, provides that either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. State v. Nielsen 597
48. Under section 28-4,115 (14), R. R. S. 1943, where the weight of marijuana is referred to in the Uniform Controlled Substances Act it shall mean its weight at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time. State v. Infante 601
49. When there is no statutory classification drawn on the basis of suspect criteria, there is no denial of equal protection if the challenged statute bears some rational relationship to legitimate state ends. State v. Infante 601
50. Statutes which effect a change in the common law or take away a common law right should be strictly construed and a construction which restricts or removes a common law right should not be adopted unless the plain words of the act compel it. Bishop v. Bockoven, Inc. 613
51. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Bishop v. Bockoven, Inc. 613
52. Under section 29-402.01, R. R. S. 1943, the words "a merchant's employee" do not include a merchant's agent who is not an employee. Bishop v. Bockoven, Inc. 613
53. Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating

circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts. State v. Peery 656

54. Under aggravating circumstance (1) (c) of section 29-2523, R. R. S. 1943, a murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. State v. Peery 656

55. Aggravating circumstance (1) (d) of section 29-2523, R. R. S. 1943, exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life. State v. Peery 656

56. In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. State v. Peery 656

57. "No law enforcement officer shall have any interest in an establishment or place of business which has a liquor license. This section shall not prohibit a law enforcement officer from holding a membership in any nonprofit organization holding a liquor license. Such officer shall not participate in any manner in the management or administration of the nonprofit organization." § 53-194.01, R. R. S. 1943. Fraternal Order of Police v. Nebraska Liquor Control Commission 712

58. One, whose conduct a statute clearly governs, may not challenge its constitutionality on the ground it is vague because it is not clear whether it applies to others. Fraternal Order of Police v. Nebraska Liquor Control Commission 712

59. A statute which prohibits active law enforcement officers from participating in any manner in the management or operation of a nonprofit organization which holds a liquor license is not invidiously discriminatory in violation of the equal protection clauses of the state and federal Constitutions, for it cannot be said that it bears no rational relationship to the object of the legislation, viz, to prohibit possible conflicts of interest on the part of those who may be called upon to enforce laws pertaining to the control of alcoholic liquors. Fraternal Order of Police v. Nebraska Liquor Control Commission 712

60. "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the [Nebraska Liquor Control] commission." § 53-116, R. R. S. 1943. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
61. An appellant in an appeal to this court following an appeal to the District Court pursuant to section 24-541, R. R. S. 1943, is required to file a motion for a new trial in the District Court if this court is to review the question of the sufficiency of the evidence and other assignments of error. Christensen v. Eastern Nebraska Equipment Co., Inc. 741
62. The Sexual Sociopath Act, sections 29-2901 to 29-2910, R. R. S. 1943, proceeds on the premise that the sexual sociopath is neither normal nor legally insane and on the idea that the commission of sex crimes is evidence of a mental disorder which should be treated, if found treatable. State v. Little 772
63. The punitive aspect of the Sexual Sociopath Act is not merely limited to punishment for a status, but relates to an affirmative act or actus reus. State v. Little 772
64. Upon the initial determination by the court of untreatability under section 29-2903 (3), R. R. S. 1943, a sexual sociopath is confined in the Nebraska Penal and Correctional Complex indefinitely without treatment. State v. Little 772
65. Indefinite confinement under the Sexual Sociopath Act may well be a life sentence. State v. Little 772
66. Despite the labeling of initial commitment under the Sexual Sociopath Act as civil, the act's provision for possible life confinement without any provisions for treatability or review of treatability makes the statute penal in nature. State v. Little 772
67. A provision for treatment or review of treatability is a necessary part of a statutory scheme involving sexual sociopaths. State v. Little 772
68. Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. Kraemer v. Mental Health Board of the State of Nebraska 784
69. A mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was de-

cleared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm. Kraemer v. Mental Health Board of the State of Nebraska 784

70. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." § 27-703, R. R. S. 1943. This statute is applicable to expert testimony presented in proceedings under the Nebraska Mental Health Commitment Act. Kraemer v. Mental Health Board of the State of Nebraska 784

71. An essential element of the crime of sexual assault in the first degree under section 28-408.03 (1) (c), R. R. S. 1943, is that the defendant was more than 18 years of age at the time he or she subjected a person less than 16 years of age to sexual penetration, and the State has the burden of proving this element beyond a reasonable doubt. State v. Lauritsen 816

72. The use of deadly force may be justifiable if the actor believes such force is necessary to protect himself against sexual intercourse compelled by force or threat. § 28-836 (4), R. R. S. 1943. State v. Schroeder 822

73. The use of force may be justifiable if the actor believes that such force is immediately necessary to protect himself against the use of unlawful force by another person on the present occasion. § 28-836 (1), R. R. S. 1943. State v. Schroeder 822

74. Under section 83-1,105, R. R. S. 1943, where a trial court imposes an indeterminate sentence, the minimum term may not exceed one-third the maximum term provided by law. State v. Shepard 831

Stop and Check.

The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention

during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Donald 70

Summary Judgments.

1. In the absence of some mitigating factors which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a motion to amend pleadings. Yunghans v. O'Toole 317
2. 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. Warren v. Papillion School Dist. No. 27 410
   Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc. 555
3. 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. Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc. 555
4. In considering a motion for summary judgment the court should take that view of the evidence most favorable to the party against whom the motion is directed, and any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc. 555
5. Summary judgment may be rendered where there is no genuine issue as to material fact, and the moving party is entitled to judgment as a matter of law. Williams v. Bedford Market, Inc. 577

Supersedeas.

1. Generally, a supersedeas is not a prerequisite to an appellate review. Marksbury & Washington v. Board of Education 283
2. A supersedeas does not operate against the judgment itself but rather against its enforcement. Marksbury & Washington v. Board of Education 283
3. In the absence of a supersedeas, a judgment or final order shall retain its vitality and be capable of execution during the pendency of an appeal. Marksbury & Washington v. Board of Education 283

Supreme Court.

1. It is incumbent on this court, when reasonably possible and consistent with constitutional rights, to resolve all

doubts as to the validity of a statute in favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. Prendergast v. Nelson 97

2. The Supreme Court will not set aside a statutory discrimination if any state of facts reasonably exists to justify it. Prendergast v. Nelson 97

3. The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429

Taxation.

1. Section 77-1315, R. R. S. 1943, requires that a notice be given by first-class mail, addressed to the record owner's last-known address, on every piece of real estate which has been assessed at a higher figure than at the last previous assessment. Reed v. County of Hall 134

2. After the repeal of section 77-1306, R. R. S. 1943, section 77-1315, R. R. S. 1943, is the only statute applicable to the taxing of improvements. Reed v. County of Hall 134

3. A declaratory judgment action is not an appropriate remedy to attack an act of the county board of equalization where the plaintiff has an adequate remedy at law by direct appeal from the act of the board of equalization by virtue of the provisions of section 77-1510, R. R. S. 1943. Ryan v. Douglas County Board of Equalization 291

4. In appeals under section 77-202.04, R. R. S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20-day period. United Way of the Midlands v. Douglas County Board of Equalization 323

5. Insofar as there may be language in Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N. W. 2d 855 (1975), which conflicts with this opinion on the construction of section 77-202.04, R. R. S. 1943, it is overruled. United Way of the Midlands v. Douglas County Board of Equalization 323

6. A refusal to make any disclosure on a tax return constitutes a complete failure to file a return. The privilege against compulsory self-incrimination is no defense against a complete failure to file a return. State v.

Soester 477
7. A taxpayer who refuses to answer a question on a tax return and claims the privilege against compulsory self-incrimination must make some reasonable showing as to how the disclosure might incriminate him unless it is apparent on the face of the return. State v. Soester 477
8. Appeals may be taken from the action of the county board of equalization to the District Court in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. § 77-1510, R. R. S. 1943. Ross v. The Governors of Knights of Ak-Sar-Ben 513
9. Sections 77-1510 and 77-1511, R. R. S. 1943, are no longer applicable to the appeal from the granting of exemptions from taxation by a county board of equalization. The only person entitled to appeal from a decision of the county board of equalization on a tax exemption determination is the applicant for the exemption. Ross v. The Governors of Knights of Ak-Sar-Ben 513
10. A resident taxpayer of a city and county where property is declared exempt by the county board of equalization is a sufficiently aggrieved party to file a petition in error. Ross v. The Governors of Knights of Ak-Sar-Ben 513

Time.

1. Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court. State v. Costello 43
2. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43
3. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and secure the results of an order of suppression by the expedient of a late motion to suppress testimony. State v. Donald 70

4. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Donald 70
5. A party moving for a new trial on the ground of newly discovered evidence must show that the evidence came to him since the trial and was not equally available to him previous to the trial, and was not simply discovered by exercise of belated diligence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. Maddox v. First Westroads Bank .. 81
6. The statute of limitations is tolled during the period the matter of medical liability is subject to consideration by the medical review panel and for a period of 90 days following its opinion. Prendergast v. Nelson 97
7. The words "on or about" do not put the time at large, but indicate that it is stated with approximate certainty. The phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means "approximate," "about," "without substantial variance from," "near." State v. Metzger 186
8. In appeals under section 77-202.04, R. R. S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20-day period. United Way of the Midlands v. Douglas County Board of Equalization 323
9. Section 25-1912, R. R. S. 1943, makes the filing of the notice of appeal and the payment of the docket fee within 1 month mandatory. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429
10. The Supreme Court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the District Court in civil cases unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the District Court within the time fixed and as provided in section 25-1912, R. R. S. 1943. American Legion Post No. 90 v. Nebraska Liquor Control Commission 429
11. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of surrounding circumstances. Menke v. Foote 800

Torts.

The Legislature, consistent with the dictates of the state and federal Constitutions, may pass a law which seeks to distinguish between different types of tort actions. This is conditioned, however, upon those distinctions being reasonable and grounded upon real differences inherent in those tort actions. Prendergast v. Nelson 97

Trial.

1. An instruction which directs the jury to apply community standards without specifying what community is not erroneous. State v. Schwartz 17
2. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen 34
3. Under section 29-1207, R. R. S. 1943, every person indicted or informed against for any offense shall be brought to trial within 6 months, and in felony cases the 6-month period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed in county court. State v. Costello 43
4. The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R. R. S. 1943, exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Costello 43
5. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Costello 43
6. A trial judge's overruling of a motion for change of 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. Costello 43
7. The District Court, before trial, may in its discretion permit amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the amended information does not charge a crime other than the one on which the accused has his preliminary examination. State v. Costello 43
8. It is the duty of the prosecuting attorney to conduct the

trial in a fair and impartial manner and not to inflame the prejudices or excite the passions of the jury against the accused. State v. Costello 43
9. Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. State v. Costello 43
10. A comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the self-incriminating clause of the Fifth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment. State v. Donald 70
11. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case for error as to any matter of procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. § 29-2308, R. R. S. 1943. State v. Donald 70
12. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses. In the absence of obvious error, we are bound by that determination. Reed v. County of Hall 134
13. A motion for a continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. State v. Davis 165
14. Where the fact of insurance is relevant to some issue in a case, it cannot be properly excluded, but where not relevant to any issue, evidence of the existence of insurance coverage is inadmissible. Swartz v. Peterson 171
15. A litigant is entitled to have the jury instructed upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swartz v. Peterson 171
16. The trial court has discretion to permit or deny amendments of pleadings on motion to conform to the evidence at the close of all evidence. Swartz v. Peterson 171
17. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Galonka v. Gatewood 216
18. A litigant is entitled to have the jury instructed as to

his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial error. Galonka v. Gatewood 216

19. The interest required for intervention as a matter of right is a direct and immediate legal interest of such a character that the intervener will either lose or gain by the direct operation and legal effect of the judgment. Colman v. Colman Foundation, Inc. 263

20. The possibility that a charitable organization might share in the assets of another charity is not a sufficient interest to support intervention as a matter of right in a proceeding to liquidate the charity and distribute its assets. Colman v. Colman Foundation, Inc. 263

21. Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown error may not be predicated thereon. State v. Stephenson 362

22. A photograph proved to be a true representation of what it depicts may properly be received in evidence if a proper foundation is laid. State v. Stephenson 362

23. Findings of the trial court as to the evaluation of evidence to have children adjudged to be neglected and dependent, and to terminate parental rights as well as determining the question of custody, will not be disturbed on appeal absent a showing of clear abuse of discretion. State v. Hernandez 386

24. The giving of a technically incorrect instruction is not ground for reversal where it could not have prejudiced the rights of the losing party. Fleming Realty & Ins., Inc. v. Evans 440

25. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself, and other instructions given, that the jury was not confused or misled by the error. Fleming Realty & Ins., Inc. v. Evans 440

26. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, finds that no substantial miscarriage of justice has actually occurred. State v. Bartlett 471

27. The court in every stage of an action must disregard any error or defect in the pleadings or proceedings

which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. State v. Godboldt 561

28. The law does not permit defendant or his counsel, without reason or excuse, to provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such misconduct a ground for new trial without regard to guilt although proved beyond a reasonable doubt. State v. Godboldt 561

29. Section 24-536, R. R. S. 1943, provides that either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. State v. Nielsen 597

30. It is not the province of this court to resolve the issue of credibility of witnesses, as such matters are for the jury. State v. Infante 601

31. The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling. State v. Henggeler 651

32. Photographs are properly admissible as evidence if it be shown that they are true and correct representations of the place or subject they purport to represent at a time pertinent to the inquiry. State v. Henggeler 651

33. 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. Peery 656

34. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Peery 656

35. The judgment of the trial court in an action at law when a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless

clearly wrong. Hansen v. Circle Lake Development Corp. 678
36. Where trial is to the court, 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. Hansen v. Circle Lake Development Corp. 678
37. By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court. Paasch v. Brown 683
38. This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Paasch v. Brown 683
39. A prior conviction of the defendant offered for the purpose of impeachment may be proved only by an admission of the defendant or the public record of the conviction. State v. Caradori 691
40. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. 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. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
41. Without regard to the statutory provisions calling for trial de novo in the District Court of decisions of the Nebraska Liquor Control Commission, the court does not exercise independent judgment on fact and policy. 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission 729
42. Where a general charge fairly presents the case to the jury, it is not error for the trial court in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Smith v. Wrehe 753
43. Where a provision in a written contract is not ambiguous, the trial court must determine its meaning as a matter of law, and not submit the issue to the jury. Smith v. Wrehe 753
44. An action for specific performance is triable de novo on appeal to this court. Menke v. Foote 800
45. In a trial de novo in the Supreme Court, this court, in

reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Menke v. Foote 800

Trusts.

1. A resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Biggerstaff v. Ostrand 808
2. A resulting trust will not be declared upon doubtful and uncertain grounds; and the burden is upon the one claiming the existence of the trust to establish the facts upon which it is based by clear and satisfactory evidence. Biggerstaff v. Ostrand 808
3. Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust. Biggerstaff v. Ostrand 808

Undue Influence.

1. To sustain a finding of undue influence in the case of a deed it must be shown by clear and satisfactory evidence: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Rule v. Roth 746
   Biggerstaff v. Ostrand 808
2. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Rule v. Roth 746
3. The mere existence of a confidential relationship does not void a conveyance. As a general rule, the conveyance is valid if it appears that the grantor had competent or disinterested advice or acted voluntarily, deliberately, and advisedly, with full knowledge of the nature and effect of her act, and not because the confidential relationship influenced her. Rule v. Roth 746
   Biggerstaff v. Ostrand 808
4. The undue influence must be such as controls the will of the grantor. Biggerstaff v. Ostrand 808

Uniform Commercial Code.

1. A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of issuance. It is not subject to countermand by either its purchaser or the issuing bank. Thompson Poultry, Inc. v. First Nat. Bank of York 8
2. A bank money order, purchased for adequate consideration, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank. It is equivalent to a negotiable promissory note of the bank. Thompson Poultry, Inc. v. First Nat. Bank of York 8
3. A bank is bound to know the genuine signature of its customers, and may not charge a customer's account without receiving a valid order to do so. § 4-401, U. C. C. It may not properly charge a customer's account on the basis of a forged withdrawal slip. Maddox v. First Westroads Bank 81
4. Under section 3-419, U. C. C., the payee or true owner of a check which is cashed bearing a forged endorsement may recover from a drawee bank which has paid the check. Maddox v. First Westroads Bank 81
5. Under section 4-207, U. C. C., when a collecting bank receives a check bearing a forged endorsement and processes it through banking channels, the warranties set forth in section 4-207 apply, and the fact that the drawee bank has paid the check does not bar it from recovery under the warranties of the collecting bank on the ground that final payment has been made. Maddox v. First Westroads Bank 81
6. When a bank delivers a cashier's check made payable to its customer to a purported agent of the customer, who forges the name of the payee as endorser thereof, section 3-405, U. C. C., does not operate to validate or make such endorsement effective. Maddox v. First Westroads Bank 81
7. Under sections 1-201 and 3-302, U. C. C., a collecting bank receiving a check bearing a forged endorsement is not a holder in due course of the item. Maddox v. First Westroads Bank 81
8. Under section 3-406, U. C. C., a drawer is precluded from recovery against a bank which pays a check bearing a forged endorsement only where the drawer's negligent conduct contributes to the forgery, and not merely to the unwarranted issuance of the check. Maddox v. First Westroads Bank 81
9. Under section 2-315, U.C.C., a warranty of fitness for a

particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Whether or not the warranty of fitness for a particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

10. Lost profits, proximately caused by a seller's breach of warranty, are consequential damages which may be recovered under section 2-715, U.C.C., if the evidence is such that damages can be ascertained with a reasonable degree of certainty. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

11. Fitness for the ordinary purposes for which goods are used is a fundamental concept of section 2-314, U. C. C., and is covered by paragraph (c). Merchantability is also a part of the obligation owing to the purchaser for use. Christensen v. Eastern Nebraska Equipment Co., Inc. 741

United States.

In order for the provisions of section 79-408.02, R. R. S. 1943, to be applicable, the acquisition of land by the United States for the purposes named in the statute must have been the cause, or a substantial part of the cause, of the existence of the conditions described in the statute under which the county superintendent is directed to attach the territory of the school district affected to an adjoining district or districts. State ex rel. Goetz v. Lundak 585

Venue.

1. The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. State v. Metzger 186

2. If an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of which the victim may have been brought in the prosecution of the offense or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Tiff 519

Verdicts.

1. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Merten v. Pedersen 34
   Fleming Realty Ins., Inc. v. Evans 440
2. The verdict of a jury will not be set aside on appeal as inadequate unless it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake. Merten v. Pedersen 34
3. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Andrews 60
   State v. Infante 601
4. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Mills 295
   State v. Partee 305
   State v. Tiff 519
5. After a jury has considered the evidence in the light of the rule concerning circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Keeton 405
6. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. 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. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

Waiver.

1. If a defendant waives his right to have physical evidence suppressed by failing to make a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943, he cannot avoid the consequence of his waiver and

secure the results of an order of suppression by the expedient of a late motion to suppress testimony. State v. Donald 70

2. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial and where the exceptions thereto have no application. State v. Donald 70
3. Section 39-669.09, R. R. S. 1943, which provides that if the officer directs that the test shall be of the person's blood or urine, such person may choose whether the test shall be of blood or urine, does not require the officer to notify the person of his option, and if the person takes one or the other of these tests, then he has waived his right to insist that the test to be made by the State be the one of his choice. State v. Wahrman 337
4. Failure to file a timely motion to suppress constitutes a waiver. State v. Bartlett 471
5. Where a defendant has voluntarily waived his right to counsel at the arraignment at which a plea of guilty was entered, the trial court is not required at the subsequent sentencing proceeding to again apprise the defendant of his right to counsel, so long as nothing has intervened between the arraignment and the sentencing that should cause the waiver at the arraignment to be ineffective for the purposes of the sentencing proceeding. State v. Tiff 519

Warranties.

1. Under section 2-315, U.C.C., a warranty of fitness for a particular purpose is implied where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Whether or not the warranty of fitness for a particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
2. Where the seller of goods has breached a warranty with respect thereto, the purchaser may recover consequential damages proximately resulting from the seller's breach. Such damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697
3. Lost profits, proximately caused by a seller's breach of

warranty, are consequential damages which may be recovered under section 2-715, U.C.C., if the evidence is such that damages can be ascertained with a reasonable degree of certainty. El Fredo Pizza, Inc. v. Roto-Flex Oven Co. 697

4. Fitness for the ordinary purposes for which goods are used is a fundamental concept of section 2-314, U. C. C., and is covered by paragraph (c). Merchantability is also a part of the obligation owing to the purchaser for use. Christensen v. Eastern Nebraska Equipment Co., Inc. 741

Witnesses.

1. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr 29
2. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Merten v. Pedersen 34
3. It is not the province of this court on appeal to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence in a criminal case. These matters are for the jury. State v. Andrews 60
   State v. Stephenson 362
4. The credibility of the testimony of an expert witness is peculiarly for the trier of fact to determine. State v. Kells 374
5. It is not the province of this court to resolve the issue of credibility of witnesses, as such matters are for the jury. State v. Infante 601
6. It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. State v. Henggeler 651
7. Great latitude is allowed the trial judge in ruling on the admissibility of a hypothetical question. State v. Henggeler 651
8. This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment

as to credibility. Paasch v. Brown 683
9. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." § 27-703, R. R. S. 1943. This statute is applicable to expert testimony presented in proceedings under the Nebraska Mental Health Commitment Act. Kraemer v. Mental Health Board of the State of Nebraska 784

Words and Phrases.

1. A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of issuance. It is not subject to countermand by either its purchaser or the issuing bank. Thompson Poultry, Inc. v. First Nat. Bank of York 8
2. A bank money order, purchased for adequate consideration, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank. It is equivalent to a negotiable promissory note of the bank. Thompson Poultry, Inc. v. First Nat. Bank of York 8
3. Generally, 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. Hatridge 142
4. It was the intent of the Legislature that the words "subject to the approval of the Board of Pardons" should condition the entire section 9 of L. B. 567, Laws of 1975. Johnson & Cunningham v. Exon 154
5. Spot zoning has been generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein. Holmgren v. City of Lincoln 178
6. The words "on or about" do not put the time at large, but indicate that it is stated with approximate certainty. The phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means "approximate," "about," "without substantial variance from," "near." State v. Metzger 186
7. Section 39-669.07, R. R. S. 1943, defines but one offense

which can be the result of being under the influence of alcoholic liquor, being under the influence of any drug, or having ten-hundredths of one percent or more by weight of alcohol in the body fluid. State v. Jablonski 341

8. The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning. State v. Keeton 405

9. Prejudice is an essential element of a claim of ineffectiveness of counsel. State v. Bartlett 471

10. A resident taxpayer of a city and county where property is declared exempt by the county board of equalization is a sufficiently aggrieved party to file a petition in error. Ross v. The Governors of Knights of Ak-Sar-Ben 513

11. The word "operates" as used in the statute relating to operation of a motor vehicle while the operator was under the influence of intoxicating liquor refers to the actual physical handling of the controls while under the influence of intoxicating liquor. State v. Nielsen 597

12. Under section 29-402.01, R. R. S. 1943, the words "a merchant's employee" do not include a merchant's agent who is not an employee. Bishop v. Bockoven, Inc. 613

13. The term "financial exigency," as used in the contract of employment herein, may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole. Scheuer v. Creighton University 618

14. Substantial history of serious assaultive or terrorizing criminal activity within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstances surrounding the current charge, but refer solely to earlier acts. State v. Peery 656

15. The language "or any person in legal custody" is interpreted to apply to anyone taken into custody for transportation to the place of confinement. State v. Reeves 725

16. It is the departure from custody rather than the departure from a place of confinement which is the essential element of the offense of escape from legal custody. State v. Reeves 725

17. The crime of escape from legal custody is committed when a prisoner escapes from the custody of an arresting officer while being taken to the place of confinement. State v. Reeves 725

18. The principal distinction between the terms "lawful" and "legal" is that the former contemplates the substance of law, the latter the form of law. To say of an

act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden by law. To say that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner. State v. Reeves 725

19. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Comer 762

20. Section 83-1059, R. R. S. 1943, which prescribes the rules of evidence applicable to preliminary and final hearings and judicial hearings under the Nebraska Mental Health Commitment Act does not mandate that Miranda-type warnings precede a psychiatric interview of the person claimed to be a mentally ill dangerous person as defined by section 83-1009, R. R. S. 1943. Kraemer v. Mental Health Board of the State of Nebraska 784

21. A mentally ill person, who was confined at the time the predecessor statute to Laws 1976, L. B. 806, was declared unconstitutional and who became entitled to a hearing under the provisions of section 83-1072, R. R. S. 1943, may be determined to be a mentally ill dangerous person if, at the time of hearing under section 83-1072, R. R. S. 1943, he still presents the risk described in section 83-1009, R. R. S. 1943, and if his confinement was the consequence of a proven violent act or threat of violence or placing others in fear of such harm. Kraemer v. Mental Health Board of the State of Nebraska 784

22. A resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument or conveyance. Biggerstaff v. Ostrand 808

23. Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust. Biggerstaff v. Ostrand 808

Workmen's Compensation.

1. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. S. Supp., 1972, 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. Broderson v. Federal Chemi-

cal Co. 278
2. The Workmen's Compensation Act is one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Fite v. Ammco Tools, Inc. 353
3. The purpose of the nonapplicability of the Nebraska Rules of Evidence to the Workmen's Compensation Court was to allow the compensation court to make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190. Fite v. Ammco Tools, Inc. 353
4. The Workmen's Compensation Court must permit the introduction of evidence which is admissible in the trial courts of this state. Fite v. Ammco Tools, Inc. 353
5. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that: (1) The court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the court do not support the order or award. Fite v. Ammco Tools, Inc. 353

Wrongful Death.

An action for the wrongful death of a stillborn fetus may not be maintained under section 30-809, R. R. S. 1943. Egbert v. Wenzl 573

Zoning.

1. Zoning regulations shall be designed to secure safety from fire, flood, and other dangers and to promote the public health, safety, and general welfare, and shall be made with consideration having been given to the character of the various parts of the area zoned and their peculiar suitability for particular uses and types of development, and with a view to conserving property values and encouraging the most appropriate use of land throughout the area zoned, in accordance with a comprehensive plan. § 15-902, R. R. S. 1943. Holmgren v. City of Lincoln 178
2. A comprehensive plan is a guide to community development. Holmgren v. City of Lincoln 178

3. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Holmgren v. City of Lincoln 178
4. Spot zoning has been generally defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein. Holmgren v. City of Lincoln 178