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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1978

VIOLET M. SPIKER, CONSERVATOR OF THE ESTATE OF HAROLD SPIKER, INCOMPETENT, APPELLEE AND CROSS-APPELLANT, V. JOHN DAY CO., A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

270 N. W. 2d 300

Filed September 22, 1978. No. 41776.

1. **Workmen's Compensation.** The Workmen's Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act. The policy of the act should not be thwarted by technical refinements of interpretation.
2. _____. An employer is liable to an injured workman for reasonable medical and hospital services and medicines which are necessary to relieve or cure the injuries suffered by the workman.
3. _____. The liability of an employer to an injured workman for reasonable medical and hospital services and medicines which are necessary as a result of an injury is not limited to only those situations in which the employee may be cured or his disability reduced by further treatment.
4. _____. Ordinarily, a workman's right to recover the cost of medical and hospital services and medicines depends upon his having paid for the services or incurred a liability to pay for them.
5. **Workmen's Compensation: Parties.** Ordinarily, the Workmen's Compensation Court has no right to adjudicate a claim of a third party against an employer for services furnished to an injured employee unless the third party is a party to the action.
6. **Workmen's Compensation: Nursing Care.** An injured workman may recover the reasonable value of necessary nursing care furnished to him by his wife while he was cared for at home.
7. **Workmen's Compensation.** A finding of the Workmen's Compen-

sation Court that is clearly wrong will be reversed.

8. **Workmen's Compensation: Penalties: Time.** Where there is a reasonable controversy between the parties, an injured workman is not entitled to the statutory penalties for waiting time.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

Knudsen, Berkheimer, Endacott & Beam, for appellants.

Law Offices of Kenneth Cobb, P.C., and Kenneth Cobb, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Harold A. Spiker, was employed by the defendant, John Day Co. as a salesman. On August 11, 1971, the plaintiff was severely injured in an automobile accident which arose out of and in the course of his employment.

Following the accident the defendant and its insurance carrier paid compensation to the plaintiff for total disability and paid the plaintiff's medical and hospital expenses through March 3, 1972. This action was commenced on September 28, 1976, to recover medical and hospital expenses which the plaintiff incurred after March 3, 1972. The plaintiff's wife, who was appointed as conservator for the plaintiff on March 21, 1977, has been substituted as plaintiff. However, for convenience, the injured workman will be referred to as the plaintiff.

At the hearing before a single judge of the compensation court the plaintiff recovered an award for total disability, the award to continue for so long as the plaintiff remained totally disabled. The court found that the plaintiff suffered from chronic focal

organic brain syndrome with behavioral disorder due to cerebral trauma sustained at the time of the accident. Although the plaintiff's condition had stabilized, it was probable that he would require institutional care with adequate nursing care and medical management for the rest of his life. The defendants were ordered to reimburse the plaintiff, the Veterans' Administration, and Medicare for expenses in the amount of $53,432.47 and were ordered to pay for such future medical, institutional, and hospital care as was reasonably necessary. The defendants refused to accept the findings and award and requested a rehearing before the compensation court.

Upon rehearing, the compensation court found that the plaintiff was totally and permanently disabled as a result of the accident; that none of the plaintiff's hospital confinements on or after March 3, 1972, were required for the treatment of any condition or disease caused or aggravated by the accident; that there was no substantial connection between the accident and subsequent urinary tract infections, bladder tumor, enlarged prostate, respiratory infections, or hemiplegia; and that all expenses attributable to the treatment of those conditions and diseases were not compensable.

The compensation court further found, one judge dissenting, that the plaintiff required continual custodial or nursing home care as a result of the brain injury, irrespective of other conditions or diseases, and that such care will be required for the rest of the plaintiff's life. The court awarded the plaintiff an amount equivalent to the cost of custodial care in a nursing home for the time in which he had been cared for at home. The court also ordered the defendants to reimburse the Veterans' Administration in the amount of $18,909.40, and Medicare in the amount of $2,812.80, for hospital, medical, surgical, and nursing home services which had been furnished

to the plaintiff. The defendants have appealed and the plaintiff has cross-appealed from the award on rehearing.

The principal question presented by the appeal is whether an injured workman who is totally and permanently disabled and requires nursing care as the result of an accident and injury which arose out of and in the course of his employment is entitled to recover for the cost of such care although it will not cure or lessen his disability.

The issue here is not one of fact but is a question of law. There is no dispute concerning the plaintiff's right to compensation or his need for nursing care for the remainder of his life. In construing the act it is important to remember that the Workmen's Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act. Marlow v. Maple Manor Apartments, 193 Neb. 654, 228 N. W. 2d 303. The policy of the act should not be thwarted by technical refinements of interpretation.

At the time of the accident on August 11, 1971, section 48-120, R. R. S. 1943, provided in part as follows: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, and in addition to devices necessary for treatment, the first prosthetic devices, subject to the approval of the compensation court, not to exceed the regular charge made for such service in similar cases * * *.

"The court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished * * *."

In Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165, this court said: "The burden placed upon the employer by section 48-120, R. R. S. 1943, is designed to *relieve or cure* the physical injuries suffered by the employee." (Emphasis supplied.)

Although there is some conflict in authority, most of the cases which have considered the question hold

that an employer is liable for medical, surgical, and hospital services required by an injured workman even though his disability is total and permanent and there is no hope of a cure. See, 2 Larson, The Law of Workmen's Compensation, § 61.14, p. 10-474; 10 Schneider's Workmen's Compensation (Perm. Ed.), § 2016, p. 137.

In W. J. Newman Co. v. Industrial Commission, 353 Ill. 190, 187 N. E. 137, the employee was paralyzed from the hips down as a result of a fractured spine. His disability was total and permanent and could not be reduced by any further treatment. His condition required constant nursing care. The Illinois Supreme Court held that the care which he required was necessary to relieve him from the effects of the injury and that the employer's liability continued so long as medical, surgical, and hospital services were required in order to relieve the injured employee from the effects of his injury.

In Castle v. City of Stillwater, 235 Minn. 502, 51 N. W. 2d 370, the employee had sustained injury to the cervical spine which resulted in permanent total disability. The Supreme Court of Minnesota held that the employer was required to provide physiotherapy, massage, and heat treatments because such treatments were necessary to relieve the employee from the effects of the injury even though such treatments could not effect a cure or reduce the disability of the employee.

In Howard v. Harwood's Restaurant Co., 40 N. J. Super. 564, 123 A. 2d 815, the employee was totally and permanently disabled as a result of an assault by a deranged fellow employee. The injured employee required care in a nursing home, or at home with nurses, and medical supervision to prevent complications such as pneumonia, kidney and skin infections, and to take care of her bowels, bladder, and nutrition. The New Jersey court held that the employer was liable for such services under a stat-

ute requiring "medical, surgical and other treatment, and hospital service as shall be necessary to *cure and relieve* the workman of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible" even though the employee could not be cured by such treatment, and would never be able to get out of bed or be able to take care of herself. (Emphasis supplied.)

In Stephens v. Crane Trucking, Inc. (Mo.), 446 S. W. 2d 772, the employee was totally and permanently disabled as a result of injuries suffered in a truck accident. The Supreme Court of Missouri held that the employee was entitled to nursing care under a statute authorizing medical, surgical, and hospital treatment, including nursing where required "to cure and relieve from the effects of the injury." The court said: "In Brollier v. Van Alstine, 236 Mo. App. 1233, 163 S. W. 2d 109, the insurer contended that the statutory terms 'cure' and 'relieve' were used in the conjunctive and that if the employee could not be 'cured' of his injuries the commission lacked power to order the insurer to furnish treatment to 'relieve' him. The court held: ' * * * such a position is untenable. The two words do not have identical meaning and the Legislature must have intended that both words should be given effect, else it would not have used both. * * * The words as used in the statute must be given their usual and well recognized meaning, and the statute must be liberally construed. Claimant * * * may be "relieved," that is, given comfort, succor, aid, help, and ease, in his suffering; but he cannot be "cured" or "restored to soundness" after his injury.' 163 S. W. 2d 1. c. 115 [7, 8]. So it is with Mr. Stephens—he is entitled to nursing services which 'relieve him in his otherwise helpless bedfast condition even though there is no further course of 'medical' treatment in anticipation of a 'cure' or restoration to soundness." See, also,

Di Giorgio Fruit Corp. v. Pittman (Fla.), 49 So. 2d 600; Loomis v. Travelers Ins. Co. (La. App.), 169 So. 2d 544; Orrick Stone Co. v. Jeffries (Okla.), 488 P. 2d 1243.

The defendants rely upon Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N. W. 254; Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11; Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387; and Halbert v. United States F. & G. Co., 185 Neb. 775, 178 N. W. 2d 781, in which cases it was stated that the employer's liability under section 48-120 to furnish reasonable medical and hospital services and medicines, as and when needed, ceases when further medical, hospital, and surgical services would not definitely improve the condition of the injured employee and improvement would be conjectural. None of these cases involved an employee who had suffered a brain injury which produced total permanent disability. The issues involved in those cases was whether the workman was entitled to recover the expense of further surgical procedure where it was conjectural whether such procedure would be of any benefit to the workman. In the Halbert case the workman was allowed to recover the expense of surgery to his left foot even though the operation had been of questionable value, proved to be unsuccessful, and actually increased his disability. In the Peek case the employee had sustained a brain injury but this court determined "no necessity for further surgical or psychiatric treatment was shown." None of these cases are controlling or applicable here.

In Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, the employee was totally and permanently disabled as the result of an accident on April 7, 1936, in which he fell from the rear of a truck and injured his spine. The injury resulted in total permanent disability on March 31, 1941. In a proceeding commenced August 25, 1941, the employee recovered an award for total

disability and medical, surgical, and hospital care. No appeal was taken from this award by the employer. The employee was paid compensation for total disability until his death on September 27, 1944. The employer refused to pay for medical and hospital care for the employee after November 15, 1942. An application for additional benefits filed on July 24, 1944, resulted in an award for the medical and hospital expenses incurred by the employee from November 15, 1942, until his death, which award was affirmed by the District Court and this court. We held that the medical and hospital expense incurred by the employee "from and after the accident and resulting injuries until his death, were necessary and directly connected with the accident of April 7, 1936," and were compensable.

In Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N. W. 2d 624, the employee had suffered multiple injuries to his right arm, both feet, left leg, and spine with resulting bowel and urinary difficulties as a result of his injuries. He was determined to be permanently partially disabled as a result of the accident and the probability was recognized that he would become totally disabled. Three judges of this court were of the opinion he was then totally and permanently disabled. It was undisputed that his condition would deteriorate with the passage of time and there was evidence he would need the services of an orthopedist and urologist for the rest of his life. He was awarded compensation by this court for temporary total disability for 149 4/7 weeks; 65 percent permanent partial disability for 150 2/7 weeks; and 17 1/2 percent permanent partial disability for the two-member injury for the rest of his life. With respect to his right to future medical expenses under section 48-120, R. R. S. 1943, we said: "Section 48-120, R. R. S. 1943, provides: 'The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, * * * subject to

the approval of the compensation court, * * *.' The undisputed evidence indicates plaintiff will require medicines, and medical and hospital services in the future as a result of his injuries. If and when such items are required, they shall, subject to approval by the compensation court, be supplied at defendants' expense. See Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918."

The employee's right to future medical expenses in the Shotwell case was not in any way dependent upon some hope of a "cure" or a reduction in disability. The employee had then reached his maximum recovery and it was apparent his condition would worsen in the future rather than improve. Nevertheless, he was awarded future medical and hospital services and medicines as and when needed to be supplied at the expense of the employer.

The evidence in this case establishes that the plaintiff requires nursing care on a permanent basis as a direct result of the brain injury sustained in the accident on August 11, 1971. The plaintiff is entitled to recover the cost of such care under section 48-120, R. R. S. 1943.

The defendants further contend the trial court erred in awarding the plaintiff an amount equivalent to the cost of custodial care in a nursing home as a substitute for reimbursement for home care, and in ordering the defendants to reimburse the Veterans' Administration and Medicare for services furnished to the plaintiff.

Neither the Veterans' Administration nor Medicare, nor any agency concerned with that program, were parties to the action. There was no evidence that the plaintiff had incurred any liability for services furnished by the Veterans' Administration or Medicare. It is clear that the plaintiff had no claim for reimbursement for services furnished by the Veterans' Administration and Medicare and the compensation court had no jurisdiction to determine

any right of reimbursement that either the Veterans' Administration or Medicare might have as against the defendants. That portion of the award ordering the defendants to reimburse the Veterans' Administration and Medicare was erroneous and is reversed.

In Claus v. DeVere, 120 Neb. 812, 235 N. W. 450, this court held that an injured workman could not recover for his wife's services as a nurse which were furnished to him while he was cared for at home. There is much authority to the contrary in other jurisdictions and a majority of this court is now of the opinion that the decision in Claus v. DeVere, *supra,* should be overruled for the reasons stated in the concurring opinion of Brodkey, J. The plaintiff is entitled to an award for the reasonable value of the nursing care furnished to him by Mrs. Spiker while he was cared for at home together with the reasonable expense of the nurses and aides who were employed to assist Mrs. Spiker in caring for the plaintiff during the time that he was at home. This does not include the cost of additions to the plaintiff's home.

The cross-appeal contends the compensation court erred (1) in finding the hospital confinements after March 3, 1972, were not directly related to the accident; (2) in finding there was no causal connection between the accident and the plaintiff's urinary tract infections, enlarged prostate, respiratory infections, and hemiplegia; (3) in failing to compensate the plaintiff's wife for home nursing care; (4) in failing to award a portion of the cost of adding a room to the plaintiff's home to enable him to be cared for at his home; (5) in failing to award the Veterans' Administration the fair and reasonable value of the hospital care furnished to the plaintiff; and (6) in failing to award the statutory penalty and attorney's fees as provided in section 48-125, R. R. S. 1943.

The fourth and fifth contentions of the cross-appeal

are without merit for reasons which have been stated before.

The evidence shows that following the accident on August 11, 1971, the plaintiff was hospitalized at Bryan Memorial Hospital. He was discharged from the hospital on October 12, 1971, and readmitted on November 1, 1971. He was transferred to Madonna Professional Care Center on January 6, 1972. He was readmitted to the hospital on January 14, 1972, and transferred to the Veterans' Administration Hospital on March 3, 1972. Since March 3, 1972, he has been in a Veterans' Administration Hospital, Eastmont Manor, the Americana Nursing Home, Bethesda Hospital, Lincoln General Hospital, or Milder Manor Nursing Home except for 171 days when he was cared for at his home.

On January 26, 1972, Dr. John D. Baldwin, a psychiatrist who had been assisting with the treatment of the plaintiff, wrote to the plaintiff's wife and attorney concerning the future care and treatment of the plaintiff. Dr. Baldwin stated that although the plaintiff's condition had now stabilized, it was probable that he would require institutional care for the rest of his life in a long-term psychiatric facility with adequate nursing personnel and medical management. Dr. Baldwin emphasized that the plaintiff's condition might deteriorate as he became aged and that he would need continual medical management and medications.

On February 18, 1972, the defendant insurance carrier wrote to the plaintiff's lawyer stating that further medical payments for the plaintiff would be terminated after March 3, 1972. Apparently, March 3, 1972, was an arbitrary date selected by the insurance carrier and the termination was actually based upon Dr. Baldwin's letter of January 26, 1972.

When the plaintiff was first hospitalized following the accident, one of the injuries for which he was treated was blood in his urine. The treatment for

this condition necessitated the insertion of a catheter which was left in place for several weeks. Thereafter, the plaintiff had a series of urinary difficulties including incontinence, infections of the urinary tract, strictures, and retention. Various procedures were performed including cystoscopy and transurethral resection.

In the course of treatment it was discovered that the plaintiff had a small bladder tumor and enlargement of the prostate. The tumor was not related to the accident in any way. The enlargement of the prostate was not related to the accident except that it combined with his injuries to complicate his urinary problems and the procedures undertaken to correct that condition were done in an effort to relieve the incontinency and infections which were related to the brain injury sustained in the accident.

Since the accident the plaintiff has been treated by Dr. Donald Purvis, a specialist in internal medicine; Dr. Bruce McMullen, a specialist in internal medicine; Dr. John Baldwin, a psychiatrist; Dr. Louis Gilbert, a urologist; Dr. Guy Matson, a physician; Dr. David J. Gogela, a specialist in neurosurgery; Dr. Carlos Mota, a surgeon and urologist; Dr. Julia Hopkins, a specialist in internal medicine; Dr. Douglass Decker, a neurologist; and Dr. George Hachiya, a psychiatrist. All these physicians were called as witnesses by the plaintiff and testified in his behalf. Their testimony established that the injury to the plaintiff's brain produced a general debilitating effect and resulted in his bowel and urinary difficulties.

The testimony of the treating physicians established that the urinary infections were directly related to the brain injury. The only evidence to the contrary was the testimony of Dr. Harold Ladwig, a neurologist, who had not examined or treated the plaintiff and whose testimony was based entirely upon an examination of records.

The evidence is nearly conclusive that the urinary tract infections were the result of the brain injury and the treatments utilized in attempting to control the urinary problems which the plaintiff had as a result of his injury. The finding of the compensation court that there was no causal connection between the urinary tract infections and the injury was clearly wrong and is reversed.

In addition to his urinary and bowel problems the plaintiff sustained a cerebral vascular accident on April 25, 1975, resulting in hemiplegia. The plaintiff has had several severe respiratory infections. Although the plaintiff's brain injury may have been a contributing cause to these difficulties, the evidence is such that we can not say that the compensation court was clearly wrong in finding to the contrary.

There was a reasonable controversy between the parties in this case and the plaintiff was not entitled to the statutory penalties for waiting time. § 48-125, R. R. S. 1943; Marshall v. Columbus Steel Supply, 187 Neb. 102, 187 N. W. 2d 607. Since it does not appear that the award to the plaintiff was increased in this court, no allowance is made for the services of the plaintiff's attorneys in this court.

The judgment of the compensation court is affirmed in part, and in part reversed, and the cause remanded for further proceedings in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BRODKEY, J., concurring.

I feel the time has come for this court to reconsider and overrule our previous pronouncement in Claus v. DeVere, 120 Neb. 812, 235 N. W. 450 (1931), in which this court announced the rule that an injured workman cannot recover for his wife's services as a nurse which were furnished to him while he was cared for at home.

The accident in question occurred on August 11, 1971. The defendant and the insurance company refused to make any further payments to the claimant after March 3, 1972, on the basis that plaintiff's condition would not be further improved, and might even deteriorate. The applicable statute in effect at that time provided that: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, and in addition to devices necessary for treatment, the first prosthetic devices, subject to the approval of the compensation court, not to exceed the regular charge made for such service in similar cases * * *. The court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of doctor, physician, hospital, or rehabilitation facility when it deems such change is desirable or necessary." See section 48-120, R. R. S. 1943, in effect at that time. We point out that the above section was amended, effective August 24, 1975, and the principal change in the language is italicized as follows: "The employer shall be liable for all reasonable medical and hospital services, appliances, supplies, prosthetic devices and medicines as and when needed, *which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment,* subject to the approval of and regulation by the compensation court, * * *." Laws 1975, L.B. 127, § 1, p. 264. However, even under the wording of the original statute, this court held in Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165 (1956): "The burden placed upon the employer by section 48-120, R. R. S. 1943, is designed to *relieve or cure* the physical injuries suffered by the employee." (Emphasis supplied.) There is little question that under either the original statute or the subsequent amendment, nursing services, as such, are covered

as "reasonable medical services." In some of the jurisdictions hereinafter referred to, the statutes specifically provide for liability for "nursing services," but we do not believe the result would be any different even though not specifically mentioned in the particular statute involved. The principal problem involved in this case, as well as one frequently encountered in other jurisdictions, is whether recovery for nursing services are recoverable when rendered by the claimant's spouse or other members of his or her immediate family. See, 2 Larson, The Law of Workmen's Compensation, § 61.13, pp. 10-469 to 10-472; 10 Schneider's Workmen's Compensation (Perm. Ed.), § 2004(m), p. 34 et. seq., and Supplements thereto; 99 C. J. S., Workmen's Compensation, § 268, pp. 918, 919. The problem is well delineated and discussed by the court in A. G. Crunkelton Electric Co., Inc. v. Barkdoll, 227 Md. 364, 177 A. 2d 252 (1962), where the court states: "Appellants' next contention is that the appellee's wife is not entitled to receive compensation for nursing services performed for her husband. This raises a question novel in this State. Ordinarily nursing services, when necessary and authorized, are part of any workmen's compensation law, and the injured employee, when it is required, is entitled to nursing services at home or in a hospital. There is no dispute on this point. However, when a member of the employee's immediate family (wife) as here, is involved, a conflict of judicial opinion arises.

"The cases which deny such allowances (compensation to the wife) do so on the grounds that the services rendered constitute a duty imposed by the marital relationship and for which the husband would not be liable in suit for quantum meruit, nor can the wife recover in a suit against a third party. Other cases have held, in the absence of a showing that the wife had given up other employment to care for her husband, that such a claim would not be allowed.

For cases denying the allowance to a wife, see Claus v. DeVere (Neb.), 235 N. W. 450; Graf v. Montgomery Ward (Minn.), 49 N. W. 2d 797; and Galway v. Doody Steel Erecting Co. (Conn.), 130 Atl. 705.

"However, other states have adopted the so-called 'modern rule' as enunciated by Professor Larson, and have permitted such payments to a wife on the grounds that when the wife was employable she was entitled to compensation for caring for her husband, or, that the services required were of an extraordinary nature and not those contemplated by the usual marital relationship and, therefore, she would be entitled to be recompensed for the same. California Casualty Ind. Exch. v. Industrial Acc. Com'n (Cal.), 190 P. 2d 990; Daugherty v. City of Monett (Mo.), 192 S. W. 2d 51; and Berkowitz v. Highmount Hotel, 120 N. Y. S. 2d 600. See also 2 Larson, Workmen's Compensation Law, § 61.13."

Inasmuch as the decision in many of the opinions hereinafter cited appear to turn on the peculiar facts of the individual cases, it will be helpful at this point to set out the type of services rendered by Mrs. Spiker to her husband during the course of his illness. The insurer informed the plaintiff's attorney on February 18, 1972, that all medical payments for the plaintiff would terminate on March 3, 1972. After that date, Mrs. Spiker cared for her husband at their home for a total of 171 days, during which time she attended her husband singlehandedly for a total of 3,371 hours. During the night it was necessary for her to get up at least once an hour to turn her husband, change the bedding when he had a bowel movement, give him medication when his bladder spasms commenced, insert catheters when necessary, and generally take care of him in the evenings and on weekends, when the employed nurse was absent. Her stated reason for the extensive care she rendered him was for the purpose of reducing the cost of such care. It is clear that the

type of services rendered by Mrs. Spiker to her husband were not those of an ordinary housewife, but were of an extraordinary nature and the type usually rendered by professional nurses.

In-depth research of authorities from other jurisdictions, as well as our own, reveals that there are three basic requirements to be satisfied before compensation will be allowed for the care given an injured employee by the spouse in their home. These requirements are that: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the wife must be extraordinary and beyond normal household duties; and, finally (3) there must be a means of determining the reasonable value of the services rendered by the spouse. These considerations presuppose that nursing care in the employee's home is allowable under the statute. As set out in the majority opinion, Nebraska would allow recovery for such care in the home.

Both Michigan and Massachusetts have considered statutes similar to Nebraska's section 48-120, R. R. S. 1943, and have held that nursing care rendered at home by the wife would be included in the term "medical services." Dunaj v. Harry Becker Co., 52 Mich. App. 354, 217 N. W. 2d 397 (1974); In re Klapac, 355 Mass. 46, 242 N. E. 2d 862 (1968). The Michigan Court of Appeals in Dunaj v. Harry Becker Co., *supra*, discussed the question of "whether medical services rendered by claimant's wife are unpaid *medical services* within the meaning of the statute," (in effect at the time of the accident) and held "that medical service by a claimant's wife are compensable to the same extent as they would be if the services had been rendered by someone other than the wife." (Emphasis supplied.) The court concluded by stating "we do not believe that the Legislature intended that an employee and its insurer should re-

ceive a windfall by reason of the fact that claimant's wife has performed services which should have been provided by said employer."

The Massachusetts Supreme Court in In re Klapac, *supra,* stated: "The term 'medical services' as used in the statute is inclusive of the services of a nurse * * *." The court stated that: "The wife was not barred from receiving payments for nursing services because of the marital relationship * * *. It is beside the point that no debt may have arisen between husband and wife * * *. The employer through the insurer, if insured, has the affirmative duty to furnish to an injured employee 'adequate and reasonable medical and hospital services, and medicines if needed, * * *.' G. L. c. 152, § 30. If services that fall within the statutory provisions are furnished by the wife, they should be paid for. The statutory obligation is not expressed in terms of reimbursing the employee for amounts he became obligated to pay." The court in In re Klapac, *supra*, did not allow compensation for the wife's care as she was not supervised by a physician.

Many other jurisdictions, with statutes specifically providing nursing care, have allowed the spouse' claim for services. In Daugherty v. City of Monett, 238 Mo. App. 924, 192 S. W. 2d 51, the appellate court found that "the wife rendered excellent services and it was certainly in addition to her ordinary household duties." The court also distinguished Claus v. DeVere, *supra*, because the wife in the Daugherty case was not being compensated for the "ordinary household services of a wife but extraordinary services in addition to her ordinary duties." See, also, Groce v. J. E. Pyle, 315 S. W. 2d 482 (Mo. App., 1958).

The Missouri Court of Appeals spoke again on the issue of compensating a spouse for home care in Collins v. Reed-Harlin Grocery Co., 230 S. W. 2d 880 (Mo. App., 1950). The court found that the employer knew of the employee's injuries and his need for as-

sistance. The court concluded that the employer's failure to provide or to offer to provide such services resulted in its liability for the care provided by the wife. See, also, Stephens v. Crane Trucking, Inc., 446 S. W. 2d 772 (Mo., 1969); Balsamo v. Fisher Body Div. - G. M. Corp., 481 S. W. 2d 536 (Mo. App., 1972).

California has also decided that a spouse should be compensated for nursing care provided an injured employee at their home in the case of California Cas. Indem. Exch. v. Industrial Accident Commission, 84 Cal. App. 2d 417, 190 P. 2d 990 (1948). The California statute, section 4600 of the Labor Code provided that "nursing" should be provided an injured employee by the employer. See, also, Pacific Elec. Ry. Co. v. Industrial Accident Commission, 96 Cal. App. 2d 651, 216 P. 2d 135 (1950), where a practical nurse was hired in order to reduce medical expenses. The Court of Appeals allowed the employee full compensation although the nurse performed general housework in addition to providing nursing care.

Both Texas and Oklahoma have statutes which require the employer to provide nursing care to an injured employee. Texas, Vernon's Ann. Civ. St., art. 8306, § 7; Oklahoma Statute, 85 O. S. 1961, § 14. Both states have found that a spouse' care of an injured employee is to be compensated under the statutes. Western Alliance Ins. Co. v. Tubbs, 400 S. W. 2d 850 (Tex. Civ. App., 1965); Transport Ins. Co. v. Polk, 400 S. W. 2d 881 (Tex., 1966); Orrick Stone Co. v. Jeffries, 488 P. 2d 1243 (Okla., 1971). The court in Western Alliance Ins. Co. v. Tubbs, *supra*, stated that the wife's services "consisted of feeding, bathing, shaving and turning claimant, taking him to the doctor and generally 'taking care of' him in his home while he was an invalid." In the instant case Mrs. Spiker has rendered very similar care and assistance to her husband.

The Supreme Court of Michigan in Kushay v. Sex-

ton Dairy Co., 394 Mich. 69, 228 N. W. 2d 205 (1975), found that the Michigan statute, M. C. L. A., § 418.315, which provided for "other attendance" of an injured employee, included the care rendered by a spouse. The Michigan Supreme Court stated that: "The language of the statute * * * focuses on the nature of the service provided, not the status or devotion of the provider of the service. * * * If services within the statutory intendment are provided by a spouse, the employer is obligated to pay for them." I believe that Mrs. Spiker in this case provided the same type of nursing care in the nurse' absence, hence, the employee should be compensated for the reasonable value of such services. It is the "nature of the service provided, not the status or devotion of the provider of the service * * *."

Florida has allowed compensation for the wife's services as a practical nurse while caring for her husband, but without discussion or explanation as to the reasons for so doing. Brinson v. Southeastern Utilities Service Co., 72 So. 2d 37 (Fla., 1954); Brown v. Dennis, 114 So. 2d 335 (Fla. App., 1959).

The Florida Supreme Court has also allowed a wife compensation for nursing her husband, although "she did not give up any regular employment." Oolite Rock Co. v. Deese, 134 So. 2d 241 (Fla., 1961). The court there stated that: "The position that the wife could not be compensated in such an extreme case, though the petitioners were escaping the payment to some one else, simply because the wife did not happen to have been employed at the time of the husband's misfortune, is one we cannot accept. We think adoption of the rule would be so harsh as to be downright unjust." See, also, McMahon v. Huntington, 246 So. 2d 743 (Fla., 1971).

Many of the cases which have denied a spouse compensation for the care rendered an injured employee, did so on the ground that the care rendered was *not* so unusual or extraordinary from normal

household duties as to be compensable. Claus v. DeVere, *supra*; Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 135; South Coast Constr. Co. v. Chizauskas, 172 So. 2d 442 (Fla., 1965); Pan American World Airways, Inc. v. Weaver, 226 So. 2d 801 (Fla., 1969); Bituminous Cas. Corp. v. Wilbanks, *supra*; Graf v. Montgomery Ward Co., 234 Minn. 485, 49 N. W. 2d 797.

The reason given by the Nebraska Supreme Court for its holding in the case of Claus v. DeVere, *supra*, was as follows: "The rule is that the husband is entitled to the services of the wife. He is not liable to her; nor could she sue and recover from him for any service rendered him as a wife * * *."

The care rendered by a spouse is intended for the injured employee's benefit only, not for the employer-insurer's benefit. In this case the employer and insurer refused to provide further care for Mr. Spiker and Mrs. Spiker was forced to care for her husband at their own expense. Mrs. Spiker testified that she was trying to reduce the cost of her husband's care by bringing him home. The employer-insurer should not be allowed to profit from the gratuitous care, given out of love, to an injured employee by his spouse, when it was the employer which *forced* the care of the employee upon the spouse.

I conclude from the foregoing authorities that it would be most inequitable not to permit an injured employee, entitled to workmen's compensation benefits under the applicable statute, to recover the value of services rendered him by his spouse or other members of his family. The obvious injustice is made clear particularly in cases where a wife, prior to the time of the accident, has been gainfully employed and contributing the fruits of her labors to the family income. The same is true in situations where the wife, although not employed at the time, would normally have had the opportunity to obtain

employment and make such contribution. In either event, through no fault of the wife or the injured husband, the family had been deprived of income probably sorely needed to supply their daily requirements. See Oolite Rock Co. v. Deese, *supra*.

As previously noted, there are jurisdictions which do not permit the injured employee compensation for services rendered in the home by the spouse or by other close relatives. However, as stated in 2 Larson, the Law of Workmen's Compensation, § 61.13, p. 10-465, the modern trend of authority is away from that espoused in older cases previously referred to and the equitable view adopted by the more modern cases would appear to be in line with the view I am espousing herein. Most of the cases to the contrary, which I have cited above, may be distinguished on their facts. Other older cases, not cited herein and holding to the contrary, may also be distinguished on other grounds.

I believe the rule announced by this court in Claus v. DeVere, *supra*, in 1931 is outdated, out of step with modern thinking, and highly inequitable in its result, and that this court is correct in overruling that decision. We have in the past stated on many occasions that the Workmen's Compensation Act should be liberally interpreted so as to effectuate the beneficent purposes of the act. Our action today gives substance to that adage.

BOSLAUGH, MCCOWN, and WHITE, C. THOMAS, JJ., join in the opinion of BRODKEY, J.

WHITE, C. J., concurring in part, and dissenting in part.

I concur in the majority opinion insofar as it holds:

(1) That the Veterans' Administration and Medicare are not entitled to reimbursement for the reasonable value of medical services provided to plaintiff:

(2) That plaintiff is not entitled to an award for a portion of the cost of adding a room to his home to

enable him to be cared for at home;

(3) That the determination of the Workmen's Compensation Court that the plaintiff's cerebral vascular accident, hemiplegia, and respiratory infections were not a result of his brain injury, is not clearly wrong; and

(4) That plaintiff is not entitled to the statutory penalty and attorney's fees as provided in section 48-125, R. R. S. 1943.

For the following reasons, however, I respectfully dissent from the remainder of the majority opinion.

"The findings of fact made by the Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case." § 48-185, R. S. Supp., 1976. The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Boults v. Church, 200 Neb. 319, 263 N. W. 2d 478 (1978); Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977). The compensation court unanimously and specifically determined that plaintiff's urinary tract infections and bowel difficulties were not the result of his brain injury, but were due to independent and unrelated causes.

Dr. Harold Ladwig examined plaintiff's medical records and gave his opinion that plaintiff's subsequent urinary tract infections were not a result of his brain injury. While plaintiff possibly had a minor urinary tract infection shortly after the accident, the serious reoccurring urinary tract infections he has since suffered from did not commence until August 1972. At that time he underwent surgery on his bladder and prostate. In connection with this a catheter was inserted. Several witnesses acknowledged that an indwelling catheter is a potential source of infection. Dr. Baldwin, who treated plaintiff from October 1971, until March 3, 1972, testified that when he last saw plaintiff he was not suffering from or afflicted with a urinary tract infection.

There is sufficient evidence to sustain the finding of the compensation court, and it cannot be said to be clearly wrong.

It is clear and undisputed from the record that plaintiff reached maximum recovery from his brain injury as of March 3, 1972, and that no further medical treatment, medicine, or surgical procedure would improve, remove, or lessen his injury. The primary question in this case is whether plaintiff is entitled, under the workmen's compensation statutes, as existed on the date of his injury, to an award for noncurative custodial care.

With a single stroke of the pen, the majority opinion concludes that a long series of precedents, by this court, are not "controlling or applicable here." Citing these same decisions, one eminent author in the field of workmen's compensation law concludes that Nebraska is among those jurisdictions which hold that workmen's compensation medical benefits do not extend to "palliative measures useful only to prevent pain and discomfort after all hope of cure is gone." 2 Larson, The Law of Workmen's Compensation, § 61.14, p. 10-474.

In Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11 (1947), the plaintiff suffered an injury to his right foot, and sought an award for an operation to decrease the disability to that foot. The record there failed to show there would be a definite improvement to plaintiff's foot if the operation were performed. Denying plaintiff's claim, we held: "Where the evidence discloses that further medical, hospital and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability, under section 48-120, R. R. S. 1943, to furnish reasonable medical and hospital services and medicines, as and when needed, ceases."

In Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N.

W. 2d 387 (1952), plaintiff, a salesman, suffered various injuries as the result of an automobile accident. Among the injuries suffered was a "brain injury with resulting traumatic encephalitis and post-traumatic neurosis." Plaintiff sought an award for further medical services in connection with his injury. In denying his claim, we stated: "At the hearing on December 19, 1950, the plaintiff was admittedly improved and no necessity for further surgical or psychiatric treatment was shown. (Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11 (1947) cited). * * * Therefore, in the light of the evidence and such rules, we conclude that defendant should not be required to furnish plaintiff any future medical and hospital services." See, also, Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N. W. 254 (1938); Halbert v. United States F. & G. Co., 185 Neb. 775, 178 N. W. 2d 781 (1970). These cases are directly applicable and should be controlling in this case.

Clearly, plaintiff will need custodial care for the rest of his life. In Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165 (1956), plaintiff broke his eyeglasses in the course of an accident. He developed headaches from not wearing them, purchased a new pair, and claimed payment for the eyeglasses. In denying his claim, we stated: "*Need* for eyeglasses *is not the test.* The burden placed upon the employer by section 48-120, R. R. S. 1943, is designed to relieve or cure the physical injuries suffered by the employee." (Emphasis supplied.)

Obviously, plaintiff is in pitiful condition. We cannot, however, permit our sympathy for plaintiff to force us into strained interpretations of our statutes and case law. As was cautioned in Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186 (1964): "The result of the instant case appears to be a harsh one. But this court is bound by the statute as enacted. It has no authority to alleviate

the apparent harshness of the result by the application of equitable principles. The plain language of the workmen's compensation law must be followed by this court. The right to and amount of recovery are purely statutory."

"While the conception underlying workmen's compensation is one of insurance, an employer is not an insurer of his employee or his safety, and the acts are not designed to afford life, health, old age, or unemployment insurance." 99 C. J. S., Workmen's Compensation, § 9, p. 54. " * * * the existence and amount of the right to, and corresponding liability for, compensation depend on the provisions of the particular statute." 99 C. J. S., Workmen's Compensation, § 6, at p. 51.

The majority opinion concludes that under section 48-120, R. R. S. 1943, plaintiff is entitled to an award for noncurative custodial care. Section 48-120, R. R. S. 1943, holds the employer liable for "reasonable *medical* and *hospital services* and *medicines* as and when needed and in addition to *devices* necessary for treatment, the first *prosthetic devices.*" (Emphasis supplied.) Under no reasonable construction or interpretation of this statute can it be said that the employer is liable for purely custodial care of the injured employee, which will do nothing to improve his injured condition.

In 1965, the Workmen's Compensation Law was amended by the Legislature to allow the injured employee to recover the cost of a first prosthetic device. Laws 1965, c. 278, § 1, p. 799. The introducer of that act in his Statement of Intent, and later in floor debate explained that: "This bill expands the definition of medical payments under the Workmen's Compensation Statutes. Presently, the statute, as interpreted by the Supreme Court, has meaning that no prosthetic device is covered under medical payments. This means that if a workman is injured on the job in the scope of employment and

otherwise covered by Workmen's Compensation his medical expenses would terminate at the point that he needed a prosthetic device. If he lost a leg or an arm and needed an artificial limb or a glass eye or other similar prosthetic device, the present law does not cover it." Floor Debate, L. B. 278, p. 393 (1965).

The majority opinion holds that the same statutory language, which had to be amended by the Legislature to allow an injured workman to recover the cost of a prosthetic device, permits recovery for unlimited noncurative custodial care.

The majority opinion overrules Claus v. DeVere, 120 Neb. 812, 235 N. W. 450 (1931), and establishes a right to compensation for nursing care furnished by the wife at home. The rule denying such compensation under our statute has been settled law for 47 years (since 1931). So far as I can discover, it has never been challenged or disturbed by the Legislature. It is now abrupty overruled. It would seem clear that a rule of such established standing, interpreting the statute, should not be reversed except after a full hearing and examination in the legislative forum.

Plaintiff and the concurring opinion of Brodkey, J., cite numerous cases to us from other jurisdictions for the propositions that the long-range "reasonable medical and hospital services" include nursing home care, and that the nursing services of a wife are compensable. I have carefully examined these cases and find them inapplicable. These cases arise in different jurisdictions, under different statutory language, and are the products of different case law. I shall not attempt to distinguish each and every case in this dissent. Two examples, however, will suffice to illustrate the inappropriateness of these cases to the situation before us. In Daugherty v. City of Monett, 238 Mo. App. 924, 192 S. W. 2d 51 (1946), the Missouri workmen's compensation statute specifically required the employer to furnish

"medical, surgical and hospital treatment, *including nursing.*" (Emphasis supplied.) The statute did not require the nursing to be that of a trained professional. Thus, in allowing compensation for the nursing services of a wife, the Missouri court was merely following the directive of its Legislature. Again, in A. G. Crunkelton Electric Co., Inc. v. Barkdoll, 227 Md. 364, 177 A. 2d 252 (1962), that state's statute specifically held the employer liable for "*nurse* and hospital services." (Emphasis supplied.)

Time forbids further discussion.

Every wife now becomes a nurse — and a paid one. The claim here is already for 3,371 hours from August 2, 1975, to February 12, 1976. The plaintiff is elderly, but suppose he were 20 years younger? And the wedding vow "to care for him, in sickness and health" becomes, in part, an employer's financial burden.

Where does the majority opinion tell us where the marital obligation ceases and the paid nursing services begin? How does the fact-finder resolve the overlap between household duties and nursing care? For example, what portion of special diet preparation is paid for, et cetera? Is the time spent on a necessary exercise walk with the injured husband compensable? Where are the guidelines?

If there are professional criteria for the determination of such issues, it would seem particularly appropriate for their establishment in the legislative forum.

The question of the burden of proof is not met in the broad brush of the majority opinion. The evidence necessarily must come from and be developed under the protected cloak of the home and domestic privacy. It, perhaps, will be undisputed and invulnerable to attack. The recent experience of the federal government in administering the welfare programs points to caution in the context presented in this case.

There are a multitude of free welfare services and disability provisions now available in our society which did not exist at the time of the decision of this court in Claus v. DeVere, *supra,* or when the compensation statute was enacted. Whether any of this is relevant, I do not know. But I do know that this abrupt and far-reaching policy determination and reversal of settled law should not be made unless full opportunity for consideration and hearing of the competing considerations is had in the legislative forum.

Under the guise of judicial interpretation, the majority opinion has rewritten and liberalized recovery under the workmen's compensation laws. If such a result is desirable, the responsibility for the nature and amount of benefits accorded to the injured employee rests with the Legislature.

SPENCER and CLINTON, JJ., join in this concurrence and dissent.

MARY P. NICHOLSON, APPELLANT, V. TERRY BRADDOCK ET AL., APPELLEES.

270 N. W. 2d 314

Filed October 11, 1978. No. 41626.

1. **Accord and Satisfaction: Damages: Proof.** One who seeks to avoid the legal effect of a release of a cause of action for personal injuries has the burden of pleading and proving the facts which entitle him to such relief.
2. **Appeal and Error: Records: Evidence.** Purported evidence which does not appear in the bill of exceptions cannot be considered by the Supreme Court on appeal.

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

Seb Caporale, for appellant.

Pilcher, Howard & Dustin, for appellees.

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

CLINTON, J.

This is an action for personal injuries allegedly received by the plaintiff in a collision of two automobiles and claimed to have been caused by the negligence of the defendants. The defendants answered, denying generally and alleging in accord and satisfaction. The plaintiff replied by way of general denial. The defendants moved for summary judgment which was granted. The plaintiff appeals to this court and here admits execution by her of a release of all claims for personal injuries received in the accident and argues that the release is void because of mutual mistake and insufficiency of consideration.

The defect in the plaintiff's position is that she neither pleaded any defense to, nor offered any proof in avoidance of, the release. The entire bill of exceptions consists of the release executed by the plaintiff, the draft in payment of the consideration which had been endorsed by her, and accident reports which do not include her among the persons reported to have been injured in the accident. No objection appears to have been made to this evidence.

The following principles govern this case and require affirmance. One who seeks to avoid the legal effect of a release of a cause of action for personal injuries has the burden of pleading and proving the facts which entitle him to such relief. Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165; Blaha v. Chicago & N. W. Ry. Co., 119 Neb. 611, 230 N. W. 453; Perry v. Omaha Electric Light & Power Co., 99 Neb. 730, 157 N. W. 921. Purported evidence which does not appear in the bill of exceptions cannot be considered by the Supreme Court on appeal. Insurance Co. of North America v. Hawkins, 197 Neb. 126, 246 N. W. 2d 878; Timmerman v. Hertz, 195 Neb. 237, 238 N. W.

2d 220; Elm Creek State Bank v. Johnson, 195 Neb. 131, 236 N. W. 2d 838.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLENN M. CRUSE, APPELLANT.

270 N. W. 2d 316

Filed October 11, 1978. No. 41787

1. **Criminal Law: Assault and Battery: Proof.** Proof that great bodily injury actually occurred is not an essential element of the crime of assault with intent to inflict great bodily injury.
2. **Criminal Law: Assault and Battery: Intent: Proof.** Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction.
3. **Criminal Law: Intent: Proof: Evidence.** Because the intent with which an act is done exists only in the mind of the actor, its proof may be inferred from the act itself and from the facts surrounding the act.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

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

SPENCER, C. J., PRO TEM.

Defendant appeals his conviction for the offense of assault with intent to inflict great bodily injury. His only assignment of error is that the District Court committed reversible error in failing to sustain defense objections to expert medical testimony. We affirm.

On the evening of October 31, 1976, the complaining witness, Joann Hatthorn, went to a bar in Omaha with her niece, Kathy Adams, and her niece' roommate, Luann Brenning. Defendant, who was in the bar, began talking to Luann, his former girl friend. Joann had never met the defendant before. Shortly thereafter, Joann and Kathy were ready to leave, and they went out of the bar. A few minutes later Joann returned inside to get Luann. Joann came back to the car and sat behind the wheel. Defendant came outside and threw a glass at the car. He entered the car on the passenger's side and crawled over Kathy to get to Joann. Joann got out of the car and defendant followed. Defendant accused Joann of calling him a name and he struck her in the face with his fist. Joann fell to the ground and defendant kicked her two or three times in the face. Joann testified the next thing she remembered she was in the hospital. Surgery was performed and her jaw was wired shut. Joann checked herself out of the hospital a day after the surgery. Five photographs of her taken on that date were received in evidence.

Kathy Adams testified that she observed the defendant strike Joann in the face and kick her two or three times after she was down.

The issue on appeal concerns the testimony of Doctor Dennis Bresnahan who was in attendance at the emergency room of St. Joseph's Hospital on the evening of October 31, 1976. When asked if he recalled receiving a patient by the name of Joann Hatthorn in the emergency room that evening, he stated: "Not specifically, but upon reviewing the chart, I did examine her * * *." He was asked to examine the photographs of the complaining witness, whereupon he stated: "I recognize her as the lady sitting in the first row (Indicating), but if I was asked to say who this lady was, I would have to say that I don't know who it is." Over objection, the doctor was permitted to testify the records showed

the patient had a fractured jaw and abrasions and soft tissue swelling around the eyes and over the face. The patient was treated for pain and admitted to the hospital.

Defendant argues: "Without proof beyond a reasonable doubt that the injuries that Dr. Bresnahan testified to were in fact the injuries sustained by the victim, the evidence is insufficient as a matter of law to sustain the conviction since there was no proof of the seriousness of the injuries." This contention is frivolous. Proof that great bodily injury actually occurred is not an essential element of the crime charged. See State v. Lang, 197 Neb. 47, 246 N. W. 2d 608 (1976).

The essential element is that the defendant intended to inflict great bodily injury. This is evident from his kicking her in the face after he had knocked her to the ground by a blow to the face. In State v. Judd, 200 Neb. 344, 263 N. W. 2d 487 (1978), we said: "Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act." There definitely was sufficient evidence in the record from which to infer the intent without the medical testimony.

While testimony by a physician who attended the complaining witness as to the extent of the injuries is relevant as tending to establish the element of intent, Stevens v. State, 84 Neb. 759, 122 N. W. 58 (1909), it has never been held that such evidence is required to be introduced. In this case the physician had no question Joann Hatthorn was the person he treated in the emergency room. He just did not recall her name.

The record is clear. Defendant struck Joann Hatthorn in the face with his fist, and then kicked

her two or three times in the face after she had fallen. She testified as to her injuries, and photographs of her taken after her release from the hospital were received in evidence. This evidence was clearly sufficient to establish the intent to inflict great bodily injury. While the medical testimony was admissible, on the record herein it was at most merely cumulative. Even if it had been inadmissible, its admission would be harmless error. Admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented thereby from having a fair trial. State v. Martin, 198 Neb. 811, 255 N. W. 2d 844 (1977).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SAMUEL P. BROWN, APPELLANT.

270 N. W. 2d 318

Filed October 11, 1978. No. 41913.

1. **Criminal Law: Sentences.** A sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Criminal Law: Evidence: Trial.** 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, if a proper foundation is laid.
3. _____: _____: _____. Admission of photographs in evidence is largely within the discretion of the trial court, and, unless an abuse of discretion is shown, error may not be predicated thereon.
4. **Criminal Law: Sentences.** The trial judge, in imposing sentence is entitled to know to the fullest extent the details of defendant's criminal conduct.

Appeal from the District Court for Stanton County: EUGENE C. MCFADDEN, Judge. Affirmed.

R. D. Stafford, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee.

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

SPENCER, C. J., PRO TEM.

Defendant, Samuel P. Brown, was originally charged with two counts of murder in the first degree. Pursuant to a plea bargain, he pled guilty to an amended information of murder in the second degree. He was sentenced to a term of 35 years in the Nebraska Penal and Correctional Complex, with credit for the 222 days he was held in custody prior to sentencing.

Defendant prosecutes an appeal to this court, alleging: (1) The sentence imposed by the court is excessive; and (2) the court erred in overruling defendant's motion to strike certain exhibits attached to the presentence report as being irrelevant. We affirm.

On the evening of April 29, 1977, defendant and two codefendants, Ricky Roewert and Daniel Forster, were drinking beer in a bar at Norfolk when they observed the victim, Henry Hernandez, with a large sum of money in his possession. Roewert suggested to his two companions that they rob Hernandez. Both defendant and Forster agreed to go along with the robbery. For this purpose they borrowed an automobile owned by Deb Murray, Roewert's girl friend, who was with them. Murray returned to her apartment with someone else, and left her car with Roewert.

The men persuaded Hernandez to leave the bar with them by telling him they were going to a party. Hernandez was intoxicated and had to be helped to the car. With Forster driving, they proceeded to the Murray apartment. Roewert went inside and Forster followed a short time later. After several minutes, defendant also went inside and he observed Roewert placing two knives inside the front of his

trousers. The men returned to the car and Roewert laid the knives near him in the front seat. Hernandez was passed out in the rear seat at this time.

The men stopped to buy gasoline for the car and defendant removed $16 from Hernandez' pocket. They then drove out of town in the direction of the city dump. Roewert instructed Forster to stop the car on a gravel road near a large brush pile. He got out of the vehicle and, with defendant's help, pulled Hernandez out of the back seat. Roewert slashed the victim's throat with a paring knife. He had Forster retrieve the larger bread knife from the car, and Roewert used it to decapitate the victim. Defendant assisted in dragging the headless body to the opposite side of the road near the brush pile. Roewert then used the bread knife to make multiple cuts on the front and back of the body. He also cu off portions of the victim's clothing and removed the billfold. The men covered the body with the bi ush and returned to the Murray apartment where they divided the money obtained from the billfold.

Defendant maintained he had no idea Hernandez was going to be killed. In a statement Roewert gave to the police, although he accepted full responsibility for the murder, he stated that he told defendant and Forster at the bar they would have to kill Hernandez so they would not be identified.

Defendant's plea bargain involved a promise the State would recommend the defendant would not receive a more severe sentence than Forster. Forster, whose judgment of conviction was recently affirmed by this court, was sentenced to a term of 35 years in the Nebraska Penal and Correctional Complex, with credit for days served prior to the imposition of sentence. This is the same sentence received by the defendant. At the time of the trial defendant was 28 years old. Forster at the time of the offense was not quite 20 years of age. Forster had a rather

negligible prior criminal record when compared with that of the defendant.

The penalty provided by section 28-402, R. R. S. 1943, for murder in the second degree is imprisonment in the Nebraska Penal and Correctional Complex for not less than 10 years, or during life. We have repeatedly held that a sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Stephenson, 199 Neb. 362, 258 N. W. 2d 824 (1977). There clearly was no abuse of discretion herein. The crime was a vicious one and defendant could well have been sentenced to the Penal and Correctional Complex for the rest of his natural life.

Defendant's second assignment is directed at the refusal of the trial court to strike certain exhibits, including the photographs of the decedent, the body fluid alcohol analysis of Mr. Hernandez, and the autopsy report, as being irrelevant and immaterial to the presentence investigation and also as being cumulative to the evidence before the court, as well as inflammatory. There is no merit to this assignment. The photographs, which were of the decedent's body, and the exhibits were a part of the proof of the crime to which the defendant had pled guilty.

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, if a proper foundation is laid. State v. Williams, 182 Neb. 372, 155 N. W. 2d 189 (1967). 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. Ell, 196 Neb. 800, 246 N. W. 2d 594 (1976).

These exhibits would have been properly received in evidence if the defendant had gone to trial. They certainly would be of assistance to the trial judge in carrying out his weighty responsibilities concerning the imposition of sentence. The trial judge, in im-

posing sentence, is entitled to know to the fullest extent the details of defendant's criminal conduct. They were pertinent in assisting the trial court to understand the true nature of the criminal act in deciding what sentence to impose. Defendant had pled guilty to the crime, and had been cooperative with the authorities. It is evident from the sentence imposed that the trial judge was not unduly influenced against the defendant by virtue of having viewed the exhibits attached to the presentence report.

There is no evidence of prejudice. The sentence imposed is well within the statutory limit. There is no merit to the assignments of error urged by the defendant. The judgment of the District Court is affirmed.

AFFIRMED.

JEAN REESE ET AL., APPELLEES, V. MARIAN HATFIELD ET AL., APPELLANTS.

270 N. W. 2d 898

Filed October 25, 1978. No. 41616.

1. **Contracts: Specific Performance.** As a general rule, where a valid binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
2. _____: _____. A contract for the purchase and sale of the stock of a closely held family corporation, which stock is not procurable on any market, is a proper subject for specific performance.

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

Vincent J. Kirby, for appellants.

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

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

McCOWN, J.

This is an action for specific performance of a written contract for the purchase and sale of shares of stock of a family corporation. The District Court granted specific performance of the contract and directed the payment of certain supplemental amounts by the purchaser. The defendant sellers have appealed.

In 1972, George W. McNaught, pursuant to an estate plan, organized a Nebraska corporation, the sole asset of which was the Diamond 8 Ranch. Approximately 1/6th of the shares of stock of the corporation were given to each of his three daughters, the plaintiff Jean Reese, and the defendants Marian Hatfield and Donice Bruner. An additional 1/6th of the shares was sold to each daughter for $33,867, and a promissory note was given for the purchase price. The interest on the notes was to be paid by the daughters to George W. McNaught, and their management salaries were to cover the principal and interest payments due on the notes. George W. McNaught executed a will in which he provided that the notes were to be forgiven at his death. Each daughter assumed an executive position in the corporation and the daughters also comprised the board of directors.

The Diamond 8 Ranch was leased under a cash lease. In 1975 the plaintiff Jean Reese and her husband were the lessees. After the annual stockholders' meeting of the corporation on February 6, 1975, John Hatfield, the husband of defendant Marian Hatfield, suggested that the ranch should be either divided up or sold because the cash lease arrangement was causing friction in the family. The Reeses requested that a price be set so that they could either buy the defendants' stock or the defendants could

buy Jean Reese' stock. The defendants offered to sell Jean Reese their respective shares of stock on the basis of a $450,000 valuation of the entire corporate property. The plaintiff, Jean Reese, then agreed to buy the defendants' stock on the basis of the price set, and the attorney for the corporation prepared the sale contract. Each of the three daughters was given a copy of the contract. Each of them read the contract and executed it the same evening, February 6, 1975.

The contract recited that the plaintiff, Jean Reese, and the defendants, Marian Hatfield and Donice Bruner, were all the stockholders of Diamond 8 Ranch, Inc., a Nebraska corporation; that Marian Hatfield owned 308 5/6ths shares, and Donice Bruner owned 320 5/6ths shares; and that the plaintiff owned the balance of the 1,000 shares outstanding. The contract provided that defendant, Marian Hatfield, sold her shares of stock to the plaintiff, Jean Reese, for the total sum of $135,900; and the defendant, Donice Bruner, sold her shares of stock to plaintiff, Jean Reese, for the total sum of $144,450. Checks for the purchase price specified were executed and delivered to the attorney for delivery to the defendants upon receipt of the stock certificates, duly endorsed, pursuant to the contract. The defendants did not deliver the stock certificates. The plaintiff, Jean Reese, and her husband took over the management of the corporation and have continued it.

This action for specific performance was begun by the plaintiff, Jean Reese, on April 11, 1975. George W. McNaught joined with the plaintiff, Jean Reese, seeking specific performance of the contract. Plaintiffs' petition alleged that the plaintiff, Jean Reese, had agreed to assume the outstanding indebtedness of the defendants to George W. McNaught on the promissory notes. The District Court entered a decree requiring specific performance of the contract, and ordered the plaintiff, Jean Reese, to pay addi-

tional amounts of $1,775.16 to Marian Hatfield and $1,847.13 to Donice Bruner for certain rent and cash on hand in the corporation at the time of sale. Jean Reese was also ordered to pay a further additional amount of $2,850 to Marian Hatfield to compensate for an error in computation in the contract. The plaintiff, Jean Reese, was also ordered to pay the promissory notes given to George W. McNaught by the defendants, and the defendants were relieved from further liability on the notes. The defendants have appealed.

Essentially, the defendants contend that there was no meeting of the minds with respect to the contract because the plaintiff had failed to disclose to the defendants the complete legal effect of the execution of the contract, and that the parties had failed to take into consideration the individual indebtedness of the parties represented by the promissory notes to George W. McNaught. They therefore assert that there is no basis for ordering specific performance.

As a general rule, where a valid binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. See, Dowd Grain Co., Inc. v. Pflug, 193 Neb. 483, 227 N. W. 2d 610; 71 Am. Jur. 2d., Specific Performance, § 7, p. 19.

In this case there is no allegation or evidence that the $450,000 valuation was not fair and equitable, nor that there were any misrepresentations or false or misleading statements made. The obligations were mutual, and the defendants themselves set the price. Neither is there any evidence that the enforcement of the contract as written would be unjust or inequitable.

The defendants' position is that they did not intend

to transfer the accrued rent and bank account of the corporation, or that they did not know the amount of these assets of the corporation. The defendants were well educated, competent persons who were officers of the corporation, and they had just attended a stockholders' meeting. They knew, or should have known, all the facts that were to be known about the corporation. They also knew all about the promissory notes that had been executed by the parties to this lawsuit to their father, and they knew all the facts just as well as did the plaintiff. It is incredible that defendants would seriously contend that they should be entitled to avoid a fair and reasonable written contract, voluntarily entered into, simply by asserting that they did not understand its legal effect.

There was one matter as to which there was evidence of a mutual mistake. The attorney who drafted the contract made an error in computing the value of the stock of Marian Hatfield, and the mistake was not discovered until the contract had been executed. Neither party asked for reformation on that score but the court did correct that error in its decree.

A contract for the purchase and sale of the stock of a closely held family corporation, which stock is not procurable on any market, is a proper subject for specific performance. See Goodall v. Stanosheck, 131 Neb. 720, 269 N. W. 814.

With the possible exception of the error in the computation of the purchase price of the Hatfield stock, the evidence establishes that the contract should have been specifically enforced upon payment of the purchase price provided for in the contract without requiring the payment of any additional amounts. Although the plaintiff agreed to pay additional amounts and to assume the obligations on the promissory notes, she did so after the contract had been executed, and there was no separate or ad-

ditional consideration for such agreements. Nevertheless, the plaintiff has filed no cross-appeal, but, instead, prays that the decree of the District Court be affirmed. The plaintiff is the only party injured by the requirement of additional payments in the decree. Those provisions were more favorable to the defendants than they were entitled to. Under the circumstances, the decree must be affirmed.

AFFIRMED.

JAMES L. PAXTON, JR., APPELLEE AND CROSS-APPELLANT, V. ALICE A. PAXTON, APPELLANT AND CROSS-APPELLEE.

270 N. W. 2d 900

Filed October 25, 1978. No. 41617.

1. **Divorce: Property Settlement Agreements: Statutes.** Property settlement agreements are governed by section 42-366, R. R. S. 1943. They are favored in the law and will not be set aside unless the agreement is unconscionable.
2. **Divorce: Property Settlement Agreements.** A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable it binds both the parties and the court.
3. _____: _____. A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side.
4. **Words and Phrases: Statutes.** The term "unconscionable" as used in statutes like in section 42-366, R. R. S. 1943, has been interpreted as meaning "manifestly unfair or inequitable."

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Patrick H. Mullin, and Warren C. Schrempp of Schrempp & McQuade, for appellant.

Robert G. Fraser of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and Kuns, Retired District Judge.

SPENCER, J.

This is an action for dissolution of marriage. The District Court found the marriage was irretrievably broken and approved a property settlement negotiated by the parties. The respondent wife appeals. She contends the property settlement agreement is unconscionable. We affirm.

The parties were married in 1942. Petitioner, James L. Paxton, Jr., was 68 years old at the time of trial. Alice A. Paxton, the respondent, was 63 years of age. The parties have been separated since 1969, when respondent filed a suit for divorce. Petitioner made support payments of $2,000 per month to the date of the trial.

Petitioner filed this action for dissolution of marriage in October 1976. The record reflects extensive negotiations regarding a settlement and further that petitioner's financial records were made available to respondent. On May 9, 1977, at respondent's request, her counsel obtained leave to withdraw and new counsel entered an appearance for her. Trial was had on May 13, 1977.

At trial it was admitted that petitioner's net worth is in excess of $2 million. The 1976 joint income tax of the parties shows an adjusted gross income of $197,300. Respondent's separate personal property, consisting of savings accounts, stocks and bonds, and jewelry, has a value of approximately $335,000.

Under the terms of the property settlement approved by the District Court, respondent receives all her personal property; the family residence, the value of which is not disclosed in the record; alimony of $2,500 per month until death or remarriage; and a lump sum of $250,000, payable within 10 months, at the rate of $50,000 every 2 months. The

agreement further requires petitioner to provide medical, health, and accident insurance for respondent for the rest of her lifetime. He is required to pay the fees of her previous attorney. Respondent agrees that if she predeceases petitioner there will be a provision in her will that the unexpended portion of the $250,000 shall go to a charity of petitioner's choice.

Petitioner was put on the witness stand and the terms of the final property settlement agreement were reviewed with him. Mrs. Paxton, the respondent, was then put on the witness stand and asked if she was present in the courtroom when the two attorneys went over the terms of the property settlement with Mr. Paxton. After an affirmative answer she was asked if she understood those terms, to which she replied affirmatively. The entire settlement agreement was then reviewed with her, specifically as to her receiving $250,000 cash; $2,500 per month for life or until remarriage; the Jackson Street home; major medical and health insurance; and the fact petitioner was to pay her former attorney's fee.

Respondent acknowledged and accepted the terms of the agreement as enumerated by her attorney as a complete and final settlement. Respondent was then asked: "---appreciating that this is a total and complete and final settlement and an absolute divorce and that you cannot come back to this Court at a later date for additional changes or additional provisions in this settlement agreement; do you understand that?" To which she answered, "Yes."

Property settlement agreements are governed by section 42-366, R. R. S. 1943. They are favored in the law and will not be set aside unless the agreement is unconscionable.

In Prochazka v. Prochazka, 198 Neb. 525, 253 N. W. 2d 407 (1977), we said: "A property settlement agreement by the parties to an action for dissolution

of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court.

"A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side."

In Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436 (1978), we stated: "The term 'unconscionable' as used in statutes like in section 42-366, R. R. S. 1943, has been interpreted as meaning 'manifestly unfair or inequitable.' "

The settlement arrived at in this case was reached after extensive negotiation by competent counsel and after a full disclosure. There is no question the respondent was fully aware of the terms of the agreement. She was examined as to each item of it. It was then approved by the court, only after she acknowledged and accepted the terms, with the full understanding that it was a final and complete settlement of all property rights of the parties. To permit her to overturn the agreement at this late date would be unconscionable.

In a cross-appeal petitioner seeks to recover costs and his attorney's fee on this appeal. While this court has the power to decree costs and attorneys' fees against either party in a dissolution action, we deny the cross-appeal. We do, however, decree that the costs of this action will be taxed to Alice A. Paxton, respondent, and she is denied the allowance of any attorneys' fees from the petitioner.

The judgment of the trial court is affirmed.

AFFIRMED.

WILLIAM HENRY STEELE, APPELLEE, V. LORRAINE C. STEELE, APPELLANT.

270 N. W. 2d 903

Filed October 25, 1978. No. 41625.

1. **Divorce. Statutes.** Under section 42-365, R. S. Supp., 1978, the criteria to be used is what appears to be fair and equitable between the parties under the circumstances present in the case.
2. **Divorce: Trial.** Although review in marriage dissolution cases is de novo in this court, we also give weight to the fact that the trial court had an opportunity to observe the parties and hear the witnesses.
3. **Divorce: Property.** A decree in a dissolution of a marriage case awarding one party all her "personal effects" does not include bank accounts standing in that party's name alone.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed as modified.

Robert M. Harris, for appellant.

P. J. Heaton, Jr., for appellee.

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

BRODKEY, J.

Lorraine C. Steele has appealed to this court from a decree entered by the District Court for Kimball County in a marriage dissolution action. The court entered a decree dissolving the marriage on May 19, 1976, but reserved questions of alimony, division of property, attorney's fees, and court costs for a later hearing. These latter items were dealt with by the decree of the court entered on September 2, 1976, and Lorraine thereafter perfected her appeal to this court. In her brief on appeal, appellant makes three assignments of error. First she claims the division of the property by the trial court was unreasonable and unfair; second, she alleges that the court erred in not awarding her savings account and a checking account standing in her name alone to her as her

separate property; and third, that the court erred in permitting the appellee, William Henry Steele, to have the option of paying the $7,800 awarded to Lorraine by the court either in cash within 10 days of the decree, or in the alternative to pay her the sum of $1,800 within 10 days of the decree, with further annual payments of $2,000 each due on or before January 11, 1977, 1978, and 1979, without requiring appellee to pay interest thereon. We modify the decree of the court in the respects hereinafter indicated, and otherwise affirm its judgment.

The somewhat unusual facts of this case must be noted. The parties were married on January 7, 1969. The marriage lasted for approximately 7 years, having been terminated by the decree of May 19, 1976. It was the second marriage for both. No children were born to this marriage but both had children by prior marriages. At the time of their marriage in 1969, William was 79 years of age, and Lorraine was 54. They were 86 and 61 years of age respectively when the marriage was dissolved. Prior to their marriage, Lorraine had been employed in taking care of elderly and ailing persons in their home. She brought little property into the marriage, the principal asset being a used automobile which she has retained. William owned a farm in Kimball County, Nebraska, which he personally farmed until September 1972, at which time he sold the farm on land contract and purchased a house in Kimball, Nebraska. The funds for the purchase of the home were provided exclusively by William from the sale of the farm; and the title to the farm was originally in his name, although later, at her insistence, was placed in both their names as joint tenants. Other than the above, there was no other property accumulated by them other than what they owned at the time of the marriage. Just before they were married, William paid off two of Lorraine's personal obligations, totaling approximately $600. It

further appears that subsequently, Lorraine became disabled with a back ailment in 1970, and in 1971 received from social security a lump sum payment of $1,000 for past payments due her in 1970. She retained this payment for her own use. She has since received monthly social security payments due to her disability. During the marriage Lorraine performed ordinary household duties of a farm wife, including the preparation of meals for herself and her husband, and on occasions for farm help employed to assist in the harvesting of the crops. On at least two occasions during the marriage, William became ill and was forced to go to the hospital, but most of his care was taken care of in the hospital itself, although Lorraine also assisted when he returned home from the hospital. Also, in the later years, she acted as chauffeur for her husband, driving him around in the automobile when it was necessary for him to make trips.

Lorraine testified that before she married William she had expressed concern about her future financial well-being, and had even orally discussed the matter with William and his attorney. However, no prenuptial agreement was ever entered into. In its decree the court found that William owned property of the approximate value of $100,000. However, the largest single asset appears to be the land contract for the sale of the farm, with a balance remaining thereon in the amount of approximately $84,000 as of the time of the trial. Appellee's source of income at the present time appears to be annual payments in the amount of $4,500, plus interest, required by the terms of the contract to be made by the purchaser during the period of January 10, 1974, through January 10, 1983, with a final lump sum payment due January 10, 1984. Out of these annual payments, he is required to make payments due to the Federal Land Bank on its mortgage covering the farm in an unspecified amount.

In the decree of the trial court the appellant was awarded as her division of the property the sum of $12,800, less $5,000 previously given to appellant by appellee in two previous payments of $2,500 each; and the court entered a judgment of $7,800, representing the balance, payable at his option in either cash or installments, as previously set out. The court also awarded certain unpaid temporary and alimony payments in the sum of $1,050, which has already been paid, and an attorney's fee for her attorney in the sum of $600, and court costs. The court also awarded her the 1962 Fairlane Ford in her possession and also other personal effects in her possession, and further provided that the balance of the property should be the property of William.

We discuss first appellant's claim that the property award was unfair and unreasonable. The applicable statute for determining the award of alimony and division of property in dissolution cases is section 42-365, R. S. Supp., 1978. That section reads in pertinent part as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." In any event it appears that the criteria to be used in determining the amount to be awarded in a property settlement is what appears to be fair and equitable between the parties under the circumstances present in the case. Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975). In the totality of the circumstances present in the instant

case, we are not prepared to say that the trial court's property division award to Lorraine was unreasonable or unfair. As previously stated, this was the second marriage for both parties. She had little other than her automobile before the marriage. He had what he accumulated as a farmer during his lifetime and he was 79 years of age at the time of the marriage. She was then 54. The marriage lasted only approximately 7 years. He supported her well during that time and provided her with a checking account which she could use as she wished, although it was her claim that she was only to draw checks for groceries. During the course of their marriage she received all her social security payments plus the $1,000 lump sum payment for past due installments all of which she devoted to her own use. He deposited his social security payments in their joint account. In return, she performed ordinary duties of a farmer's housewife, cooking only for the two of them except when they had an occasional hired hand. William did not complain about what she spent or how she performed her duties. When she left, she took everything with her she brought to the marriage plus an additional $6,000 or $7,000 which she had accumulated. She is presently employed at the rate of $35 or $40 per week. Besides paying off certain of her existing debts at the time of the marriage, he also gave her on two occasions the sum of $2,500 each or a total of $5,000 which she still has. Her present income is approximately the same as she had before the marriage including her social security, and in addition the court has awarded her an additional $7,800. William has less than when he married her, and his only source of income, in addition to his social security, are the payments from his farm contract sale at the rate of $4,500 a year, out of which he is required to make payments due to the Federal Land Bank. We cannot say that the division of the property by the court was patently unfair

to Lorraine; and we also point out that although review of these matters in this court is de novo, we have also held that we give weight to the fact the trial court had an opportunity to observe the parties and hear the witnesses.

Two further matters require attention. The decree of the trial court, which awarded Lorraine all "her personal effects" cannot be interpreted to include the bank accounts in Lorraine's name alone. The Arizona Supreme Court in the case of Hatch v. Jones, 81 Ariz. 5, 299 P. 2d 181 (1956), in defining the term "personal effects" has stated that: "* * * 'personal effects' almost invariably is interpreted to mean personal property having a more or less intimate relation with the person of the possessor such as wearing apparel, jewelry, or other items of property of like character." See, also, 32 Words and Phrases, Personal Effects, p. 418 et seq., and 1978 Pocket Part, p. 91 et seq. However, we note that during argument in this court and also in his brief on appeal, counsel for appellee has acknowledged William has no interest or claim to the bank accounts in Lorraine's name alone. We feel it would be both illogical and inequitable to consider the $5,000 given to Lorraine by William to reduce the property award by the court to Lorraine in the sum of $12,800 to a net of $7,800, and at the same time deny her her savings and checking accounts which represent this amount. We therefore modify the decree of the trial court to specifically provide that the bank accounts in question are to be the property of Lorraine.

It also appears that appellee does not desire to pay off any amounts due to Lorraine on an installment basis, as permitted in the court's decree, but intends to pay such amount in full forthwith. We therefore modify the decree of the court to provide that Lorraine shall receive interest on the balance due on the property award at the statutory rate of 8 percent per annum from the date of the issuance of the mandate

in this case until paid. We also award Lorraine an attorney's fee in the amount of $750 for services performed in this court, and the court costs are taxed to the appellee.

As modified, the decree of the trial court is affirmed.

AFFIRMED AS MODIFIED.

WILLIAM VLCEK, APPELLEE, V. DR. JAMES R. SUTTON, APPELLANT, IMPLEADED WITH ROBERT SIEGRIST, APPELLEE.

270 N. W. 2d 906

Filed October 25, 1978. No. 41627.

1. **Trial: Judgments.** The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
2. **Trial: Continuances.** A motion for 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.

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

Dean E. Erickson, for appellant.

Steven J. Lustgarten, for appellee Vlcek. No appearance for appellee Siegrist.

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

MCCOWN, J.

This is an action at law to recover money advanced to the defendant on a loan allegedly procured by fraud, deceit, and misrepresentation. The District Court found for the plaintiff and entered judgment in the sum of $6,500. The defendant Sutton has appealed.

In April 1973, the defendant attempted to borrow $15,000 from the plaintiff and offered as collateral certain lots he said he owned. The plaintiff viewed the lots and decided they were not worth $15,000 and offered to loan the defendant $7,500. The defendant offered plaintiff a handwritten document intended to serve as a title guaranty. Plaintiff refused to accept the document. The defendant then submitted the loan contract involved here. The contract, executed in May 1973, provided, among other things: "We have a good legal title, one that gives us the right to convey a full warranty deed to William and Wilma Vlcek, husband and wife of Omaha, Ne. There are no mortgages or liens of any type on these six lots. * * * The amount of the loan is $7,500.00 and these lots will act as collateral for this loan." The contract also provided that if the defendant did not pay the principal and interest on the loan within 1 year, the lots were to become the property of the plaintiff. The plaintiff delivered a cashier's check for $6,000 and a stock certificate for 150 shares of corporate stock, which had a value of $1,500, to the defendant. The defendant never repaid the loan, but after this proceeding was commenced in 1976, he returned the stock to the plaintiff. At the time of return, the stock had a reasonable value of $1,000.

After default, when the plaintiff attempted to obtain the lots, he discovered that the defendant had never had legal title to the property, and that there was a paving assessment lien on the property.

The plaintiff testified at trial that he relied on the representation that defendant owned the lots, and that the plaintiff would not have made the loan had he known that defendant did not own the property. The defendant admitted at trial that he had never received a deed to the property and had never held good legal title. The defendant also admitted that he had endorsed and cashed the $6,000 check and used the proceeds, and admitted that he knew about

the paving assessment on the lots at the time of the loan and did not tell the plaintiff about it. Defendant denied that he intended to defraud or deceive the plaintiff.

The District Court entered a judgment finding that the money and stock were acquired by defendant through fraud, deceit, and false representations, and entered judgment against the defendant for $6,500.

The evidence overwhelmingly supports the judgment of the District Court. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Hull v. Bahensky, 196 Neb. 648, 244 N. W. 2d 293. The judgment here was clearly correct.

The defendant also contends that it was reversible error to fail to grant a continuance to the defendant when defendant's counsel was not present at the time set for trial. The record shows that this case was originally called for trial before the jury panel of January 1977. When counsel for all parties informed the court that jury trial would be waived, the court then set the case for trial on March 28, 1977. On that date plaintiff and plaintiff's counsel appeared ready for trial but defendant's counsel informed the court that he was ill and requested that the matter be reset. The case was reset for trial to commence on April 28, 1977. At that time the plaintiff and plaintiff's counsel again appeared ready for trial but neither the defendant nor his counsel appeared. The matter was again reset for trial on May 6, 1977. Again plaintiff and plaintiff's counsel appeared ready for trial but neither defendant nor his counsel appeared. The matter was again reset for trial on May 25, 1977. In each instance defendant's counsel was notified of the various settings. On May 25, 1977, plaintiff and plaintiff's counsel appeared in court at 9:30 a.m., ready for trial but the defendant and his counsel did not appear. At ap-

proximately 10:15 a.m., the defendant appeared in person without counsel. The court informed him that the matter would proceed to trial; that no further continuances would be permitted; and that if he did not remain, a default judgment would be entered against him.

At no time was any motion for continuance filed by defendant or his counsel. Judgment was entered on June 21, 1977, and on June 30, 1977, defendant's counsel filed an affidavit that he had been in the hospital on May 25, 1977.

A motion for 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. Elm Creek State Bank v. Department of Banking, 191 Neb. 584, 216 N. W. 2d 883. In the case at bar there was not even a motion for continuance as required by section 25-1148, R. R. S. 1943. The District Court was more than fair in granting continuance after continuance on his own motion and there was certainly no abuse of discretion here.

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

AFFIRMED.

JACK HARTMAN, APPELLEE, V. FAYE N. BRADY, APPELLANT.

270 N. W. 2d 909

Filed October 25, 1978. No. 41652.

1. **Trial: Evidence.** In determining the sufficiency of the evidence to sustain the verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor and he must have the benefit of all inferences reasonably deducible therefrom.
2. **Motor Vehicles: Highways.** A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to

come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets.

3. ____: ____. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.
4. **Motor Vehicles: Highways: Statutes.** A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether or not the violation is negligent.
5. **Trial: Evidence: Witnesses.** A party is ordinarily entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case.

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

Richard J. Spethman, for appellant.

Larry E. Welch of McGroarty, Welch & Langdon, for appellee.

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

CLINTON, J.

This is an action for damages arising out of a collision of two automobiles at the intersection of 72nd Street and Bedford Avenue in the city of Omaha which occurred on November 6, 1975, at about 7 p.m. At the intersection where the collision occurred,

72nd Street is a four-lane arterial street which runs north and south and is protected by stop signs. At the time of the collision, the plaintiff was traveling south on 72nd Street in the inside lane. The defendant was traveling east on Bedford Avenue and was crossing 72nd Street after having stopped at the stop sign on the west side of the intersection. After trial, the jury found for the plaintiff on his petition, and judgment was entered accordingly.

The defendant appeals and makes various assignments of error which may be summarized by the following contention: The evidence is insufficient to establish any negligence on the part of the defendant; and it does show that the plaintiff was guilty of negligence which, as a matter of law, should bar recovery. Accordingly, the defendant's motion for directed verdict should have been granted.

The evidence was such that, taking the view most favorable to the successful party, the jury could have found the following facts. The defendant brought her car to a stop at the stop sign on the west side of 72nd Street, looked to the north on 72nd Street, and saw the headlights of two automobiles approaching about a block or more away. The headlights which the defendant saw indicated there was a car in each of the southbound traffic lanes. Defendant immediately turned her head to look south on 72nd Street without watching the lights approaching from the north long enough to make any estimate of the speed of the vehicles, observed no vehicles approaching from the south, and proceeded into the intersection without again looking north. The defendant did not see the plaintiff's vehicle at any time after the initial observation.

The plaintiff did not observe the defendant's vehicle until it began to move from the stop sign. Although he applied the brakes of his car, he was unable to stop. His car struck the defendant's vehicle in the center of its left side, the collision occurring in

the eastern-most lane for southbound vehicles on 72nd Street.

The plaintiff had entered 72nd Street a considerable distance north of Bedford Avenue. He was intending to turn right at Maple Street, which is south of Bedford Avenue. As he was proceeding south and before reaching Bedford Avenue, he wanted to change to the right-hand lane; but another vehicle in the right-hand lane kept changing speeds, apparently to prevent him from making a lane change. The plaintiff varied his speed in attempting to change lanes, alternately slowing down to about 35 miles per hour and then speeding up to as much as 50 or 65 miles per hour. The speed limit on 72nd Street at Bedford Avenue is shown in the evidence to be 40 or 45 miles per hour. Shortly before the accident, the plaintiff was traveling at the higher speed of 50 to 65 miles per hour but began to slow down when his car was about 150 feet north of the Bedford Avenue intersection. He saw the defendant's car begin to enter the intersection when his own car was 75 to 100 feet from the intersection. The plaintiff's car left about 60 feet of skid marks.

A disinterested eyewitness testified that he saw the collision occur. He estimated the plaintiff's speed when the car was about 30 feet north of the north edge of Bedford Avenue to be 40 miles per hour. He testified that it was at that time that the defendant pulled into the intersection.

No contention is made that the instructions to the jury do not state correct principles of law.

The following principles govern our review on appeal of this law action to this court. In determining the sufficiency of the evidence to sustain the verdict, it must be considered most favorably to the successful party, every controverted fact must be resolved in his favor and he must have the benefit of all inferences reasonably deducible therefrom. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601; C I T

Financial Services of Kansas v. Egging Co., 198 Neb. 514, 253 N. W. 2d 840.

The following are the applicable principles of substantive law which the jury was required to apply to the particular evidence in this case. A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. § 39-637, R. R. S. 1943; Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318. It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets. Bezdek v. Patrick, *supra*.

A person traveling on a favored street protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that motorists about to enter from a nonfavored street will observe the foregoing rules. Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583; Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507. However, the right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident. Angstadt v. Coleman, *supra*.

The fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff is slight and the negligence of the defendant is gross in

comparison, but the contributory negligence of the plaintiff will be considered by the jury in the mitigation of damages in proportion to the contributory negligence attributable to the plaintiff. § 25-1151, R. R. S. 1943.

A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether or not the violation is negligent. Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436.

In this case, it was clearly possible for the jury to find that the plaintiff's vehicle presented an immediate hazard when the defendant drove into the intersection. The evidence also presented questions of (1) whether the defendant was negligent in failing to look again to the north just before entering the intersection; (2) whether the plaintiff was also negligent in traveling at a rate of speed which was excessive under the circumstances and, if so, whether such negligence was a proximate cause of the collision; and (3) the comparative negligence, if any, between the two parties. All such questions were for the determination of the jury under the evidence of this case.

The defendant specifically contends that, since the plaintiff's own testimony indicates he was traveling substantially in excess of the speed limit shortly before the accident, his negligence is thus conclusively established. Apparently, she also contends that the plaintiff's negligence was thus established as more than slight and as a proximate cause of the accident. Among other things, this overlooks the fact there was other testimony which indicated that, at the time the defendant began to drive into the intersection, the plaintiff had already slowed to 40 miles an hour. Defendant takes the position that plaintiff's

admission of speed in excess of the speed limit is binding, and the more favorable evidence of the nonparty witness is not to be considered. This is not the law. The rule is that a party is ordinarily entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case. Sacco v. Gau, 188 Neb. 808, 199 N. W. 2d 605. 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., 199 Neb. 632, 260 N. W. 2d 601. The jury was entitled to consider the evidence of the other witness as well as the admission of the plaintiff and to determine that, while plaintiff's speed was the reason for his being close to the intersection at the time defendant drove into it, it was the failure of defendant to maintain a lookout which was the sole proximate cause of the collision or that plaintiff's negligence was slight in comparison with that of the defendant.

AFFIRMED.

BETTY LOU SCARPINO, APPELLEE, V. EUGENE JAMES SCARPINO, APPELLANT.

270 N. W. 2d 913

Filed October 25, 1978. No. 41655.

1. **Parent and Child: Child Support: Equity.** The father has the primary responsibility for child support but the ability of the mother to support the children must also be considered. The trial court has the responsibility of adjusting the equities between the parties.
2. **Parent and Child: Child Support.** In determining the amount of child support to be awarded, the status, character, and situation of the parties, and all attendant circumstances, including the financial position of the husband and wife, must be considered.

3. **Parent and Child: Child Support: Custody: Appeal and Error.** The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal.

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

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

Margaret S. Galstan, for appellee.

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

MCCOWN, J.

This is an action to modify the terms of a divorce decree with respect to the custody and support of a minor child. The District Court granted custody of the minor daughter to the father; terminated the father's obligation to pay child support; and denied the father's prayer for child support from the mother. The father has appealed. The sole issue on the appeal is whether the court erred in refusing to order the mother to pay child support.

In October 1971, the petitioner, Betty Lou Scarpino, filed a petition for divorce against the respondent, Eugene James Scarpino. Two children had been born to the marriage; Gary Dean, born September 30, 1959, and Keri Lynn, born August 15, 1963. On January 3, 1972, a decree of divorce was entered which awarded custody of the two minor children to the petitioner and ordered respondent to pay child support of $150 per month per child. On March 21, 1972, by agreement of the parties, custody of the minor children was awarded to the respondent and child support obligations terminated. On November 7, 1974, again by agreement of the parties, custody of the minor children was placed in the court and possession of the children was awarded to

the petitioner and the respondent was ordered to pay child support of $100 per month per child until December 1975, at which time respondent was ordered to pay the sum of $150 per month per child, to continue until the children married, died, or became emancipated.

On October 28, 1976, the respondent husband filed his petition to modify the decree by granting possession of the daughter, Keri Lynn, to the respondent, and terminating respondent's obligation for child support for both children as of September 1, 1976. The respondent prayed that the petitioner be required to assist in the cost of child support for Keri Lynn. The petitioner's answer prayed that possession of Keri Lynn be granted to the parent most capable of properly caring for her, taking into account her own wishes and desires. Trial was held on July 19, 1977.

The evidence at trial established that Gary Dean was married on December 29, 1976, and was emancipated. The evidence also established that Keri Lynn had been living with the respondent since September 1, 1976, and preferred to live with him.

Respondent's gross salary as a police captain was $1,600 per month, and his take-home pay was approximately $1,200 per month. He had remarried and his present wife and her three children lived with him in his home. His present wife is employed and also has some investment income and is receiving child support for her children from her former husband. The respondent testified that the cost of support of Keri Lynn was approximately $150 per month.

Petitioner was unmarried and was employed by an insurance company. Her take-home pay was $357.81 per month. She testified that her absolutely necessary living expenses were $305.52 per month. That amount did not include any amounts for clothing, medical bills, or any other emergencies. The

petitioner also received interest income of approximately $35 per month from insurance proceeds.

The District Court determined that not only possession but custody of the minor child should be changed. The court awarded custody of Keri Lynn to the respondent and terminated his obligation to pay child support, effective September 1, 1976. The court also denied respondent's application praying that petitioner be required to pay some amount of child support.

The respondent contends that the adoption of the new dissolution of marriage statutes in Nebraska in 1972 altered the former rules as to child support, and that under the new statutes the trial court should have required the petitioner to pay some amount of child support.

Prior to July 6, 1972, the effective date of the new statutes, section 42-311, R. S. Supp., 1971, of the old divorce law, provided that "upon decreeing a divorce, * * * the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain." In the new dissolution of marriage statutes of 1972, that section became section 42-364, R. S. Supp., 1972. That section then read in part: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody * * *." There was no real difference in the language as to child support between the old divorce statutes and the new dissolution of marriage statutes. In 1974, section 42-364 was amended once more. The 1972 language as to child support remained intact but the 1974 amendment added an additional provision: "(3) In determining the amount of child support to be paid by a parent, the court

shall consider the earning capacity of each parent. * * *." That language obviously constitutes a very slight addition to the statutory provisions as to child support.

Prior to the adoption of the dissolution of marriage statutes this court consistently applied the rule that "independent of the assets of the wife, the father is primarily liable for the support of his children." Benton v. Benton, 187 Neb. 205, 188 N. W. 2d 685; Trautman v. Trautman, 184 Neb. 202, 166 N. W. 2d 415. Under the new dissolution of marriage statutes this court recently held: "In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties." Remmers v. Remmers, 200 Neb. 647, 264 N. W. 2d 857.

In Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231, this court considered a contention that the amount of child support was excessive and improper because the trial court failed to consider the earning capacity of each parent as required by section 42-364 (3), R. S. Supp., 1974. We said: "This court has held that in determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account."

Those rules are clearly applicable in the present case. The respondent's income is almost four times the income of the petitioner. There is no evidence as to the respondent's necessary living expenses, while the evidence is that the petitioner's total income is barely sufficient for her own support. Any comparison of the status, character, and situation of the parties, and the attendant circumstances, includ-

ing the earning capacity of each parent, compels the conclusion that the District Court was correct in refusing to require the petitioner to assist in the cost of supporting the minor child.

The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Greenfield v. Greenfield, 200 Neb. 608, 264 N. W. 2d 675. There was no abuse of discretion here.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD M. HURLEY, APPELLEE, PEERLESS INSURANCE COMPANY ET AL., APPELLANTS.

270 N. W. 2d 915

Filed October 25, 1978. No. 41680.

1. **Contracts.** Every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part thereof.
2. **Criminal Law: Sentences: Bail: Sureties.** Where the execution of a sentence has been suspended under section 29-2301, R. R. S. 1943, and the defendant has been at liberty under bail, the bond may be continued without the consent of the surety during the period of suspension.

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

Walter J. Matejka, for appellants.

No appearance for appellee State.

No appearance for appellee Hurley.

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

BOSLAUGH, J.

This is an appeal by Peerless Insurance Company from a judgment forfeiting an appearance bond in a criminal case on which the appellant was the surety. The bond in question was executed and filed in the District Court for Nemaha County, Nebraska, on May 25, 1977. The bond was given to insure the appearance of Donald M. Hurley who had been charged with assault to inflict great bodily injury.

The jury returned a verdict of guilty on June 29, 1977, and Hurley was sentenced to imprisonment for 1 year on July 19, 1977. Hurley stated in open court that he intended to appeal to this court. He had been represented by retained counsel who was granted leave to withdraw from the case. Since Hurley claimed to be indigent, the trial court appointed counsel to assist Hurley in making an application for the appointment of counsel and set the matter for hearing on August 2, 1977. The trial court also suspended the sentence which had been imposed and released Hurley upon the bond which had been filed on May 25, 1977.

When Hurley failed to appear on August 2, 1977, the bond was revoked, a bench warrant was issued for Hurley, and a motion for judgment on the bond was filed by the county attorney. The motion was heard on August 16, 1977, and judgment was entered against Peerless for the full amount of the bond. From this judgment Peerless has appealed.

The condition of the bond was that Hurley should "personally appear in the District Court of Nemaha County, Nebraska, holding in Auburn, Nebraska, from day to day, and from term to term, until final judgment or as directed by said Court, until finally discharged * * *." Peerless contends that it has fulfilled its obligation under the bond since Hurley appeared for trial and sentencing and was remanded to the custody of the sheriff at the end of the sentencing hearing.

Section 29-2301, R. R. S. 1943, provides that the execution of a sentence may be suspended for 1 month in order to give the person convicted an opportunity to apply for a writ of error and: "Where the defendant is, prior to pronouncement of judgment, at liberty under bail, the court in its discretion, may allow the defendant to continue at liberty under his bail bond during the period of suspension of sentence authorized by this section." This section authorizes the trial court to continue the defendant's bond, without the consent of the surety, for up to 1 month after sentence has been imposed.

It is a well-established rule that every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part thereof. Bobbitt v. Order of United Commercial Travelers of America, 180 Neb. 285, 142 N. W. 2d 351. The rule is applicable to appearance bonds. See, Restatement, Security, § 203, comment c, p. 549; State v. Casey, 180 Neb. 888, 146 N. W. 2d 370.

The bond in this case was subject to the provisions of section 29-2301, R. R. S. 1943. It was within the discretion of the District Court to suspend the sentence for up to 1 month and to continue the bond during that time.

The judgment of the District Court is affirmed.

AFFIRMED.

TERRI J. STRAUSS, APPELLANT, V. SQUARE D COMPANY, A CORPORATION, ET AL., APPELLEES.

270 N. W. 2d 917

Filed October 25, 1978. No. 41837.

1. **Administrative Law: Appeal and Error.** The Department of Labor Appeal Tribunal exercises quasi-judicial power as distinguished from legislative power. Consequently, the statutory provision for a de novo review is valid.

2. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

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

Thomas A. Wurtz, for appellant.

No appearance for appellee Square D Co.

James R. Jones and John W. Wynkoop, for appellee Chizek.

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

SPENCER, C. J., Pro Tem.

This is an action for unemployment compensation benefits. The District Court affirmed the holding of the Department of Labor Appeal Tribunal that claimant, Terri J. Strauss, voluntarily left her employment, and disqualified her from receiving benefits for a period of 9 weeks. Claimant appeals. We affirm.

Claimant was employed at Square D Company, Inc., hereinafter referred to as employer. From February 1976, through February 1977, claimant worked a 3:30 p.m. to 12 midnight shift. At approximately 8:30 p.m., on February 15, 1977, claimant bumped her head on a press and wrenched her neck. She claims this happened when a coworker operating an unregulated air hose blew dirt into her face. Claimant completed her shift that evening and worked a complete shift the next day. On February 17, 1977, claimant consulted her personal physician and obtained a disability certificate for February 17, 1977. Claimant then called her employer and requested a leave of absence for the rest of the week and the following week. She was instructed to bring in a disability certificate. When she presented the

certificate from her personal physician she was told it was not sufficient to warrant an extended leave of absence. She was also advised she could not miss more than 3 consecutive days without further medical documentation. She was told she would be excused from work on February 18, 1977, and that after the long weekend she could report for light duty on February 22, 1977, or obtain a leave of absence upon presentation of sufficient medical evidence.

The collective bargaining agreement between the claimant's union and the employer contained the following provisions, so far as material herein: "Article XI Leaves of Absence Section 1. A written leave of absence shall be required in all cases when an employee is absent from work for more than three (3) consecutive work days, except as hereinafter provided. Any employee wishing a leave of absence shall make a request in writing to the personnel department, setting forth in detail the reason for such request.

"Section 2. Upon presentation of satisfactory medical evidence from a registered physician in each instance, leaves of absence for personal illness or injury shall be granted. However, the Company may require an examination by its own physician (at its expense), prior to granting the leave or any extension thereof, or prior to permitting the employee to return to work."

Claimant contends her disability was a tension headache. She testified she called her employer on the 22nd of February and each day thereafter to inform it she was unable to work. When she called on February 25, 1977, she was informed that her employment was terminated because she had missed 3 consecutive work days without good cause. This termination was pursuant to the provision of the collective bargaining agreement between the company and the claimant's union, set out above.

There is no question claimant was apprised of the

need to obtain a written leave of absence which would be issued upon the presentation of satisfactory medical evidence. Claimant had applied for and received medical leave on two prior occasions.

On September 10, 1976, claimant had been issued a written warning for failure to return to work at the expiration of a leave of absence. The warning notice stated: "On Tuesday, September 7, 1976, you did not return from leave of absence as scheduled. You were aware of the leave requirements. Your doctor, however, has verified you need to be off work. It is your responsibility to provide medical evidence for approval of a medical leave. Failure to properly follow the leave of absence procedure in the future will be reason for disciplinary action."

Claimant's employment records demonstrate she was absent a considerable number of days during the year she was employed by the employer. She had been warned about her absenteeism. On January 7, 1977, the employer issued a written reprimand informing claimant she could be suspended or discharged if her attendance did not improve.

Claimant denied the personnel supervisor told her the disability certificate she submitted was insufficient. She testified she believed she was following the correct procedure and that medical evidence specifying the dates she was unable to work had not been required on previous occasions. Claimant did admit her physician had not told her to stay away from work.

The claims deputy, following an investigation, determined claimant had left work voluntarily without good cause. The notice of determination mailed to claimant reads as follows: "You left your employment with Square D Co. on 2-23-77 (after vacation pay) when you failed to work after three (3) consecutive working days. It has been shown that you did, on 2-18-76 (sic), request a medical leave of absence. It has not been shown, however, that you

did, at the time of this request, submit positive proof of disability (in the form of a disability statement with inclusive dates of disability) as requested by the employer. It has been shown that you were, prior to and at the time of this request, aware of the company policy governing medical leaves of absence. Because you failed to report for work, it is held that you quit voluntarily without good cause."

As authorized by section 48-628, R. S. Supp., 1976, the claims deputy disqualified plaintiff from receiving benefits for the week ending February 26, 1977, plus an additional 9 weeks. This determination was affirmed by the Department of Labor Appeal Tribunal with the finding that it would not have been unreasonable for the claimant to have complied with the alternatives given her. These alternatives were: Reporting for light work that was available; or, returning to her doctor and obtaining a more definite statement of her injuries. The Appeal Tribunal found the testimony indicated that this would have been satisfactory medical evidence for the employer and a medical leave of absence would have been granted.

Section 48-639, R. R. S. 1943, provides for a review de novo upon the record in the District Court. Both parties assume such review would be unconstitutional, in view of recent decisions of this court, beginning with Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683 (1976), and both assert the scope of review is limited to a determination of whether the decision of the Appeal Tribunal was supported by substantial evidence; whether it acted within the scope of its authority; and whether its action was arbitrary, capricious, or unreasonable. The function of the Appeal Tribunal, however, is "To hear and decide disputed claims, * * *." § 48-633, R. R. S. 1943. It exercises quasi-judicial power as distinguished from legislative power. Consequently, the statutory provision for a de novo review is valid.

See Snygg v. City of Scottsbluff Police Dept., *ante* p. 16, 266 N. W. 2d 76 (1978).

Claimant's main contention is she did not quit her employment but was discharged. Thus, she argues, benefits cannot be denied on the basis that she "left work voluntarily without good cause;" rather, the issue is whether she was "discharged for misconduct." The disqualification period is the same in either event under section 48-628, R. S. Supp., 1976, except that benefits may be denied altogether if the individual was discharged for misconduct which was "gross, flagrant, and willful, or was unlawful."

There is substantial evidence to support a finding that claimant was discharged for misconduct. The District Court did not specifically find she had voluntarily left work, but succinctly determined that the ultimate decision of the Appeal Tribunal was correct because "by her acts of commission and omission the plaintiff has deprived herself of the unemployment compensation benefits which she seeks." Whether claimant voluntarily left work without good cause or whether she was discharged for misconduct, the result is the same. It is a familiar principle that a proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. See Riederer v. Siciunas, 193 Neb. 580, 228 N. W. 2d 283 (1975).

The judgment is affirmed.

AFFIRMED.

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

270 N. W. 2d 920

Filed October 25, 1978. No. 41878.

1. **Criminal Law: Sexual Assault: Evidence.** In a prosecution for sexual assault it is not essential that the prosecutrix be cor-

roborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue.

2. **Criminal Law: Sexual Assault: Proof.** In a prosecution for sexual assault, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed as modified.

Stephen A. Scherr and Thomas J. Mullen, for appellant.

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

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

BOSLAUGH, J.

The defendant, Kenneth Rhodes, was convicted of first degree sexual assault and sodomy and sentenced to imprisonment for 7 to 10 years on each count, the sentences to run concurrently. He has appealed and contends the evidence was insufficient to sustain the conviction; the prosecutor was guilty of misconduct; and that the sentences imposed were excessive and in violation of section 83-1,105, R. S. Supp., 1976.

The prosecuting witness was a married woman, 20 years of age, who was 6 months pregnant at the time of the offense. The defendant and two companions, Laurens Albert and Duane Ives, had spent a part of the afternoon and evening of July 4, 1977, drinking. While driving around in an automobile owned by Ives, they came upon the prosecuting witness and offered to take her home. Shortly before that they had given her a ride to the Regional Center west of Hastings, Nebraska. Instead of taking her home, they drove out into the country north and east of town and parked on a country road. The prosecut-

ing witness left the automobile and started walking or running down the road. The defendant followed her, pushed her into the ditch, and threatened to harm her unborn baby if she did not submit. When she tried to get away the defendant choked her and told her that he "would really hurt the baby" if she tried that again. The defendant forced her to attempt an act of fellatio and then had intercourse with her. The prosecuting witness was then taken back to town.

When she arrived back at her home her clothing was wet, her hair "was a mess," and "she was all messed up." She immediately told her husband what had happened. The police were called and then she was taken to the hospital where she was examined by a physician.

The evidence of the State was clearly sufficient, if believed, to sustain a finding of guilty beyond a reasonable doubt on both counts.

In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387. Here the testimony of Albert and Ives corroborated the prosecuting witness as to what had happened that evening except as to the details of the assault itself. The testimony of the husband concerning her complaint to him, and the testimony of the police officer and the physician further corroborated her testimony.

So far as resistance is concerned, there was evidence of force exerted by the defendant together with a threat to harm the unborn baby. Reasonable resistance in good faith under the circumstances is all that is required. See, State v. Parker, 196 Neb. 762, 246 N. W. 2d 210; State v. Newman, 199 Neb. 246, 257 N. W. 2d 825.

On direct examination the husband of the prosecuting witness was asked about a conversation he had with her when she returned home after the assault. An objection on the ground that the statement was hearsay was overruled. The ruling was correct because evidence that a complaint was made by the prosecuting witness is admissible. After the witness had answered, an objection to the answer was sustained because of the scope of the answer. The record shows no misconduct of the prosecuting attorney which was prejudicial to any substantial right of the defendant.

The defendant is now 24 years of age. The presentence report shows that in 1975 the defendant was convicted of delivering a controlled substance and in 1977 pleaded guilty to possession of a firearm by a felon. The offenses in this case involved violence and some harm to the victim. Under the circumstances in this case the sentences imposed were not excessive.

The maximum penalty for sodomy is imprisonment for 20 years. Under section 83-1,105, R. S. Supp., 1976, the minimum term for an indeterminate sentence could not exceed 6 years and 8 months. The sentence on count II is modified to imprisonment for a term of 6 years and 8 months to 10 years. The judgment in all other respects is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOE O. BAKER, APPELLANT.

270 N. W. 2d 922

Filed October 25, 1978. No. 41942.

Trial: Prosecuting Attorneys: Waiver: Appeal and Error. A party who does not object at trial to an argument of the prosecutor which

is alleged to constitute misconduct will be held to have waived his rights to complain on appeal.

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

Joe O. Baker, pro se.

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

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

WHITE, J.

The defendant was charged in the county court of Scotts Bluff County for a violation of section 77-2701 et seq., R. R. S. 1943, of willfully failing to make a valid income tax return to the State of Nebraska. On the return form provided by the Department of Revenue, he had entered his name, address, and a claim for a refund of food sales tax and tax withheld. In response to all other inquiries on the form, he had entered the words "I object" and attached an explanation that this meant he was asserting a Fifth Amendment privilege not to disclose the requested information. A jury of six persons found the defendant guilty of the offense charged. The defendant appealed to the District Court for Scotts Bluff County and the conviction was affirmed.

On appeal to this court, defendant assigns four errors: (1) That the defendant was denied lay counsel guaranteed by the Sixth Amendment to the United States Constitution; there is no contention by the defendant that he was indigent or unable to afford counsel, simply that lay counsel should be allowed to represent him; (2) that "Claiming the Fifth Amendment on a tax return in good faith cannot constitute a 'crime' "; (3) that defendant was denied a jury of 12 persons as guaranteed by the Sixth Amendment to the United States Constitution; and (4) that

defendant was prejudiced by remarks of the prosecuting attorney in closing arguments to the jury.

Each of the first three assignments of error have been passed on by this court, most recently in State v. Spurgeon, 200 Neb. 719, 265 N. W. 2d 224 (1978). Defendant's assignments are without merit.

The remaining assignment of error relates to the county attorney's statement to the jury on final argument as follows: "He elected to stand pat. He says, 'I can interpret the constitution so that I don't have to comply with the tax laws', and what, if that reasoning is followed, will it do to government? It will make it possible for a group of people within this country to get together and just refuse to pay taxes and they can destroy the government." The bill of exceptions does not note any contemporaneous objection to the remarks of the county attorney. Ordinarily, a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his rights to complain. See State v. Boss, 195 Neb. 467, 238 N. W. 2d 639. The defendant, who, by his own assertion is well able to afford counsel, chose not to do so, electing to act as his own counsel. There is no reason he should not be held responsible for the inept counsel he freely chose even though that counsel was himself. See State v. Morford, 192 Neb. 412, 222 N. W. 2d 117. He cannot be heard here to assert prejudice in remarks to which he did not object at the time they were made. In any event, we have examined the remarks of counsel in the context of the entire record and we find that statements to the jury were not improper and did not operate to prejudice the rights of the defendant. See State v. Costello, 199 Neb. 43, 256 N. W. 2d 97.

The judgment and sentence of the trial court below are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM L. BRASHEAR, APPELLANT.

270 N. W. 2d 924

Filed October 25, 1978. No. 41943.

1. **Trial: Right to Counsel.** The defendant by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him must be held responsible for his ineptness of counsel even though that counsel was himself.
2. **Appeal and Error: Motions, Rules, and Orders.** A party who does not object to a misstatement when made and who does not assign the alleged error in a motion for new trial cannot be heard here on possible prejudice of that misstatement.

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

William L. Brashear, pro se.

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

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

SPENCER, C. J., Pro Tem.

Defendant was charged in county court with willful and unlawful failure to file a valid Nebraska state income tax return. A six-man jury found the defendant guilty. His conviction was affirmed on appeal to the District Court and he prosecutes this appeal. We affirm.

Defendant filed a tax return for 1975 in which he entered his name, address, and a statement that his income was under $740. On appeal to this court, defendant assigns four errors, as follows:

"1. Improper statements by the judge at the jury selection did unduly influence and prejudice the jury, and constitute fundamental and reversible error.

"2. The defendant in a criminal case cannot be denied lay counsel and still be considered to have

had 'assistance of counsel' as guaranteed by the Sixth Amendment to the United States Constitution, nor can a defendant be denied the common law right to plead by proxy.

"3. Claiming the Fifth Amendment on a tax return in good faith cannot constitute a 'crime'.

"4. The State of Nebraska cannot deny a defendant a twelve (12) man jury which is guaranteed by the Federal Constitution."

Defendant's second, third, and fourth assignments of error have been passed on and adequately answered by this court in State v. Soester, 199 Neb. 477, 259 N. W. 2d 921 (1977), and State v. Spurgeon, 200 Neb. 719, 265 N. W. 2d 224 (1978). These assignments are without merit.

Defendant's remaining assignment of error refers to the following statement made by the trial judge in selecting and empaneling the jury on voir dire for this case: "William L. Brashear has been charged in this case with the filing of a false and fictitious Nebraska State income tax return. In other words, it might be commonly referred to as income tax evasion. Does anyone know anything about this particular case at all?"

Initially, defendant was in fact charged with evading income tax. Subsequently, that charge was amended to failure to file a valid Nebraska state income tax return. While it is clear the judge did erroneously state the charge at the time of the selection of the jury, we can see no prejudice arising by virtue of this misstatement. The jury was selected on July 11, 1977, by one county judge, and the case was tried on July 19, 1977, by another county judge.

The question was designed merely to elicit from the jurors a response regarding their knowledge of this particular case. The trial itself, the instructions given by the court at the trial, and the complaint upon which the case was tried made the nature of the offense clear to the jury. The defendant was not

misled. He called attention to the fact that he had not yet been arraigned on the amended charge.

The momentary misstatement of the nature of the charge a week before the actual trial could not possibly have been prejudicial herein. The remark expressed no opinion of any nature but merely stated a specific charge to elicit any knowledge the jury might have of the case. It was an inadvertent misstatement, which in no way was calculated to influence the jurors. On the record it could not possibly have had any prejudicial effect.

In any event, the defendant made no objections to the statement at the time it was made. Nor, did he assign it as error in his motion for a new trial. The defendant by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him must be held responsible for his ineptness of counsel even though that counsel was himself. See State v. Morford, 192 Neb. 412, 222 N. W. 2d 117 (1974). A party who does not object to a misstatement when made and who does not assign the alleged error in a motion for new trial cannot be heard here on possible prejudice of that misstatement.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED E. KNUDSEN, APPELLANT.

270 N. W. 2d 926

Filed October 25, 1978. No. 41955.

Criminal Law: Arrest. Ordinarily, the illegality of an arrest is not a defense to the crime for which the arrest was made.

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

Clarence E. Mock, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted in the county court of driving while intoxicated, second offense. He was sentenced to 5 days imprisonment in the county jail, fined $300, his driving privileges were suspended for 1 year, and he was ordered to pay the costs of the prosecution. On appeal to the District Court the judgment was affirmed. The defendant has now appealed to this court.

The record shows that on June 3, 1977, a police officer of the city of Blair, Nebraska, observed the defendant driving in an erratic manner. The officer followed the defendant to a point outside the city limits of Blair where the defendant was stopped and arrested. The defendant contends that the arrest was illegal because the officer had no authority to make an arrest beyond the city limits and, therefore, the judgment should be reversed.

It is unnecessary in this case to determine whether the arrest was illegal because the validity of the arrest was of no consequence so far as the prosecution for the offense was concerned. Although the illegality of an arrest may give rise to other collateral rights and remedies, it ordinarily is not a defense to the crime for which the arrest was made.

In United States v. Marzano, 537 F. 2d 257, the court said: "The power of a court to try a person is not affected by the impropriety of the method used to bring the defendant under the jurisdiction of the court. Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952); Ker v. Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886). Once the defendant is

before the court, the court will not inquire into the circumstances surrounding his presence there. United States ex rel. Calhoun v. Twomey, 454 F. 2d 326, 328 (7th Cir. 1971). The Supreme Court recently reaffirmed the continuing validity of the Ker-Frisbie doctrine. Gerstein v. Pugh, 420 U. S. 103, 119, 95 S. Ct. 854, 865-6, 43 L. Ed. 2d 54, 68 (1975)." In Gerstein v. Pugh, 420 U. S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54, the court noted that it was an established rule that an illegal arrest or detention did not void a subsequent conviction. See, also, Bell v. Janing, 188 Neb. 690, 199 N. W. 2d 24; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124; 5 Am. Jur. 2d, Arrest, § 116, p. 796.

The fact that the defendant was arrested by a Blair police officer outside the city limits of Blair was not a defense in this case. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GORDON C. GOBEL, A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

271 N. W. 2d 41

Filed November 1, 1978. No. 41251.

1. **Disciplinary Proceedings: Attorneys at Law: Attorney and Client: Canons.** A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law.
2. **Disciplinary Proceedings: Attorneys at Law: Canons.** A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Original action. Judgment of suspension.

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

David S. Lathrop of Lathrop, Albracht & Swenson, for respondent.

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

MCCOWN, J.

This is a disciplinary proceeding brought against Gordon C. Gobel, a practicing member of the Nebraska State Bar Association. Charges of misconduct were filed against the respondent before the Committee on Inquiry of the Sixth Judicial District in the spring of 1976. Following hearing before that committee, and approval of formal charges by the State Advisory Committee, nine formal charges were filed in this court. The report of the referee found that the respondent had violated the provisions of the Code of Professional Responsibility with respect to five of the formal charges and recommended that respondent be suspended from the practice of law for a period of 1 month. No objections were made or exceptions taken to the referee's report. The respondent filed a motion for judgment on the report and recommendation of the referee. The motion was overruled and the matter was briefed, argued, and submitted to the court.

The respondent is 59 years old and has been practicing law in this state since 1948. The evidence established that the respondent had violated the provisions of the Code of Professional Responsibility with respect to five separate matters:

(1) Respondent, who was the attorney for the administratrix of an estate, after embezzlement by the administratrix was apparent to him, sent a "waiver" to the sole surviving heir of the estate. The "waiver" purported to relieve the administratrix of liability on her bond for unauthorized expenditures of estate funds. At the time the "waiver" was drafted and mailed, the respondent was the attorney for the administratrix, the resident agent for the surety on the bond of the administratrix, and the county attorney, whose duties included the enforcement of the statutes

pertaining to embezzlement. The referee found that the respondent, by such conduct, had violated Canon 5 and disciplinary rule DR 5-105 (B) of the Code of Professional Responsibility.

(2) The respondent, while county attorney, threatened that criminal charges of assault and battery would be filed against an individual if the individual attempted to interfere with certain activities of a private client of respondent.

(3) Respondent, while county attorney, threatened the debtor of a private client of respondent that unless certain money was paid immediately the respondent would file criminal charges against the debtor on the following day.

(4) Respondent, while county attorney, in an attempt to recover property or money from an individual on a civil claim on behalf of a private client, threatened to file felony charges against the individual unless payment was made within a specified time, and suggested that the matter might be compromised for a specified amount.

Charges 2, 3, and 4 involved threats to use criminal process to coerce the payment or adjustment of civil claims of private clients of respondent at a time when the respondent was the county attorney of Dodge County, Nebraska. The referee found that in each instance the respondent had violated Canon 7 and disciplinary rule DR 7-105 of the Code of Professional Responsibility.

(5) The respondent communicated directly with a party in writing when he knew the party was represented by another attorney. This action was in violation of disciplinary rule DR 7-104 of the Code of Professional Responsibility.

The evidence establishes that the respondent violated the Code of Professional Responsibility and disciplinary rules referred to as charged in each of the five instances. The referee recommended a period of suspension be imposed. The referee felt

that respondent's practice had already suffered substantially from the long pendency of this matter; that the more serious charges involved activities as county attorney; and that respondent has not held that office for some time, and repetition was unlikely. The referee therefore recommended a period of suspension of 1 month.

A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. See Canons 5 and 7, Code of Professional Responsibility.

While his actions may have been motivated by misjudgment rather than personal profit, the respondent here has violated specific disciplinary rules of the Code forbidding multiple employment and the representation of clients with conflicting interests; communicating with a party known to be represented by another lawyer without the prior consent of the other lawyer; and threatening criminal prosecution solely to obtain an advantage in a civil matter. See, Disciplinary Rules, DR 5-105 (B); DR 7-104 (A) (1); DR 7-105. The latter rule provides: "(A) A lawyer shall not present, participate in the presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce an adjustment of private civil claims or controversies is a subversion of that process and tends to diminish public confidence in the legal system. See EC 7-21, Code of Professional Responsibility.

Under the circumstances reflected in the record here, the recommended period of suspension is inadequate. We find that the respondent should be suspended from the practice of law for a period of 3 months from and after November 1, 1978. At the end of that period the suspension may be lifted upon

an affirmative showing by the respondent that he has not, during the period of his suspension, engaged in the practice of law in this or any other jurisdiction, and that during that time he has not engaged in any conduct which would subject him to discipline under the disciplinary rules if he were engaged in the practice of law, and that he will not do so in the future.

Costs of the proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

ELSIE M. HALL, APPELLEE, V. MAYNARD A. HALL, APPELLANT.
271 N. W. 2d 43

Filed November 1, 1978. No. 41623.

Courts: Motions, Rules, and Orders: Judgments. A trial court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered.

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

Andrew J. McMullen, for appellant.

Meier & Adkins and David G. Wondra, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; awarded custody of the two minor children of the parties to the petitioner; awarded the petitioner child support in the amount of $50 per child per month; awarded to each party the property then in his possession; ordered the petitioner to pay certain

medical bills; and ordered the respondent to pay all other debts of the parties.

The petitioner did not file a motion for new trial within 10 days after the rendition of the judgment but filed a motion to vacate the decree some 51 days later. The motion was supported by affidavits of the petitioner's counsel and a daughter-in-law of the parties. The trial court sustained the petitioner's motion, vacated the decree, and granted a new trial. The respondent has appealed.

The respondent assigns as error the granting of the motion without any evidence having been introduced, and in receiving evidence in support of the motion in the absence of the respondent and his attorney and after having granted the motion. As we understand the record it does not support these assignments.

The journal entry for the hearing on the motion on July 20, 1977, recites that petitioner offered in evidence the affidavits filed in support of her motion and respondent, who was present with his attorney, objected thereto on the ground that they were incompetent and hearsay, which objection was overruled. Objections to the journal entry were filed by the respondent on August 10, 1977. The transcript does not show any ruling or other disposition made of these objections.

The bill of exceptions contains a statement by the trial court, dictated to the court reporter after the hearing had concluded, which recites that the affidavits were offered and received in evidence over the objection of the respondent. We interpret this statement to be a record of the proceeding made by the trial court, the court reporter not having been in attendance at the hearing on the motion. See Rule 7 e 3 of the Revised Rules of the Supreme Court, 1977. The record shows no objection by the respondent to the above statement of the trial court in the bill of exceptions.

We conclude that neither assignment of error is supported by the record before us.

A trial court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. Pofahl v. Pofahl, 196 Neb. 347, 243 N. W. 2d 55. The respondent does not contend, and the record does not indicate that the term at which the decree was entered had expired at the time the decree was vacated.

The affidavits alleged, among other things, that statements made by the respondent upon which the decree was based were "grossly untrue." Under the circumstances we believe it was within the discretion of the trial court to vacate the decree and grant a new trial. The judgment is, therefore, affirmed.

AFFIRMED.

INEBA RANCH, A PARTNERSHIP, APPELLANT, V. WILLIAM R. COCKERILL, DOING BUSINESS AS COCKERILL FEEDING COMPANY, APPELLEE.

271 N. W. 2d 44

Filed November 1, 1978. No. 41637.

1. **Judgments: Appeal and Error.** The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong.
2. **Judgments: Trial: Evidence.** In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. The successful party is also entitled to any inference reasonably deducible from the evidence.
3. **Appeal and Error: Evidence: Witnesses.** In an action at law, it is not for the Supreme Court to resolve the conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact.

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

Richard J. Bruckner, for appellant.

David L. Buelt and Michael D. Jones of Ellick, Spire & Jones, for appellee.

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

WHITE, J.

This is an appeal from the judgment of the District Court in a law action. Trial was to the court. The trial court found for the defendant. Plaintiff appeals. We affirm.

In March 1975, the plaintiff shipped approximately 475 head of cattle to the Omaha Stockyards for sale. A number of the cattle tested positively for brucellosis or "bangs" disease. As a result, the cattle were required to be quarantined for 30 to 60 days prior to sale. Those cows which were thought to be pregnant (approximately 400) were sent to the defendant's feedlot in Sarpy County. Many of these cows did calve during the quarantine period. The cows which were thought not to be pregnant (approximately 75) were sent to another commercial feedlot.

The plaintiff agreed that defendant would place the cattle on a "weight maintenance" ration during the quarantine period. Plaintiff contends this weight maintenance was not achieved by the defendant. The defendant contended that the weight was generally maintained and any weight loss was due to the generally poor condition of the cattle or calving.

The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. The successful party is also entitled to any inference reasonably deducible from the evidence. See Burgess v. Curley Olney's Inc., 198 Neb. 153, 251 N. W. 2d 888.

The cattle were not weighed prior to shipment. The plaintiff's evidence indicated that the Ineba cows weighed 750 to 800 pounds upon delivery to defendant's yards; and that they were in good condition and weighed only 600 to 675 pounds at the end of the quarantine. The plaintiff also introduced evidence tending to show that the 75 head of cattle sent to another feedlot did considerably better than the 400 head left in the care of the defendant.

In response to this evidence, the defendant offered the testimony of Dr. Norman B. Jernigan, a veterinarian, and of several other people who observed the Ineba cattle. Dr. Jernigan described the cows as being thin and in generally poor condition when he first saw them shortly after their arrival at the defendant's feedlot. He expressed the opinion that if there was any weight loss, it was due to this poor condition or to calving. John Thomas Farrell, a consignment seller of livestock who observed the Ineba cattle, expressed a similar opinion. Gary Gardner, terminal manager for the trucking company which shipped the cattle to defendant's yard, described them as being "thin" at the time of shipment.

It is not for this court to resolve the conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact. See Insurance Co. of North America v. Hawkins, 197 Neb. 126, 246 N. W. 2d 878. Clearly, there was evidence sufficient to support the judgment of the trial court. Considering, as we must, the evidence most favorable to the defendant, it could be found that the Ineba cattle maintained their initial weight during their stay at defendant's feedlot, Cockerill Feeding Company, or that any weight loss was due to preexisting disease or the effects of calving.

The judgment of the trial court, not being clearly wrong, is affirmed.

AFFIRMED.

CHARLES A. FERRY, APPELLEE AND CROSS-APPELLANT, v. DARLENE M. FERRY, ALSO KNOWN AS DARLENE M. WRIGHT, APPELLANT AND CROSS-APPELLEE.

271 N. W. 2d 450

Filed November 1, 1978. No. 41656.

1. **Divorce: Minors: Child Support.** Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
2. _____: _____: _____. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances.
3. **Divorce: Minors: Child Support: Proof.** In order to rebut the presumption that an award in an amount for the support of more than one child continues until the last child reaches majority or otherwise becomes ineligible for support, some evidence must exist. The burden of proof is on the moving party to produce such evidence.
4. **Courts: Judicial Notice.** A court will take judicial notice of the pleadings, orders, and judgments in the case before it.
5. **Statutes: Minors: Child Support: Interest.** Section 45-103, R. R. S. 1943, providing for interest on judgments from the date of rendition thereof, is applicable to child support installments accrued prior to August 24, 1975.
6. **Judgments: Interest.** When the judgment is payable in installments, interest begins to accrue on the individual installments when they are due.
7. **Interest: Time.** When the statutory interest rate changes, the new rate applies to all delinquent installments from the effective date of the new rate.
8. **Statutes: Garnishment.** Section 1673 (b) and (c) of Title 15, U.S.C., preempts state garnishment statutes to the extent that state statutes are less restrictive.
9. **Statutes.** Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to or repealed by the latter, the earlier statute is repealed or modified by the implication of the later act, but only to the extent of repugnancy or conflict.
10. _____. L. B. 1015, Laws 1974, sections 6 to 17, now sections 42-364.01

to 42-364.12, R. S. Supp., 1978, amends section 25-1558, R. R. S. 1943, to the extent that the two statutes are inconsistent.

11. **Statutes: Garnishment: Minors: Child Support.** Section 42-364.06, R. S. Supp., 1978, provides in part that if jurisdiction has been acquired of the employer, "In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such come due."

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for further proceedings not inconsistent with this opinion.

James W. Moriarty, for appellant.

Michael G. Helms for Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

CLINTON, J.

This appeal arises from a garnishment proceeding to collect past-due child support payments under an order rendered on February 14, 1968, which directed the plaintiff father to pay "the sum of thirty-five dollars per week to the Clerk of the District Court and continuing until further order of this Court, for the support and maintenance of the minor children of the parties hereto." The plaintiff moved to quash the garnishment. The court, on July 29, 1977, denied the motion to quash, but modified the 1968 order to reduce the amount of child support pro rata as of the time each child reached majority or was married.

The defendant mother has appealed and makes the following assignments of error: (1) The court erred in modifying retroactively child support payments which had vested. (2) The order of July 29, 1977, was beyond the power of the court because an earlier order entered on April 29, 1977, denying modi-

fication and reduction, was res judicata of the matter of retroactive modification. (3) The court erred in not allowing interest prior to August 24, 1975, on delinquent payments. (4) The order reducing payments is not supported by the evidence.

The plaintiff has cross-appealed and makes the claim that section 25-1558, R. R. S. 1943, is unconstitutional.

We reverse that part of the order of July 29, 1977, which interprets the order of February 14, 1968, so as to have the effect of modifying the child support payments already accrued. We reverse that part of the order refusing to quash the garnishment, noting that the amount garnished exceeded applicable statutory limitations. We also find that interest should have been allowed on delinquent payments. We remand with directions for further proceedings in accordance with this opinion.

The decree of divorce in this case was entered on December 22, 1964, and awarded "sole and absolute custody of the three younger children" to the plaintiff. It awarded "sole and absolute custody of the oldest child" to the defendant and directed the plaintiff to make semimonthly payments of $22 for that child's support. On February 14, 1968, the court entered a modifying order awarding custody of the three younger children to the defendant and directing plaintiff to pay "thirty-five dollars per week . . . until further order of this Court" for the support of the "minor children of the parties." At that time all four children were still minors and unmarried.

The oldest child, Marta, was married on March 31, 1969. The third child, Kimberly, was married on July 18, 1970. The second child, Charles, was married on November 13, 1970. The youngest child, Jane, was married on May 8, 1976.

The record shows that the plaintiff was aware of Marta's marriage when it occurred but took no action to secure a modification of the support order.

After he became aware of Kimberly's marriage, he began making monthly payments of $80 but again took no action to have the order modified. In June 1976, upon motion of plaintiff, the support order of February 14, 1968, was terminated for the reason that the children were emancipated.

In August 1976, the defendant began proceedings to collect delinquent payments by filing a motion and affidavit asking that the plaintiff be found guilty of contempt. In October 1976, the plaintiff filed a petition to modify the child support order. Among other things, the application alleged that plaintiff had entered into an agreement in February of 1969 with the defendant's attorney for reduction of the payments to $40 per month; but, in violation of the agreement, the defendant made no application for a reduction. Plaintiff further alleged that the defendant fraudulently concealed the marriages and emancipation of the minor children. The application asked that, in accordance with the alleged agreement of the parties, there be pro rata reduction, nunc pro tunc, in the amount of the child support payments as of the dates of the marriage of each of the four children. The contempt and modification hearings were consolidated for trial, and after hearing the court found the plaintiff innocent of contempt but denied the application for modification of the order for child support.

Thereafter, the defendant commenced a garnishment proceeding. It is inferable from the record that, pursuant to an order of the court entered on June 10, 1977, the plaintiff's employer withheld and paid into the office of the clerk of the District Court $429.50, which was plaintiff's entire disposable earnings for one biweekly pay period.

The plaintiff then filed his motion to quash the garnishment, alleging the amount claimed to be due — $10,464.82 — was not correct and that section 25-1558, R. R. S. 1943, was unconstitutional in permit-

ting garnishment of wages without limit. The motion made no other allegations.

Trial of the motion to quash was had before a different judge than the one who had earlier denied the modification petition. The only evidence introduced at the latter hearing was the records of the clerk of the District Court showing the amounts of the payments made by the plaintiff and the plaintiff's testimony that he began monthly payments of only $80 when he learned of the marriage of Kimberly.

On July 29, 1977, the court entered the order here appealed from. It included the following findings: "On April 29, 1977, this Court denied Petitioner's Application for Modification. It is apparent from a review of those proceedings that the question of the amount still due and unpaid for past child support was not determined therein, as the issue was not properly before the Court at that time. A review of the Court's Order of April 29, 1977, discloses that the Court at that time determined only that the procedure employed by the Petitioner was improper, and that the Court would not modify its previous decrees." The court then went on to interpret the order of February 14, 1968, finding: "This Court is of the opinion that the most appropriate and reasonable interpretation of the Order of February 14, 1968, is that as each child becomes ineligible to receive further support, the Petitioner should be entitled to a pro rata reduction in the total amount awarded." It went on to find that, under this interpretation, a total of $8,462.75 had accrued from September 3, 1964, through June 7, 1976; that the plaintiff had paid $6,224.18 and the balance due was $2,238.57. It then ordered that the motion to quash be denied because the amount owing was more than the amount presently held by the clerk.

We now proceed to a discussion of the question of whether the court had the authority to either modify or interpret the order of February 14, 1968. This

court has often held: Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Smith v. Smith, *ante* p. 21, 265 N. W. 2d 855; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617; Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919; Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340. In Schrader v. Schrader, *supra,* we held: "Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances." See, also, In re Application of Miller, 139 Neb. 242, 297 N. W. 91. The record in this case establishes without contradiction that the plaintiff took no action to secure a modification of the support order prior to the time the order of termination was entered at his request in June of 1976. At that time all payments had accrued, and the court could not reduce the accrued payments.

Thus we must next determine whether the court's "interpretation" of the order for support was authorized and supported by the evidence. The effect of our holding in Schrader v. Schrader, *supra,* is that a lump-sum periodic award for more than one child is presumed to continue until there is no longer a child eligible for support. The record contains absolutely no evidence to rebut the presumption prescribed in Schrader v. Schrader, *supra,* nor does it contain any evidence to support an order nunc pro tunc. The proper function of a nunc pro tunc order is not to correct, change, or modify some affirmative action previously taken. Rather, its purpose is to correct

the record which has been made so that it will truly record the action taken, which, through inadvertence or mistake, has not been truly recorded. Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153. The burden of proving the error is on the moving party. Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 135 N. W. 2d 712. It is true that this court has, on direct appeal from orders setting a lump-sum child support amount for more than one child, modified such orders to provide for a reduction when one or more of the children reaches majority. See Jackson v. Jackson, 197 Neb. 27, 246 N. W. 2d 722. We have thus indicated our preference for having the matter clearly stated. We were not, however, interpreting the trial court's order; we were simply modifying it on trial de novo. So far as we can determine, we have never departed from the rule established in Schrader v. Schrader, *supra*.

While it is unnecessary to consider the question of res judicata, nonetheless, we do so because the question is an important one. The plaintiff argues that res judicata was not pleaded or proved. This argument overlooks the fact that these proceedings are all in the same case. Defendant clearly raised the issue by objection during the hearing on the motion to quash. The prior pleading consisting of the amended application for modification and the previous order of the court denying modification are sufficient to show the identity of grounds for and nature of the relief sought with that involved in the subsequent hearing and order which are now on appeal. These were matters of which the judge could and should have taken judicial notice. A court will take judicial notice of pleadings, orders, and judgments in the case it has before it. Lewin v. Lewin, 174 Neb. 596, 119 N. W. 2d 96; County of Keith v. Triska, 168 Neb. 1, 95 N. W. 2d 350; Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254.

The remaining question to be decided from the de-

fendant's assignments of error is whether interest accrues on unpaid installments and, if so, at what rate.

The trial court awarded interest of 9 percent per annum on the unpaid balance from August 24, 1975, pursuant to section 42-358.02, R. S. Supp., 1978, which provides for interest on unpaid child support. Defendant contends that she should also receive interest prior to that date pursuant to section 45-103, R. R. S. 1943. That statute provides for interest "on all judgments and decrees for the payment of money from the date of rendition thereof." The interest rate under the statute was 6 percent until July 6, 1972, § 45-103, R. R. S. 1943, and 8 percent thereafter. L. B. 1330, Laws 1972, § 1.

This court has apparently never been called upon to decide the applicability of section 45-103, R. R. S. 1943, to judgments for child support, although we appear to have assumed that such judgments bear interest. Ruehle v. Ruehle, 169 Neb. 23, 97 N. W. 2d 868. There seems to be no reason why the statute should not apply. Since the payments are due in installments, the ordinary rule that interest does not begin on installment judgments until the installment comes due should apply. Dike v. Andrews, 80 Neb. 455, 114 N. W. 582; Cumming v. Cumming, 193 Neb. 601, 228 N. W. 2d 296. We therefore hold that delinquent installments of child support bear interest at the legal rate from the date of delinquency. When the legal rate changes, the new rate applies to all delinquent installments from the effective date of the new rate. Colburn v. Ley, 191 Neb. 427, 215 N. W. 2d 869. In this case the rate would be 6 percent per annum until July 6, 1972, § 45-103, R. R. S. 1943, and 8 percent from that date until August 24, 1975. L. B. 1330, Laws 1972, § 1. Thereafter the rate is 9 percent. § 42-358.02, R. S. Supp., 1978.

Next to be considered is the plaintiff's claim of the unconstitutionality of section 25-1558, R. R. S. 1943.

Section 25-1558, R. R. S. 1943, defines "disposable earnings" and places limitations upon the amount of such earnings which are subject to garnishment. These limitations are defined in subsection (1) of the statute. Subsection (2) (a) provides that these limitations do not apply in the case, among others, of "Any order of any court for the support of any persons; . . . ." Plaintiff contends that the statute is unconstitutional as applied because it permits a garnishment of his entire earnings and thus deprives him of his ability to support himself, his present wife, and his child of the second marriage.

For reasons we now set forth, the constitutional contention lacks merit. Both parties to this action have overlooked the fact that, since section 25-1558, R. R. S. 1943, was amended to its present form, L. B. 1032, Laws 1972, § 133, there have been changes in both state and federal statutes which affect the application of section 25-1558, R. R. S. 1943.

In 1974, without expressly amending section 25-1558, R. R. S. 1943, the Nebraska Legislature enacted a rather comprehensive statute pertaining to payment and collection of money "for the support of a minor child." L. B. 1015, Laws 1974, §§ 6 to 17, effective July 12, 1974. Section 13 of L. B. 1015, now section 42-364.08, R. S. Supp., 1978, exempts from an order to withhold and transmit earnings that portion of the disposable income of a "parent-employee" for any work week which equals 30 times the federal minimum hourly wage in effect at the time the earnings are payable.

Section 25-1558, R. R. S. 1943, insofar as it contains no limitations on garnishment of disposable earnings in aid of an order for support of a person, is inconsistent with the provisions of section 42-364.08, R. S. Supp., 1978. To the extent of the inconsistencies, it seems clear to us that sections 42-364.01 et seq., R. S. Supp., 1978, impliedly repeal section 25-1558, R. R. S. 1943. Where a legislative act is complete in itself

but is repugnant to or in conflict with a prior statute which is not referred to or repealed by the latter, the earlier statute is repealed or modified by the implication of the later act, but only to the extent of repugnancy or conflict. Connor v. City of Omaha, 185 Neb. 146, 174 N. W. 2d 205.

There are also federal restrictions on garnishment to be considered. Title 15, U. S. C., §§ 1671 to 1677. As originally enacted, the federal restrictions, like section 25-1558, R. R. S. 1943, did not apply to court orders for the support of persons. In 1977, the Congress of the United States amended section 1673 of Title 15, U.S.C., and imposed limitations upon the amount of disposable earnings which might be subject to garnishment pursuant to court orders for the support of persons. The act purports to preempt state law in that "no State (or officer or agency thereof)" may enforce any order in violation of this section. Title 15, U.S.C., § 1673 (b), (c).

However, the federal statute does not invalidate all state regulation of garnishment or establish any garnishment procedures but merely preempts state statutes which are less restrictive than federal law. Title 15, U. S. C., § 1677; Phillips v. General Finance Corp. of Florida, 297 So. 2d 6.

As amended, the federal statute provides that, where the person liable for the support of the person is supporting his spouse or his child, other than the ones to which the support order applies, the maximum collectible by garnishment is 50 percent of the disposable earnings for the week. Where he is not supporting such other spouse or child, the maximum collectible is 60 percent. The statute also provides that, if payments are 12 or more weeks delinquent, an additional five percentage points may be collected by garnishment. The amendment became effective June 1, 1977, about 10 days before the order of garnishment was entered in this case.

Because of the federal preemption, the more re-

strictive statute, state or federal, must be applied. In this case, it seems inferable from the evidence that the federal statute is more restrictive and therefore determinative of the maximum amount subject to garnishment. However, this should be determined by the trial court on the evidence after notice and hearing.

We call attention to the fact that, after jurisdiction is properly obtained over the employer, section 42-364.06, R. S. Supp., 1978, gives the court some discretion as to the amount that may be withheld. The amount withheld, of course, may not exceed the maximum determined under the more restrictive statute.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

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

271 N. W. 2d 46

Filed November 1, 1978. No. 41863.

1. **Criminal Law: Attorney and Client.** Effectiveness of counsel in the representation of a defendant in a criminal case is measured by comparison with the standard of performance which should be expected from a lawyer with ordinary training and skill in the criminal law in his area.
2. **Criminal Law: Double Jeopardy: Proof.** A claim of double jeopardy cannot be established without a showing of a previous charge and conviction arising out of the same transaction.
3. **Criminal Law: Sentences: Constitutional Law.** When several sentences are imposed upon counts based upon the same transaction, the provision that the sentences shall run concurrently produces a single result and the constitutional restriction against multiple punishment is not violated.

Appeal from the District Court for Cherry County: HENRY F. REIMER, Judge. Affirmed.

Magnuson, Magnuson & Peetz, for appellant.

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

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

KUNS, Retired District Judge.

This is an appeal from an order denying post conviction relief. Appellant was prosecuted in the District Court for Cherry County, Nebraska, upon an information consisting of four counts. Following a plea of guilty to each count, concurrent sentences were imposed. A belated motion for new trial was filed and upon appeal to this court the judgment was affirmed. State v. Hawkman, 198 Neb. 578, 254 N. W. 2d 90.

Subsequently, appellant moved for post conviction relief upon the grounds of ineffectiveness of counsel and that the several charges against him constituted double jeopardy. The trial court ordered an evidentiary hearing, after which it made specific findings that the evidence was insufficient to establish the allegations of lack of effective assistance of counsel, and the further claims of redundant charges of double jeopardy.

The evidence, all offered by the appellant, consisted of testimony by his previous counsel and by the appellant himself. The record does not show any testimony bearing upon the question of what standard of performance should be expected of a lawyer with ordinary training and skill in the criminal law in his area, according to State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573. The appellant disputed various portions of the testimony of his counsel. The trial court, having heard the testimony and observed the witnesses, resolved any conflicts in the testimony by its findings. No error in such findings has been shown.

Appellant was charged upon four counts: (1) Assault with intent to rob; (2) assault with intent to

commit great bodily injury; (3) stabbing with intent to wound and main; and (4) attempt to steal an automobile. Appellant claims that each pair of counts was redundant and that he was thereby placed in double jeopardy. Had the action gone to trial, it is possible that a motion to elect would have been appropriate at the conclusion of the evidence of the prosecution and might have been sustained by the trial court; any such motion, however, would have been premature in the actual proceedings. The claim of redundance can only be effective insofar as it bears upon the question of double punishment, hereinafter considered. The record shows that this was the first prosecution against the appellant for any of the acts charged; and since he had not previously been convicted, his claim of double jeopardy is not well-founded. It might be claimed that the four sentences pronounced upon the four charges constituted multiple punishment for a single transaction, contrary to Amendments V and XIV to the Constitution of the United States. These sentences were made to run concurrently with each other and do not violate the constitutional provisions. Felio v. United States, 55 F. 2d 161 (Neb., 1932); 24B C. J. S. Criminal Law, § 1990, p. 606. The finding of the trial court in this respect is correct.

No error having been shown, the judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, BRODKEY, and WHITE, JJ., concur in result.
MCCOWN, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. VICTOR JOURNEY, APPELLANT.

271 N. W. 2d 320

Filed November 1, 1978. No. 41961.

1. **Criminal Law: Indictments and Informations: Statutes: Witnesses.** The purpose of the requirement contained in section 29-

1602, R. R. S. 1943, that the names of witnesses for the prosecution be listed on the information, is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investigate regarding their background and pertinent knowledge. The failure to endorse on the information the names of witnesses to be called by the State is not ground for reversal of conviction in the absence of a showing of prejudice.

2. **Names.** Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.
3. **Statutes: Witnesses.** Under sections 27-702 to 27-705, R. R. S. 1943, an expert witness, qualified to be such, may testify in terms of opinion or inference without prior disclosure of underlying facts or data, the weight of such evidence being for the trier of facts.
4. **Criminal Law: Evidence.** The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
5. **Criminal Law: Intent: Evidence.** Intent may be determined from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter for the consideration and decision of the trier of facts.
6. **Criminal Law: Intent.** The existence of specific intent may be inferred from the circumstances under the usual rule that every sane person is presumed to intend the usual and probable consequences of his acts.

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

Ross, Schroeder & Fritzler, for appellant.

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

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

BRODKEY, J.

Defendant below, Victor Journey, appeals to this court from the convictions and sentences imposed upon him by the District Court for Buffalo County, on an amended information charging him in four counts with the offense of robbery, under section 28-

414, R. R. S. 1943; shooting with intent to kill, under section 28-410, R. R. S. 1943; use of a firearm to commit a felony, under section 28-1011.21, R. R. S. 1943; and with being a habitual criminal, under section 29-2221, R. R. S. 1943. Having waived a jury trial, he was tried by the court and found guilty of the three crimes with which he was charged. The habitual criminal hearing was later held, at the conclusion of which the court found that under the evidence adduced the defendant was a habitual criminal under the applicable statute. The court sentenced the defendant to a term of 3 to 5 years on count I for robbery; to a term of 15 to 25 years on count II, shooting with intent to kill; and a further term of 3 to 5 years on count III, use of firearm to commit a felony. The court specifically provided that all the foregoing sentences were to be served consecutively.

In his brief on appeal, defendant makes six assignments of error, but only discusses three of them. Therefore, under our Rule 8 a 2 (3), we shall limit our consideration to the three errors assigned and discussed. Those are: (1) The trial court erred in admitting the testimony of state witnesses whose names were not endorsed on the information or amended information; (2) the trial court erred in finding the defendant guilty on counts I, II, and III, when such finding was founded on circumstantial evidence insufficient to prove beyond a reasonable doubt that the defendant committed such crimes; and (3) the trial court erred in admitting the expert testimony of Edward Kerns in regard to a gunpowder residue test when such testimony lacked proper and sufficient foundation and was therefore irrelevant. We affirm the judgments and sentences of the District Court.

The facts of the case are that on July 25, 1977, at approximately 9 p.m., one Jack Muller drove his 1962 Chevrolet pickup to a gravel pit in Buffalo County, Nebraska, and began fishing in a nearby

canal. Later, just as it was getting dark, a car arrived at the pit and parked in the opposite direction behind Muller's pickup. The driver of the car came over to the canal and talked to Muller. At the trial, Muller was able to identify the driver of the car, Vernon Ellmers. After the discussion with Ellmers, Muller began preparing to leave. He noticed a passenger in the car but was unable to see him clearly. He was able to identify the car as a dark-colored Skylark. While Muller was in the process of placing his fishing equipment in the back of his truck he heard a gunshot fired behind him. As he started to turn around, a second shot was fired, which hit him in his side. He then ran around his truck to the side of the pit. As he was running he heard three or four more shots. When he got to the pit he swam across it and hid on the opposite side in some trees and brush. He observed the car and his pickup being driven around the pit several times before leaving the area. Muller then walked onto nearby Interstate 80 and flagged down a motorist who took him to the Kearney, Nebraska, interchange. At the interchange Muller informed law enforcement officers of what had taken place and he was then transported to a hospital.

Earlier in the evening, at approximately 9 p.m., a grounds-keeper and watchman at the Fort Kearney State Park, Steven Bartek, observed a brownish colored car parked in a restricted area in the park. Bartek approached the car and talked to the sole occupant whom he later identified as being Vernon Ellmers. Bartek noticed the Arizona license plates on the car and recorded the car's license number as it left the area. At about 9:20 or 9:30 p.m., Bartek saw the brown car again at the park's entrance. On the second encounter Bartek talked with the driver, Ellmers, again, and at trial identified the defendant as the passenger in the car. Ellmers had asked Bartek about a good place to fish and was told about

the lakes along the interstate. Ellmers' vehicle was then turned around and left the park. When Bartek's supervisor, Roger Sykes, came by at approximately 10 p.m., Bartek gave him the license number of the Ellmers car. Sykes then went to his home, contacted the Buffalo County sheriff's department and reported having seen the Ellmers vehicle, as a report to be on the lookout for such a vehicle had been broadcast earlier in the day. At approximately 10:20 p.m., several officers from the Buffalo and Kearney County sheriff's departments met Mr. Sykes at the park's entrance. Later a State Highway Patrol investigator Harold Kotschwar, and a conservation officer, Bill Ernst, joined the group at the park. The officers split up and began checking the roads around the interstate for the Ellmers vehicle. As the officers were searching for the Ellmers car a radio broadcast reported the shooting of Jack Muller and also a description of his truck. Shortly thereafter Ernst and Sykes met Muller's pickup coming out of the area where Muller had been shot. The Ernst and Sykes vehicle turned around and followed the pickup into Kearney, Nebraska, where a police roadblock had been set up to stop the pickup. The pickup was stopped, at which time Ellmers was driving and the defendant was a passenger therein. Officers found a revolver under the driver's seat with 6 unfired bullets in it, and, at the same time found another revolver 15 to 20 feet behind the pickup on the passenger side of the pickup, on the edge of the road, with 5 empty shells and 1 unfired shell in the gun's chamber.

An investigator for the State Highway Patrol, Officer Esley Kotschwar, examined the revolver retrieved from the road and by comparing test bullets fired from the gun with the bullet recovered from Jack Muller's body, ascertained that the retrieved revolver was the gun which had shot Jack Muller, and so testified.

The same evening when Ellmers and the defendant were arrested, a detective of the Kearney police department, Edward Kerns, conducted a gun particle residue test upon them. Officer Kerns testified that gunpowder residue was very prominent on the defendant Journey's right hand; and Officer Kerns testified that the gun residue test was also conducted on Ellmers, but that in his case, the gunpowder residue "was very minute. It wasn't prominent."

It appears that defendant had been crippled sometime prior thereto in an automobile accident, and his physician, Dr. Staley, testified on direct examination that the defendant's legs were essentially useless. On cross-examination he also testified that the defendant was "probably one-hundred percent completely useless as far as his lower extremities are concerned."

Officer David Tracy of the Kearney police department testified that he had seen the defendant driving a car in May of 1977. However, on cross-examination he admitted that there was a hand control below the steering wheel, but he did not know whether defendant was using it on that occasion.

We first address ourselves to the defendant's assignment of error that the three witnesses who were not listed on the information or amended information should not have been allowed to testify. Section 29-1602, R. R. S. 1943, provides that the prosecuting attorney shall endorse on the information "the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court * * * in its * * * discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him." However, this court in State v. Keith, 189 Neb. 536, 203 N. W. 2d 500 (1973), stated that the "purpose is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investi-

gate regarding their background and pertinent knowledge." The essential question is whether the defendant was prejudicially harmed in preparing his defense by the prosecution's failure to have the names listed on the information. We do not feel the defendant was harmed, and he has not demonstrated he was prejudiced. We have said that "prejudice will not be presumed but must be shown in this type of a case." Waite v. State, 169 Neb. 113, 98 N. W. 2d 688 (1959).

The names of the three witnesses who testified, although not appearing on the information, were included on a list filed by the prosecuting attorney in response to the defendant's motion to inspect and copy. The list also included what each witness would testify to. Although such list of witnesses was not filed until 5 days before the trial, the defendant did not request a continuance of trial to further investigate the proposed witnesses, if such investigation was necessary. See Frey v. State, 109 Neb. 483, 191 N. W. 693 (1922).

The defendant has also objected to the testimony of witness Roger Sykes, on the ground that his name was incorrectly spelled as Roger Sikes on the information, and on the list of witnesses filed by the prosecution. The defendant has not shown that he was mislead or prejudiced by the misspelling of Mr. Sykes' last name on the information.

In the case of State v. Cardin, 194 Neb. 231, 231 N. W. 2d 328 (1975), this court discussed the doctrine of idem sonans as it related to misspelled names. We stated: "Under that doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance." See, also, Carrall v. State, 53 Neb. 431, 73 N. W. 939 (1898). We conclude there was no prejudice in allowing Mr. Sykes to testify in this case although his name was misspelled on the information.

We next consider the defendant's assignment of error that the testimony of Officer Edward Kerns [spelled "Kearns" in appellant's brief], who was an expert witness for the State, lacked proper and sufficient foundation, and hence his testimony was not relevant and was inadmissible. Officer Kerns testified that he had performed the gun particle residue test on many prior occasions, and described in detail as to how it was done. His testimony was to the effect that the tests proved conclusively that the defendant had fired a gun, and that his test revealed blow back gunpowder on the right hand and wrist of the defendant, and also to a lesser extent, on his left hand and wrist. He was asked to explain what a gun particle residue examination was and answered: "It's a chemical examination to determine if a person had recently fired a weapon, this by a revolver to get a blow back of gun powder on the hand and wrist." Defendant argues that no evidence was presented to the court to prove that a revolver would "blow back." It is clear that Officer Kern's answer, set out above, is sufficient testimony of the "blow back" propensities of firearms. Defendant also argues that the prosecution failed to establish that the reagent sprayed on the hands of the defendant would react with gunpowder and appear as flakes under an ultra violet light. This contention is completely refuted by the record, which reveals that when asked by the prosecution how the test would detect gunpowder residue, Officer Kerns stated: "Under ultra violet light this will be illuminated as little flakes, metallic flakes." There is little doubt that sufficient proper foundation was presented to allow the testimony of Officer Kerns as to the results of the gunpowder tests performed on the defendant. There would seem to be little doubt that under the new Nebraska Evidence Rules, particularly sections 27-702 to 27-705, R. R. S. 1943, Officer Kerns' evidence would have been clearly admissible, even

without prior disclosure of the underlying facts or data, the weight of such evidence being for the trier of facts.

The last assignment of error raised and discussed by the defendant is that the circumstantial evidence adduced at the trial was insufficient to convict the defendant of the crimes charged against him in counts I, II, and III of the amended information. In State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904 (1975), in an opinion by Clinton, J., we stated: "We have recently restated the circumstantial evidence rule in what we believe is a more accurate formulation of the principle involved. The reformulation is: The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt." We have followed that rule in the recent cases of State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977), and State v. Swayze, 197 Neb. 149, 247 N. W. 2d 440 (1976). We believe that the evidence in this case is more than sufficient to meet the requirements of the rule regarding circumstantial evidence as is expounded in the above cases. It is clear from the record that witness Bartek saw the defendant riding as a passenger in a brownish car driven by Ellmers shortly before the incident in question. The victim, Muller, testified Ellmers had a passenger with him in a dark car when he was shot. The gun residue test showed that the defendant had recently fired a gun. The defendant was a passenger in Muller's pickup when it was stopped after leaving the area where the incident occurred. The revolver which shot Muller was found about 20 feet behind the pickup at the roadblock on the defendant's passenger side of the pickup. The gun had five spent shells and one live shell in it. Another gun was found under the

driver's seat, occupied by Ellmers in the pickup. That gun had six live shells in it, and no spent shells. We think it is clear that the evidence, although circumstantial in nature in certain respects, was sufficient to support the defendant's conviction, including the element of intent. Defendant has contended that the evidence was insufficient to prove that he shot Muller with the *intent* to kill. In Swartz v. State, 121 Neb. 696, 238 N. W. 312 (1931), we stated: "It (the intent) may be gathered or drawn from all the evidence, facts and circumstances of the case, inclusive of the act, and is a matter of fact for the consideration and decision of the jury. * * * The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it. * * * But it is sufficient in such cases to prove facts from which the specific intent may be inferred. * * * It has often been held that, while a specific intent is essential, its existence may be inferred from the circumstances, under the usual rule that every sane man is presumed to intend the usual and probable consequences of his acts." See, also, State v. Mills, 199 Neb. 295, 258 N. W. 2d 628 (1977). In this case the District Court, acting as the jury and trier of facts, had sufficient evidence before it by which it could find that the defendant had the necessary intent to kill Muller. Muller testified that while he was loading his pickup to leave the pit he heard a gunshot behind him. As he turned to look, a second shot struck him. He then ran to the edge of the pit and at that time heard three or four more shots being fired. It seems clear that since Muller was hit by the second shot, there was sufficient evidence from which the trier of fact could find that the defendant intended to kill Muller. There is clearly "substantial evidence" in this case to sustain defendant's conviction. See State v. Davis, 198 Neb. 823, 255 N. W. 2d 434 (1977).

One further matter should be mentioned. It ap-

pears from the record that the trial court found the defendant to be a habitual criminal under section 29-2221, R. R. S. 1943. That statute does not constitute a separate offense but provides an enhanced penalty of from 10 to 60 years for each conviction. It appears that the trial court might have erred in the sentences it imposed upon the defendant, but neither party has assigned error in this regard. Although defendant has claimed that the sentences imposed were excessive, he has not discussed this point, and, under Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977, we likewise shall not discuss it, other than to observe that it appears it may have been possible for the court to impose even more severe sentences upon the defendant than it did.

Finding no error, the judgments and sentences of the District Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SANDY PATRICK KERNS, APPELLANT.

271 N. W. 2d 48

Filed November 1, 1978. No. 42011.

1. **Criminal Law: Administrative Law: Double Jeopardy: Constitutional Law.** An administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy which federal constitutional clauses prohibit.
2. **Criminal Law: Administrative Law.** Prison disciplinary proceedings are not a part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.
3. **Criminal Law: Constitutional Law.** Although prisoners do not forfeit all their Fourth Amendment rights upon incarceration, they do not retain the same measure of protection afforded nonincarcerated individuals.
4. _____: _____. The reduced measure of Fourth Amendment protection afforded prisoners stems from legitimate institutional needs

as well as prisioners' diminished expectations of privacy.

5. **Criminal Law: Trial: Evidence.** Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis.
6. **Criminal Law: Trial: Evidence: Appeal and Error.** A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed on appeal except for a clear abuse of discretion.
7. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

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

Michael D. Gooch, for appellant.

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

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

SPENCER, C. J., PRO TEM.

Defendant, Sandy Patrick Kerns, after a jury trial, was convicted of sexual assault in the first degree and found to be an habitual criminal. Defendant argues four assignments of error: (1) The overruling of his plea in bar; (2) the overruling of his motion to suppress; (3) the admission into evidence of the State's exhibit 3; and (4) the excessiveness of his sentence. We affirm.

Defendant struck his 19-year-old cellmate, and then sexually assaulted him in the first degree while they were confined in the medium security unit of the Nebraska Penal and Correctional Complex. Another cellmate, a codefendant, who accepted a plea bargain, corroborated the victim's testimony.

Defendant was removed to an adjustment center cell. An officer in the medium security unit was directed to search defendant's old cell for any evidence of the crime. He found a bedsheet in the

laundry bag which he thought might contain semen or blood stains. A laboratory analysis conducted later did not reveal the presence of either. The officer also went to defendant's adjustment center cell and removed the sheet from defendant's bed. He testified when an inmate is placed in "deadlock" he is given the same bedding he had been using. He therefore removed this sheet and delivered it to a representative of the State Patrol. This sheet, exhibit 3, was found to have a semen stain and a small blood stain. Defendant's motion to suppress this exhibit for failure of the officer to obtain a search warrant was overruled. Defendant also objected to the introduction of the exhibit on the ground of a gap in the chain of custody. The court found the chain of custody had been satisfactorily established.

Prior to the filing of criminal charges against defendant he was brought before the adjustment committee at the medium security unit. The committee found him guilty of forcing another to engage in sexual activity and of assaulting an inmate. It imposed a penalty of loss of all good time. Defendant contends the hearing before the adjustment committee put him in jeopardy and the trial court erred in not sustaining his plea in bar because the present action constitutes being placed in jeopardy twice for the same offense. There is no merit to this contention.

The established rule in this jurisdiction is that an administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy which federal constitutional clauses prohibit. See State v. Mayes, 190 Neb. 837, 212 N. W. 2d 623 (1973).

Defendant apparently concedes that the great weight of authority is contrary to his argument. However, he contends that the holding of Wolff v. McDonnell, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d

935 (1974), requires that we now abandon the established rule. A clear reading of McDonnell reveals that defendant's interpretation is erroneous. McDonnell involved a procedural due process analysis of prison disciplinary hearings. The court specifically stated: "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." There is nothing in McDonnell which requires a change in the established rule regarding double jeopardy. Defendant was afforded a hearing. By inference, McDonnell supports the rule we apply.

Defendant's contention that a search warrant was required to search his cell is without merit. A similar situation was presented in United States v. Stumes, 549 F. 2d 831 (8th Cir., 1977). There, the defendant inmate was convicted of causing a threatening letter to be delivered through the mails. In upholding the refusal of the trial court to suppress a typewriter seized from defendant's cell without a warrant, the court stated: "Although prisoners do not forfeit all their Fourth Amendment rights upon incarceration, they do not retain the same measure of protection afforded non-incarcerated individuals. See, e.g., United States v. Dawson, 516 F. 2d 796 (9th Cir.) cert. denied, 423 U. S. 855, 96 S. Ct. 104, 46 L. Ed. 2d 80 (1975); Bonner v. Coughlin, 517 F. 2d 1311 (7th Cir. 1975). The reduced measure of Fourth Amendment protection afforded prisoners stems from legitimate institutional needs, see, e.g., Bonner v. Coughlin, supra, as well as prisoners' diminished expectations of privacy. See, e.g., United States v. Hitchcock, 467 F. 2d 1107 (9th Cir. 1972), cert denied, 410 U. S. 916, 93 S. Ct. 973, 35 L. Ed. 2d 279 (1973). See also, Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); and Lanza v. New York, 370 U. S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962)."

Defendant's objection to the exhibit on the ground of a gap in the chain of custody is premised on his contention the evidence is not definite that exhibit 3 was the sheet he had on the bed in the other cell. There was testimony the sheet was moved with him. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210 (1975). A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion. State v. Lynch, 196 Neb. 372, 243 N. W. 2d 62 (1976). We find there has been no abuse of discretion herein. In any event, the sheet was of limited probative value and its admission would appear to be cumulative at most.

There is no merit to defendant's claim of an excessive sentence. Defendant was sentenced as an habitual criminal under section 29-2221, R. R. S. 1943. The sentence imposed, 12 to 15 years, is well within the statutory limits of 10 to 60 years imprisonment provided by the statute for habitual criminals. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. McKenney, 198 Neb. 564, 254 N. W. 2d 81 (1977).

The judgment is affirmed.

AFFIRMED.

KENNETH V. PEARSON, ADMINISTRATOR OF THE ESTATE OF VIOLA D. PEARSON, DECEASED, APPELLANT, V. GEORGE E. RICHARD, APPELLEE.

271 N. W. 2d 326

Filed November 8, 1978. No. 41613.

1. **Trial: Evidence: Negligence.** In determining the question of

whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.

2. **Trial: Evidence: Negligence: Proof.** Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.
3. **Trial: Evidence.** The persuasiveness of direct evidence may be destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence.
4. **Trial: Evidence: Witnesses.** Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury.
5. **Wrongful Death: Evidence.** The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
6. **Motor Vehicles: Highways: Negligence.** When a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
7. **Motor Vehicles: Highways.** The right-of-way which the driver of a vehicle is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. The fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating and Haessler, Sullivan & Inbody, for appellant.

Ray C. Simmons, for appellee.

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

BRODKEY, J.

Kenneth V. Pearson, administrator of the estate of Viola D. Pearson, deceased, appeals to this court from the verdict of the jury in favor of defendant-appellee, George E. Richard, in a wrongful death action brought by said administrator to recover damages for the death of the deceased, Viola D. Pearson. The collision in question which resulted in the death of the decedent occurred on October 27, 1975, in the intersection of two open and uncontrolled gravel roads north and west of Ceresco, Nebraska. The accident in question involved an automobile driven by the decedent from the north into the intersection in a southerly direction, and a milk truck driven into the intersection by the appellee Richard, who was proceeding from the east to the west. Appellant's decedent died from injuries received in the accident.

In the petition filed by the administrator it is alleged that the sole and proximate cause of the accident was the negligence of the appellee in failing to keep a proper lookout; in failing to have his vehicle under reasonable control; in failing to yield the right-of-way to the decedent; and in operating his vehicle at an excessive rate of speed under the conditions then and there existing. In his answer, the appellee admitted the accident occurred but alleged that the sole proximate cause of the collision was the negligence of the decedent in failing to keep a proper

lookout; in failing to have her vehicle under reasonable control; in failing to stop or turn or take any other action to avoid the collision; and in operating her vehicle at an excessive rate of speed under the conditions then and there existing. Both parties filed motions for summary judgment. The trial court overruled appellee's motion for summary judgment. The court partially sustained appellant's motion for summary judgment, finding that a genuine issue existed as to whether appellant's decedent was guilty of contributory negligence, which must be determined by the jury from all the surrounding facts and circumstances. The court found, however, that appellee was guilty of negligence as a matter of law and ordered that upon trial "defendant's negligence shall be deemed established and the trial conducted accordingly." Prior to the trial the appellee admitted negligence in one or more of the particulars claimed against him by the appellant and also admitted his negligence was a proximately contributing cause of the collision. The first trial, commencing April 18, 1977, resulted in a mistrial, and the case was retried to a jury, commencing May 3, 1977. The court instructed the jury that the appellee was negligent as a matter of law and that his negligence was a proximate cause of the accident. The court submitted for the jury's consideration the question of the contributory negligence of the decedent, if any, in failing to keep a proper lookout; and in failing to have her vehicle under reasonable control; as well as the comparison of the respective negligence of the parties; and the issue of damages. As previously stated, the jury returned a verdict for the appellee, whereupon the appellant perfected the appeal to this court.

Appellant assigns as error the action of the court in submitting the issue of the decedent's contributory negligence to the jury, alleging there was no competent evidence to support a finding that the de-

cedent was negligent in failing to keep a proper lookout or in failing to have her vehicle under reasonable control. We affirm the judgment of the District Court.

As previously stated, the intersection where the accident occurred was not controlled by any traffic signs or signals. The visibility of both drivers was unobstructed, there being evidence that a motorist driving in a southerly direction at a point 431 feet north of the accident intersection could see a vehicle coming from the east from a point 361 feet east on the east-west road. There were no depressions or rises in the road during the last 431 feet of the road as it went south into the intersection. It is clear from the evidence there were no obstructions to block the view of either motorist at the northeast corner of the intersection. The initial point of impact of the vehicles was identified by the investigating officer as a point where the Pearson automobile's left front tire was pushed straight west. This was located 10 feet 9 inches south of the north edge of the east-west road and 14 feet 5 inches west of the east edge of the north-south road. Following the impact, the vehicles veered to the southwest into a field on the southwest corner of the intersection. The Richard truck continued west, then spun around 180 degrees to the left. The milk tank came off the top of the truck and flew approximately 20 feet high in the air shearing a telephone pole located 41 feet west of the west edge of the north-south road. After spinning around facing an easterly direction, the truck rolled over and subsequently landed on top of the Pearson vehicle, crushing Mrs. Pearson inside the vehicle. She died shortly after the accident. Richard, who approached the intersection from the east, which was to the left of the Pearson automobile, admitted that as he came down the hill from the east he was traveling 40-45 miles per hour. Another witness who observed the accident, testified that Rich-

ard's speed was approximately 40 miles per hour when his vehicle was approximately two car lengths from the intersection. Richard testified that he had made an observation for traffic coming from the north but never saw the Pearson automobile at any time before the accident, nor did he see any dust coming from any automobile approaching from the north. He did not recall hitting the Pearson car and did not apply his brakes at any time before the accident occurred. The investigating officer testified that he was unable to find any skid marks from either vehicle prior to the point of impact. The physical evidence indicates that the Pearson vehicle was being driven in a southerly direction near the west edge of the road. There was a conflict in the contentions of the parties as to the point of impact between the vehicles, counsel for appellee claiming that the right front fender of the westbound milk truck came in contact with the left corner of the decedent's automobile. Testimony for appellant indicated that the point of impact was immediately to the rear of the left front tire. The testimony indicated that the decedent's automobile traveled 59 feet 3 inches after the impact and the truck 60 feet after the impact.

Appellant contends that there is no evidence in the record, either direct or circumstantial, to establish either that the decedent failed to keep a proper lookout for traffic at the intersection or exercise reasonable control of her vehicle. Appellee contends, however, that the trial court should have found as a matter of law that the decedent was contributorily negligent in a degree more than slight in comparison to appellee's negligence. Appellee contends that, of necessity, one of three things must have occurred. Either (1) the decedent did not look or make any observation with regard to traffic at or near the intersection; or (2) she looked but did not see the approach of appellee's truck, although her vision to the

east was unobstructed; or (3) she looked and observed the appellee's truck, but did not take any action to avoid the accident.

At this point, a review of applicable legal principles will be helpful. The law is well established that in determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556 (1963); Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389 (1968). Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686 (1964). It is also the rule that the persuasiveness of direct evidence may be destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Merritt v. Reed, 186 Neb. 561, 185 N. W. 2d 261 (1971). Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury. Price v. King, 161 Neb. 123, 72 N. W. 2d 603 (1955). The language of this court in Price is also illuminating. In that case, the defendants contended that the evidence showed Nellie Price was guilty of negligence more than slight as a matter of law when compared with the negli-

gence of the defendants. In addressing itself to that contention this court stated: "The only negligence shown on the part of Nellie Price was that she was driving fast. There is no evidence that she was violating any speed limit fixed by statute. Whether she was negligent in failing to keep a proper lookout, or in failing to yield the right-of-way, is dependent upon the facts proved, and consequently is a matter for the jury. The presumption is that she used due care. There is a natural presumption that everyone will act with due care. The mere fact that an accident happens does not prove contributory negligence. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. The evidence of the plaintiff, and the defendants as well, is sufficient from which the jury might find that King was grossly negligent. The jury could find that he failed to keep a proper lookout and failed to slow down or stop his truck where reasonable care under the circumstances required him to do so. The fact that he had a heavy load on the truck, requiring, as he said, that he had to watch the road immediately ahead of him, would not excuse his duty to keep a proper lookout for approaching traffic. It cannot be said that Nellie Price was guilty of negligence which would as a matter of law preclude a recovery. From the record before us, she could well have assumed that her right-of-way was going to be respected by the driver of the truck. The degree of negligence on her part, if any, is for the jury to determine under proper instructions by the court."

Appellant also contends the rule is that the instinct of self-preservation and the disposition to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed was in the exercise of ordinary care. However, in Sheets v. Davenport, 181 Neb. 621, 150 N. W. 2d 224 (1967), we held

that the presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. See, also, Caradori v. Fitch, 200 Neb. 186, 263 N. W. 2d 649 (1978). While it is questionable whether, in the instant case, the circumstantial evidence and physical facts were sufficient to warrant a finding by the court as a matter of law that the decedent was guilty of contributory negligence more than slight, we need not reach that issue for the reason that we conclude that in any event the evidence was sufficient to warrant the submission of the issue of decedent's contributory negligence to the jury, which was done, and the jury has decided the issue by its verdict. The law is well established in this state that when a motorist enters an intersection of two highways he is *obligated* to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a *jury* question. Jones v. Consumers Coop. Propane Co., 186 Neb. 629, 185 N. W. 2d 458 (1971); Pupkes v. Wilson, 165 Neb. 852, 87 N. W. 2d 556 (1958); Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571 (1957). See, also, Stapleton v. Norvell, 193 Neb. 71, 225 N. W. 2d 409 (1975). There would seem to be little doubt that under our statutes the decedent had the directional right-of-way, inasmuch as the appellee entered the intersection to her left, and he was required to yield the right-of-way to her. § 39-635

(1), R. R. S. 1943. We have held, however, that the right-of-way which the driver of a vehicle is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. We have said on many occasions the fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left. Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166 (1971); Costanzo v. Trustin Manuf. Corp., *supra*. However, even assuming that appellee's automobile was not in a favored position so far as directional right-of-way is concerned, under the cases cited above the question of whether the decedent was guilty of contributory negligence in proceeding to cross the intersection was a *jury* question.

The evidence is clear that the vision of neither driver was obstructed, and each could have seen the other approaching the intersection. Appellee concededly did not see the decedent and has admitted he was negligent in not so doing. Unfortunately, the decedent, because of her death, was not available to testify as to her actions immediately preceding the accident. In this connection, we note that counsel for appellant in support of his arguments relies heavily upon the case of Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178 (1964). This case is factually dissimilar and distinguishable from the instant case, as Wolstenholm involved a "Yield Right of Way" sign, and the defendant testified that she had stopped back of that sign and had looked both ways before slowly proceeding into the intersection where the accident occurred. We conclude that Wolstenholm is not controlling under the facts existing in this case.

In this case, it is clear from the record that dece-

dent's vision was unobstructed and she could and would have seen the appellee as he approached the intersection, if she had made the observation required by law. The fact that she may have had the directional right-of-way at the intersection is, as stated in the foregoing cases, not conclusive; and the question of whether she looked and governed herself accordingly was a question of fact properly submitted to the jury. It is also clear from a lack of skid marks that she probably made no effort to apply her brakes or turn in some manner or take other action in an attempt to avoid the accident.

The jury had all the above evidence before it, and was properly instructed as to the applicable legal principles. It found for the appellee. Its verdict, and the judgment entered thereon by the court, must be affirmed.

AFFIRMED.

MAX W. COCHRAN, APPELLANT AND CROSS-APPELLEE, V. MFA MUTUAL INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

271 N. W. 2d 331

Filed November 8, 1978. No. 41681.

1. **Insurance: Motor Vehicles: Words and Phrases.** In a policy indemnifying insured for loss by burglary for "property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry on the exterior of such vehicle," such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability.
2. **Insurance: Contracts.** A limited liability provision in a policy of insurance is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured.

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

Carl I. Klekers, for appellant.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

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

CLINTON, J.

This is an action upon a homeowner's insurance policy to recover the value of certain tools allegedly stolen from the insured's locked motor vehicle. The policy contained the following exclusion: "c. Theft Exclusions applicable to property away from the described premises:

"This policy does not apply to loss away from the described premises of: . . .

"(2) property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry upon the exterior of such vehicle or the loss is the result of the theft of such vehicle which is not recovered within 30 days, but property shall not be considered unattended when the Insured is required to surrender the keys of such vehicle to a bailee."

The evidence shows that there were no visible marks of forcible entry on the exterior of the vehicle. The car had been removed from the place where the owner testified he had parked it. The owner reported the vehicle stolen and it was recovered the same afternoon a few miles from the place where it had been parked. The owner testified that the car was locked when he left it and that all windows were closed. When found, tools were missing

from the car and a "jiggle" key was found in the ignition switch. The insured, a locksmith and hardwareman by occupation, testified as an expert witness that a jiggle key is a type of key by which entry may be gained into many cars by proper and knowledgeable manipulation of the key. He gave his opinion that entry to and removal of the car had been gained by use of the jiggle key.

The case was tried in the municipal court of the city of Omaha and judgment was rendered for the defendant insurer. On appeal to the District Court the judgment was affirmed.

The defendant pled and relied upon the exclusion earlier set forth. The District Court found that there had been a forcible entry by use of a jiggle key, that there were no "visible marks of forcible entry upon the exterior of the vehicle," and that the defendant was entitled to rely upon the exclusion.

The plaintiff on this appeal urges that forced entry by use of a jiggle key comes within the coverage of the policy and urges that we so construe it.

The plaintiff relies principally upon the case of C & J Fertilizer, Inc. v. Allied Mut. Ins. Co. (Iowa), 227 N. W. 2d 169, in which the Iowa court construed similar language in a policy covering losses through burglary. The court held, among other things, that under the particular facts of that case such a provision was unconscionable and would not be enforced where, although there were no marks of forced entry on the exterior of the building, there was other clear evidence of burglary on the interior door of the particular room from which the theft was made. Plaintiff also relies upon a line of cases which hold that such exclusions are ambiguous and establish a mere rule of evidence and that the exclusion will not be literally enforced if it is clear that the burglary is not an inside job. Ferguson v. Phoenix Assurance Co., 189 Kan. 459, 370 P. 2d 379; Rosenthal v. American Bonding Co., 124 N. Y. S. 905.

This court has had prior occasion to consider similar exclusions in policies insuring against burglary and we have upheld the exclusion. Only a few years ago, in Hazuka v. Maryland Cas. Co., 183 Neb. 336, 160 N. W. 2d 174, we said: "In a policy indemnifying insured for loss by burglary for 'the felonious abstraction of insured property within a vault or safe * * * by a person making felonious entry into such vault or safe * * *, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing the safe, if entry is made through such doors, * * *,' such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability.

"Such limited liability provision is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured."

We hold that a theft exclusion in a homeowner's policy applicable to property away from the described premises providing: ". . . property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry upon the exterior of such vehicle" is unambiguous and the provision requiring visible marks of forced entry is not unconscionable. We thus adhere to our former opinion in Hazuka v. Maryland Cas. Co., *supra*.

The view we take makes it unnecessary to consider the issue raised on the cross-appeal.

AFFIRMED.

JOAN M. GUNN, EXECUTRIX OF THE ESTATE OF GERALD EDWARD GUNN, DECEASED, APPELLEE, V. EMERALD, INC., AN IOWA CORPORATION, APPELLANT.

271 N. W. 2d 334

Filed November 8, 1978. No. 41686.

1. **Appeal and Error: Estates: Statutes.** Appeals in probate matters are governed by article 16 of Chapter 30, R. R. S. 1943.
2. **Appeal and Error: Estates: Time.** An appeal in a probate matter must be taken within 30 days after the decision and a transcript filed within 10 days thereafter.
3. **Appeal and Error: Estates: Statutes.** Section 24-542, R. R. S. 1943, is not applicable to appeals in probate matters and a notice of appeal is not required in such an appeal.
4. **Appeal and Error: Estates: Courts.** Probate matters on appeal to the District Court from the county court are tried de novo.
5. **Estates: Time.** The right to file a belated claim depends upon a showing of good cause.
6. **Estates: Claims: Equity.** The showing of good cause that is required is analogous to that required by a court of equity in granting a new trial.

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

Roger S. Brink of Casey & Elworth, for appellant.

James E. Case and E. Terry Sibbernsen of Welsh, Sibbernsen & Bowen, for appellee.

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

BOSLAUGH, J.

This is an appeal from an order of the county court allowing a belated claim. The case arose prior to the effective date of the new probate code and is governed by the statutes in effect prior to January 1, 1977.

The District Court found that the claimant had failed to show good cause for the allowance of the filing of a belated claim and reversed the judgment of the county court. The claimant has appealed.

A preliminary issue raised by the claimant is whether the executrix perfected the appeal to the District Court within the time allowed by law. The order of the county court allowing the claim was entered on December 9, 1976. The executrix filed a notice of appeal and request for a transcript in the county court on January 4, 1977. A transcript of the proceedings in the county court was filed in the District Court on January 10, 1977. The claimant contends the appeal was out of time because the transcript was not filed within 30 days from the entry of the judgment in the county court and the notice of appeal was not filed within 10 days of the rendition of the judgment in the county court. The claimant relies upon sections 24-542 and 24-544, R. R. S. 1943.

Appeals in probate matters are governed by article 16 of Chapter 30, R. R. S. 1943. § 24-541, R. R. S. 1943; Bazzo v. Wallace, 16 Neb. 293, 20 N. W. 314; Malick v. McDermot's Estate, 25 Neb. 267, 41 N. W. 157; Schurmann v. Curtiss, 183 Neb. 277, 159 N. W. 2d 554. The appeal must be taken within 30 days after the decision and a transcript filed within 10 days thereafter. §§ 30-1602, 30-1605, R. R. S. 1943; Caha v. Nelson, 195 Neb. 333, 237 N. W. 2d 870.

Section 24-542, R. R. S. 1943, originally applied to appeals from municipal courts. See Laws 1971, L. B. 12, § 5, p. 3. It was made applicable to appeals from county courts in 1972. See Laws 1972, L. B. 1032, § 42, p. 348. It is not applicable to appeals in probate matters and a notice of appeal is not required in such an appeal. See Schurmann v. Curtiss, *supra*.

Since the executrix was the appellant in the appeal to the District Court, no bond was required. § 30-1603, R. R. S. 1943; In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195. The request for a transcript was filed within 30 days after the claim was allowed, and the transcript was filed in the District Court within 10 days thereafter. § 30-1605, R. R. S. 1943.

The appeal to the District Court was perfected within the time required by law.

The claim involved in this case arose out of the sale of an industrial chiller to Kreonite Plastics or Kreonite Industries by the deceased, Gerald Edward Gunn, who had been a sales representative for Emerald, Inc., the claimant. The chiller was shipped to Kreonite on December 27, 1974, and an invoice was sent to Gunn which should have been received by him 4 or 5 days later. Gunn received no billing for the chiller other than the invoice. The claimant had received monthly statements for amounts due Gunn for commissions and expenses. The parties have stipulated that the deceased was indebted to the claimant in the amount of $4,791.24 at the time of his death.

Jack Pierce is the president and a stockholder of the claimant. Pierce himself had a claim against the estate arising out of a transaction involving an airplane owned by the deceased. Pierce had helped finance Gunn's purchase of the airplane and had paid the use tax on the airplane. The deceased was indebted to Pierce in the amount of $330 for the tax paid by Pierce.

Pierce learned of Gunn's death on the third day after Gunn had died. Pierce consulted an Iowa lawyer named Greffenius concerning the claims. Greffenius called James E. Case, the lawyer representing the executrix, on April 14, 1976, concerning the claim of Pierce. Case testified that Greffenius asked for some claim forms which were mailed to Greffenius the same day. Case also testified that he told Greffenius that the last day for filing claims would be in about 60 days.

The last day for filing claims was June 28, 1976. On April 16, 1976, Case mailed copies of the notices to creditors to the creditors of the estate and filed an affidavit that the notices had been mailed. Notices were not mailed to Pierce, Greffenius, or the claim-

ant and the affidavit did not list Pierce, Greffenius, or the claimant as creditors of the estate. Case stated that he did not mail a notice to the claimant because he did not know the claimant had a claim against the deceased, and did not mail a notice to Pierce because there was no objection to his claim.

An order barring claims was entered on June 28, 1976. The Pierce claim which had been filed in time was allowed on July 2, 1976. The claimant's petition for allowance of a belated claim and motion for leave to file a belated claim was filed on August 4, 1976. Leave to file was granted on September 21, 1976. The claim was allowed by the county court on December 9, 1976.

The trial court found that the executrix and her attorney had no information which would put them on notice that the claimant had a claim against the estate; that the claimant had knowledge of the death of the deceased and that estate proceedings were pending more than 60 days prior to the final date for filing claims; that the claimant's attorney had been advised of the time limited for the filing of claims; and that the claimant had failed to show good cause for the allowance of the filing of a belated claim.

Probate matters on appeal to the District Court from the county court are tried de novo. § 30-1606, R. R. S. 1943; Boosalis v. Horace Mann Ins. Co., 198 Neb. 148, 251 N. W. 2d 885. An appeal from the allowance of a claim is tried as an action at law but issues other than the probate or denial of probate of wills are tried as actions in equity. The review in this court on the issue of the right to file a belated claim is de novo.

The right to file a belated claim depends upon a showing of good cause. § 30-605, R. R. S. 1943. The showing of good cause that is required is analogous to that required by a court of equity in granting a new trial. In re Estate of Golden, 120 Neb. 226, 231 N. W. 833.

The record in this case sustains the findings made by the trial court. Although the attorney for the estate had notice of the claim of Pierce as an individual, the evidence does not show that he or the executrix had notice of the claim of Emerald, Inc. The failure to mail a creditor's notice to Greffenius or Pierce thus relates to the Pierce claim and not the claim of Emerald, Inc. There is no other circumstance to support a finding of good cause for the delay in filing the claim of Emerald, Inc.

The judgment of the District Court is affirmed.

AFFIRMED.

KEITH M. HOBACK, APPELLEE, V. SHARON J. HOBACK, APPELLANT.

271 N. W. 2d 336

Filed November 8, 1978. No. 41690.

1. **Divorce: Parent and Child: Custody.** In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage the controlling consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Custody: Appeal and Error.** 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.

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

Casey & Elworth, for appellant.

James E. Case and E. Terry Sibbernsen of Welsh, Sibbernsen & Bowen, for appellee.

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

McCOWN, J.

This is an action for dissolution of marriage. The District Court determined that the marriage was irretrievably broken; dissolved the marriage; made a property division; made contingent alimony provisions; and awarded custody of the two minor children to the husband. The wife has appealed, and the only issue on appeal involves the custody of the minor children.

The petitioner, Keith M. Hoback, and the respondent, Sharon J. Hoback, were married on May 27, 1967. Two children were born to the marriage: John S. Hoback, born April 19, 1969; and Jolene R. Hoback, born September 25, 1971. The petition here was filed March 7, 1977. Temporary custody of the children was placed with the father on March 15, 1977, and temporary allowances made for the wife. The husband and the children lived with his parents. The children were cared for by his mother and also by a babysitter. The wife continued to live in the family home.

Trial was had on July 25, 1977. The evidence with respect to the mother established that she was employed as a nurse' aide prior to the marriage, but had not worked outside the home since the marriage. The evidence showed that during the marriage the children were clean and healthy, well fed, and properly clothed. The evidence also showed that the mother had lived in a trailer house with another man for a period of approximately 3 weeks early in 1977 and prior to the filing of the petition, and her 5-year-old daughter was with her. There was also evidence to indicate that she had left the children with the husband on one occasion and gone on a trip to another state with the same man. Witnesses testified that she failed to properly supervise her children and let them range unattended over the neighborhood. There was evidence that on one occasion, in attempting to strike her 3-year-old daugh-

ter with a belt, she struck her son on the head with the belt buckle and stitches were required to close the wound. There was also evidence that during the period between March and July 1977, when the husband had temporary custody of the children, and the wife was occupying the family home, she exercised her visitation privileges infrequently, and for 1 period of approximately 3 weeks, did not visit the children at all.

The evidence with respect to the father's fitness to have custody established that he had been regularly employed at all times during the marriage, had provided a stable and substantial home for the family, and that on the occasions when he had been left to care for the children they had been well cared for. The evidence also established that the rural home of his parents, where he and the children had lived during the period of temporary custody, was a pleasant and satisfactory home for the children; and that they had been well taken care of during the period of temporary custody. The only derogatory evidence as to the father's fitness for custody came from the mother, who testified that he read obscene magazines and kept a box of them in the bedroom and another box downstairs.

The District Court dissolved the marriage; assigned the family residence to the husband; directed the payment of specified cash amounts to the wife; awarded specified personal property to each party; and awarded custody of the two children to the husband. The wife has appealed and the sole issue is whether the court erred in giving the custody of the minor children to the husband.

In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage the controlling consideration is the best interests and welfare of the children. Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581.

Although the issues of granting custody of minor children are considered by this court de novo on the record, 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, 199 Neb. 1, 255 N. W. 2d 851. The evidence in the record supports the action of the trial court and there was no abuse of discretion.

The judgment and decree of the trial court is affirmed. The attorney for the appellant is allowed a fee of $500 for services in this court.

AFFIRMED.

BEVERLY J. (SENA) LONG, APPELLANT, V. ROBERT SENA, APPELLEE.

271 N. W. 2d 338

Filed November 8, 1978. No. 41832.

1. **Divorce: Parent and Child: Custody.** The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. _____: _____: _____. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action.
3. **Divorce: Parent and Child: Custody: Appeal and Error.** While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed as modified, and remanded with directions.

Carl I. Klekers, for appellant.

Thomas J. Garvey, for appellee.

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

SPENCER, C. J., Pro Tem.

Beverly J. (Sena) Long appeals from an order of the District Court terminating her custody of her minor children, placing temporary possession in the father, but retaining custody in the District Court. We affirm as modified.

The parties were married in Ralston, Nebraska, on December 30, 1966. It was the second marriage for appellant and the first for the appellee. Three children were born as the issue of the marriage: Robert Sena, August 17, 1967; Michael Sena, January 13, 1970; and Tammy J. Sena, March 13, 1971. The youngest child was born after the entry of the decree dissolving the marriage, which was entered November 19, 1970. Appellant was awarded custody of the minor children, subject to specified visitation rights for appellee.

Shortly after the divorce appellee moved to Denver, Colorado, where he is on permanent duty assignment in the Air Force. He remarried in 1972. He and his present wife have one child of their own who was 10 months old at the time of the trial. They live in a four-bedroom house which appellee is purchasing. His take-home pay is approximately $800 per month. His wife also works and earns approximately $600 per month.

Appellant has remarried twice since the divorce and is now separated from her fourth husband. Although not entirely clear from the record, it appears this separation occurred around September 1976. As a result of it appellant required psychiatric care and was hospitalized for 2 months because of depression. During this period of hospitalization appellant's mother took care of the children.

The application to modify the child custody decree was filed in November 1976. When appellant failed to appear at the hearing set for the 14th of September 1977, the decree was modified to transfer the custody to appellee. This default judgment was vacated and after a trial on November 2, 1977, the decree being appealed from was entered.

In March 1977, appellant took the children to Denver. She called appellee while enroute to inform him they were coming, and she left them with him for a few days. According to appellee, the children told him they were afraid to return to Nebraska because appellant had gone to a bar in Omaha and broken some windows on a truck. Appellant denied this incident had ever happened. When appellant returned for the children, appellee refused to give them to her. While attempting to get the children back she was arrested for disturbing the peace, resisting arrest, and assaulting an officer. These charges were later dismissed and appellant obtained a court order for the return of the children.

In July 1977, appellant and the children moved to Warsaw, Missouri, where appellant's parents live in retirement. This move was without court approval. The children were enrolled in school there. The report from the school states they attended regularly; appeared healthy and properly cared for; were performing satisfactorily; were well behaved; had friends; and got along well with others. Appellant did admit that the oldest child, who was in the fifth grade, had been enrolled in seven different schools. The children attended Sunday school regularly and participated in the church choir. A physical examination shortly before trial revealed no health problems in any of the children.

Both parties submitted to a court-ordered psychiatric examination. The psychiatrist testified appellant appears to have recovered from her depression and that he only observed some anxiety which he re-

lated to the trial. Appellee, who had also suffered from depression at about the time of the divorce from appellant, now appeared stable according to the psychiatrist. In the psychiatrist's opinion both probably would be good parents.

In the application to modify it was alleged that appellant had been charged with carrying a concealed weapon. Appellant denied this but she did admit to carrying a gun in the glove compartment of her car.

At the conclusion of the hearing the trial judge interviewed the children in chambers without a court reporter present. He then called appellant to the stand and asked her whether she was dating a man referred to as "Doc." She replied that she was. The court then announced its decision, stating: "Children tell things, and unexpectedly tell things. They told me enough in this case that I feel that it is in the best interest of the children that they be awarded to their father. I am going to give the permanent — temporary custody or possession of the children to the father. I am going to take custody in the Court. I find that Mrs. Sena, under the circumstances, is not a fit and proper person to have the continued care, custody and control of these children. She's been married twice since she was married to this Respondent. She is now separated from her husband. She is living in another state, without the permission of this Court with the children. She is dating another man. The children affectionately refer to him as Doc, and I feel that under those circumstances these children have no security, no stability, nothing that would make them, in my opinion, good useful citizens."

Appellee was given immédiate possession of the children. Custody was retained by the court. The order makes no provision for visitation by appellant.

The real criterion in child custody cases has repeatedly been enunciated by this court as follows: "The proper rule in a divorce case, where the cus-

tody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents." Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544 (1968).

"A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action." (Emphasis supplied.) Swearingen v. Swearingen, 201 Neb. 255, 267 N. W. 2d 514 (1978).

In this case the court specifically found appellant was not a fit and proper person to have the care of the children and further that it was for the best interests of the children to change their custody. He did so, however, on a temporary basis by retaining the custody of the children in the court, and giving their temporary possession to their father, the appellee.

"While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Swearingen v. Swearingen, *supra*.

The trial judge in this instance had an opportunity to observe the parents as well as the children and to visit personally with the children. While we do not have the benefit of the court's conversation with the children, and in the absence of it the question may be a close one, we cannot say that the court abused its discretion. On the record it does appear that the appellee, who as a father would ordinarily have an equal right with the mother to the custody of the children, can offer them a more stable environment. The appellant, however, should be permitted to have reasonable visitation rights, and the decree should be so modified.

The judgment is affirmed, insofar as it pertains to the custody of the children, but is remanded to the District Court to provide reasonable visitation rights for the appellant.

AFFIRMED AS MODIFIED, AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. FOWLER, APPELLANT.

271 N. W. 2d 341

Filed November 8, 1978. No. 41882.

1. **Criminal Law: Guilty Pleas: Words and Phrases.** In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), this state adopted the standard for determining the validity of guilty pleas set forth in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), that: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."
2. **Criminal Law: Guilty Pleas.** The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty. Those standards do not require a ritualistic litany or item-by-item review of constitutional rights before accepting a plea of guilty from a defendant in a criminal case.
3. **Criminal Law: Trial: Constitutional Law: Evidence: Appeal and Error.** The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court.
4. **Criminal Law: Hearings.** In the absence of a request for a hearing to determine voluntariness, the defendant cannot complain of the failure of the court to hold such a hearing.
5. **Criminal Law: Attorney and Client.** Our present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his clients.
6. **Criminal Law: Trial: Attorney and Client.** The decision to object or not to object to evidence is a part of trial strategy, and due deference is given to the discretion of defense counsel to formulate trial tactics.
7. **Criminal Law: Trial: Attorney and Client: Constitutional Law.**

Trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims.

8. **Criminal Law: Trial: Instructions: Attorney and Client.** The necessity of the trial court instructing the jury with reference to the failure of the defendant to testify (NJI No. 14.63) is a matter of trial strategy on the part of defendant's counsel, and must be requested by him, or the subject of agreement between counsel and the court.
9. **Criminal Law: Attorney and Client.** Effectiveness of counsel is not to be judged by hindsight.

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

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, for appellant.

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

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

BRODKEY, J.

This is the second appearance of this case in the Supreme Court. In 1975, we sustained the defendant's conviction by the jury for the crime of embezzlement, and also, at a subsequent hearing, of being an habitual criminal. The court sentenced the defendant at that time to a term of not less than 10 nor more than 15 years in the Nebraska Penal and Correctional Complex. Our opinion following that appeal, as well as the underlying facts of the case, may be found in State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975).

Thereafter, on January 31, 1977, defendant filed an amended motion to vacate his sentence under the Nebraska Post Conviction Act, sections 29-3001 to 29-3004, R. R. S. 1943. A hearing on his motion for post conviction relief was originally commenced on February 1, 1977, and thereafter was continued and resumed at a later date. On November 29, 1977, the

court entered an order denying defendant post conviction relief. He has appealed to this court from that order. We affirm.

Defendant's numerous assignments of error may be condensed and summarized into three principal contentions, the first being that the court erred in finding that the defendant was an habitual criminal; the second being that he was denied a Jackson v. Denno hearing at his original trial as to the voluntariness of a statement he made to a police officer; and, finally, that his conviction and sentence should have been set aside on the ground that he was denied effective assistance of counsel at his original trial for embezzlement.

Defendant's claim that the court erred in finding him to be an habitual criminal under section 29-2221, R. S. Supp., 1974, following his conviction for embezzlement, is based upon the contention that one of the two previous convictions relied upon by the court at the hearing on the charge of being an habitual criminal was invalid. Defendant contends that that particular conviction was the result of his guilty plea made in October 1969, to a charge of delivering an insufficient funds check. His plea to that charge was entered following the decision of Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). In Boykin, the court stated: "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. * * * Second, is the right to trial by jury. * * * Third, is the right to confront one's accusers. * * * We cannot presume a waiver of these three important federal rights from a silent record." Defendant contends that in entering his plea to the above charge, he was not advised by the court that he had a privilege against compulsory

self-incrimination, or the right to remain silent; nor was he advised that he had a right to confront his accusers, being the right to confront the witnesses who testified against him. He contends, therefore, that his guilty plea was not a voluntary and intelligent one, the record being silent on the above two matters.

Following Boykin, the Supreme Court of the United States, in the case of North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), stated in connection with the acceptance of guilty pleas: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." In 1971, this court filed its opinion in the case of State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, which case has been consistently followed in this state since it was filed and is the leading authority setting forth the tests to be observed in accepting pleas of guilty. In that case, this court accepted the test enunciated in North Carolina v. Alford, *supra*, that the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. In the opinion we stated: "This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases." The defendant in that case relied upon Boykin, as Boykin not only requires that a plea of guilty be intelligent and voluntary to be valid but that the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. In State v. Turner, *supra*, we also stated that the Standards Relating to Pleas of Guilty promulgated by the American Bar Association should be the minimum procedure in the taking of guilty pleas. In its opinion in Turner, this court considered the requirements of Boykin, but specifically declined to require a ritualistic litany or

item-by-item review of constitutional rights before accepting a guilty plea from a defendant. On the contrary, we stated: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." As previously stated, this court only requires that the procedure conform to the Standards Relating to Pleas of Guilty promulgated by the American Bar Association. Those standards do not require that a defendant be informed as to his right to confront witnesses against him and his privilege against compulsory self-incrimination. While it is true that the American Bar Association Standards Relating to The Function of the Trial Judge, adopted in August 1972, would appear to support defendant's contention in this regard, we wish to point out that this court has never adopted those particular ABA standards, as we did the ABA Standards Relating to Pleas of Guilty, in Turner. We believe, however, it would be better procedure for trial judges accepting pleas from defendants in criminal cases to include the above two items, along with the others customarily given, notwithstanding the rule announced in Turner that the overriding concern and obligation is to make certain that a defendant's guilty plea is intelligently and voluntarily made upon the record; and we suggest a checklist would be helpful in this regard.

In this case, the record reveals that the defendant's guilty plea entered in October 1969, to the charge of issuing an insufficient funds check, which was one of the two prior convictions relied upon by the State in the habitual criminal procedure, was entered intelligently and voluntarily. The defendant at that hearing was represented by counsel; and he was asked if he had talked with his attorney, if he understood that he was waiving his right to a jury trial, whether he understood what he was charged

with, and the penalties therefor, whether any threats, promises, inducements, or force had been used to secure his plea, and whether he was entering his plea freely and voluntarily. His answers to those questions indicate that every effort was made by the court to make certain that he was entering his guilty plea intelligently and voluntarily.

In addition, while defendant's assignment of error regarding the validity of his habitual criminal conviction may be disposed of on the merits, there is an additional procedural reason for finding against the defendant on this point. The record supports the conclusion that the defendant made no effort to challenge the constitutionality of his prior conviction before his habitual criminal hearing, following his conviction for embezzlement. In State v. McGhee, 184 Neb. 352, 167 N. W. 2d 765 (1969), we held that the failure at trial to challenge a prior conviction on the ground of constitutional defects forecloses its challenge on appeal. In the opinion we stated: "We hold that the failure of the defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court." To the same effect, see State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110 (1970).

We next consider defendant's assignment of error that the court failed to hold a Jackson v. Denno hearing to determine the voluntariness of a statement he made to a police officer with reference to his handling of a deposit of funds of his firm on the night in question. The court admitted the statement into evidence without holding such a hearing, but did make inquiry of counsel about the matter; and it is alleged that counsel for defendant specifically waived a Jackson v. Denno hearing.

The background for this assignment of error is that defendant's supervisor, a Mr. Consiglio, was called by the prosecution as a witness. The prosecu-

tion asked Consiglio about a conversation the defendant had with a Captain Sellmeyer at police headquarters. Sellmeyer had brought the defendant into his office and had asked him what he had done with the money the night before it was missing. At this point in the trial, the court asked the prosecution and defense counsel to approach the bench. A conversation ensued, but nothing regarding what was said at that time was placed in the record. Consiglio was allowed to continue to testify and stated that the defendant "informed us that he had left the store with the money and Mr. Knapp, taken Mr. Knapp, the assistant manager home, and then he returned to the store and placed both bags of money back in the store in a locked cabinet." The prosecution later adduced evidence that the defendant had given a prior inconsistent statement of what he had done with the money at the time in question. Dean Erickson, who was defendant's attorney at the embezzlement trial, testified at the post conviction hearing that he did not have any recollection of what was said at the bench at that time; however, Ronald Lahners, who was one of the prosecuting attorneys, also testified at the post conviction hearing as to what had transpired at the bench in the original trial. His testimony was: "As I recall, Ms. Bloss, who was co-counsel for the State at that time was on the direct examination of Paul Consiglio, who was a regional manager for the company that Richard was working for and employed by at that time. * * * the conversation started to get into an area of conversations that took place with Mr. Fowler and some statements that he was to make. At that time the Court called counsel forward to the bench and inquired into the propriety of holding a Jackson v. Denno hearing. At that particular time the Court inquired as to what the witness would say if the witness were allowed to go ahead and testify because it appeared that this was the appropriate time to have

a hearing. And at that time as I recall Judge Ronin requested Ms. Bloss to relate what the witness would testify if we proceeded on at that point. She gave a summarization of what Mr. Consiglio would say and after giving that summarization the Court inquired of Mr. Erickson, the counsel for the Defendant, whether or not he wanted to have a Jackson v. Denno hearing with regard to that particular conversation. And at that time it is my recollection that Mr. Erickson told the Court no, that he did not wish to have a Jackson v. Denno hearing and I do not recall whether Mr. Erickson went back and talked with Mr. Fowler and then came back to the bench and said no, or if he just said no, that he did not think it was necessary to have a Jackson v. Denno hearing. I am not sure which he did but in any event he told the Court that he did not wish to have a hearing outside of the presence of the jury at that time with regard to what Mr. Consiglio was about to say. Q. And did Mr. Consiglio then go ahead and testify as to certain statements made by the Defendant in Captain Sellmeyer's office in the presence of Captain Sellmeyer and Mr. Consiglio? A. Yes, that is my recollection of what he testified about. Q. And was that testimony of Mr. Consiglio consistent with what Ms. Dianna Bloss had informed Judge Ronin the testimony of that witness would be? A. That is my recollection. Yes."

We also point out that defendant's counsel, Dean Erickson, did not ask for a hearing to determine the voluntariness of defendant's statement to Officer Sellmeyer. In State v. Escamilla, 195 Neb. 558, 239 N. W. 2d 270 (1976), we stated: "In Jackson v. Denno, *supra*, the court stated that in the absence of a request for a hearing to determine voluntariness, the defendant cannot complain of the failure of the court to hold such a hearing." See, also, State v. Oliva, 183 Neb. 620, 163 N. W. 2d 112 (1968). It should be noted that it was the trial judge, Judge

Ronin, who interrupted Consiglio's testimony in order to determine the appropriateness of a Jackson v. Denno hearing, and to inquire whether counsel desired to have such a hearing. According to Lahners, Dean Erickson, defendant's counsel, at that time stated that he did not think such a hearing was necessary. In addition, defendant has not at any time either contended or established that his statement to Officer Sellmeyer was involuntary, or the product of force, fear, or coercion. Defendant's second assignment of error is without merit.

As defendant's last assignment of error, he contends that he was denied effective assistance of counsel at his embezzlement trial. In this connection defendant makes four specific complaints regarding the alleged incompetency of his trial counsel, these being that his counsel failed to object to certain hearsay testimony adduced at that trial, that he failed to call the defendant as a witness to testify in his own defense, that he failed to request a jury instruction regarding the failure of the defendant to testify, being NJI No. 14.63, and that he failed to present certain evidence and witnesses favorable to the defendant's case.

Our present standard for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is set out in State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573 (1974): "Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client." See, also, State v. Bartlett, 199 Neb. 471, 259 N. W. 2d 917 (1977); State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776 (1975).

Defendant's first complaint about the ineffectiveness of his trial counsel is that his counsel failed to object to the testimony of defendant's supervisor, Consiglio, relative to the contents of certain business

records, as being hearsay. Defendant argues that the State should have been required to produce the business records at the trial to show the truth of what was being asserted about them by Consiglio. In the post conviction hearing, the District Court found that an objection to Consiglio's testimony would have prompted the State to produce the records and would therefore have reinforced the case against the defendant. It would appear that defendant's trial counsel made a tactical decision, as part of his trial strategy, not to object to the failure of the prosecution to introduce the records themselves. In State v. Bartlett, *supra*, we stated: "The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics."

The testimony of Consiglio as to the statement made by the defendant to Officer Sellmeyer was not objected to by defense counsel and could also be considered as part of counsel's trial tactics. The statement was exculpatory in nature and was not damaging, at least not until a later witness testified that the defendant had given a conflicting version of what had taken place the night before the money was missing.

The defendant next complains that his attorney did not call him to testify in his own behalf. Although there is conflicting evidence as to defendant's desire to testify at his trial, we believe the court correctly found from the testimony at the post conviction hearing that the defendant's trial counsel had discussed this issue with the defendant and that the defendant had acquiesced in his counsel's advice not to testify. It is clear that defendant's testimony at the preliminary hearing could have been used to impeach the defendant's credibility at the trial, and his past criminal record would have been brought to the jury's attention. We concur in the finding of the District Court in the post conviction hearing that:

"Under these circumstances a decision of legal counsel advising the defendant not to take the witness stand is a matter of reasonable trial strategy and not evidence of a lack of effective assistance of counsel." We have held that trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances. State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199 (1970).

Defendant's third complaint of ineffective assistance of counsel is that Erickson failed to ask for or obtain from the trial court a jury instruction with reference to defendant's failure to testify. This instruction is NJI No. 14.63 and provides: "You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reasons in that regard." A preface of that instruction states: "It is recommended that the following instruction be given only if requested or agreed to by the defendant." As a matter of trial tactics, it is commonly known that some defense attorneys request the instruction be given, and others specifically request that it not be given, as, depending upon the circumstances, the giving of the instruction might very well be detrimental to the interests of their client. In this case it is clear that defendant's counsel made a tactical decision that such a jury instruction would cause more harm than good by bringing to the jury's attention and emphasizing the fact that the defendant had not testified, from which fact there might have been an inference that he had good reason not to subject himself to cross-examination. In any event, defendant's counsel specifically requested the court not to give that particular jury instruction.

Finally, defendant complains that his trial counsel did not present certain evidence or witnesses favor-

able to his case. His counsel testified that he called all the witnesses whose names were given to him by his client. Defendant Fowler disputes this fact, but when asked in the post conviction hearing as to the names of the witnesses he wanted to call which his attorney failed to call he stated: "If I can remember their names — I can't recall." The District Court, at the conclusion of the post conviction hearing, found that "defendant's counsel did produce witnesses on behalf of the defendant. The defendant has failed to show how his case was prejudiced by failure of his counsel to subpoena credible witnesses which were made known and were made available to him." The record supports the conclusion of the trial judge.

In addition to the above, defendant has asserted that his trial counsel should have introduced into evidence certain bank and business records which would have shown that the alleged missing money was in fact subsequently deposited and therefore was not stolen. We point out, as revealed by the record in this case, that his counsel, Dean Erickson, was at one time a certified public accountant and was familiar with banking procedures. He testified at the post conviction hearing that he had investigated the bank and business records and that he did not learn of any information which would have been helpful to his client. He also testified at that hearing that had those records been introduced in evidence they would have reinforced the State's case against the defendant.

It is the general rule that it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Tiff, 199 Neb. 519, 260 N. W. 2d 296 (1977).

We conclude from a review of the record that the evidence contained therein is insufficient to support defendant's claim of ineffective assistance of counsel, as well as his claim of prejudice therefrom. Effectiveness of counsel is not to be judged by hindsight. State v. Bartlett, *supra*.

No error in the proceedings having been demonstrated, the order of the District Court denying post conviction relief must be affirmed.

AFFIRMED.

CLINTON and WHITE, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH EUGENE GRAHAM, APPELLANT.

271 N. W. 2d 456

Filed November 8, 1978. No. 41898.

Criminal Law: Self-Defense: Statutes. Under section 28-834, R. R. S. 1943, for justification to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged.

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

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 SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

The defendant was found guilty by a jury on one count of an inmate detaining any person for the pur-

pose of compelling or inducing the performance of any act, and one count of use of a dangerous weapon during the commission of a felony. He was sentenced to a term of 10 years imprisonment on the first count and 3 years on the second count, the sentences to run consecutively to each other and consecutive to the sentence being served.

On August 15, 1977, the defendant was serving a sentence of 10 to 20 years in the Nebraska Penal and Correctional Complex. He had served approximately 20 months of his sentence, and on that date he was confined in the adjustment center at the penal complex as the result of a fight he had been involved in a few weeks before. The defendant faked a hanging of himself in his cell in the adjustment center. Two guards and a male practical nurse removed the defendant from his cell, placed him on a stretcher, and attempted to give him oxygen. When the defendant was removed to the hallway area, he grabbed the nurse, held a metal object to his throat, and threatened to cut the nurse' throat unless the guards opened two other cells in the adjustment center. Another guard knocked the defendant down with a stun gun and the guards then subdued the defendant.

The defendant testified that his plan was to escape from the penal complex. He testified that as a result of assaults upon him while in the prison and friction with the prison administration, he felt his life was in danger if he were to be sent back to the general prison population from the adjustment center. The defendant's version was that he had been assaulted by inmates on four occasions, the last of which involved a fight on July 16, 1977. For that incident he had been sent to the adjustment center.

The defendant then requested a transfer to a penitentiary in Kansas on grounds that his life was endangered in the Nebraska Penal and Correctional Complex, and that in defending himself he might hurt someone else seriously and get into further

trouble. On August 10, 1977, a committee had recommended approval of the transfer request, although the defendant testified he had not been advised of that recommendation. After the incidents of August 15, 1977, the defendant's request was denied.

The defendant contends that the trial court erred in failing to submit his theory of defense to the jury, and in refusing to give defendant's requested instruction on the defense of justification.

Section 28-834, R. R. S. 1943, provides in part: "(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."

Section 28-836, R. R. S. 1943, provides in part: "(1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

In State v. Schroeder, 199 Neb. 822, 261 N. W. 2d 759, in interpreting section 28-836, R. R. S. 1943, this court said: "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 immi-

nent danger, the present statutory requirement is essentially the same requirement as existed prior to the enactment of section 28-836, R. R. S. 1943."

Section 28-834, R. R. S. 1943, makes no specific reference to the imminence or immediacy of the harm or evil sought to be avoided. The remaining sections, sections 28-833 to 28-843, R. R. S. 1943, dealing with justification for the use of force, make it clear, however, that for the choice of evils justification of section 28-834, R. R. S. 1943, to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. See People v. Robertson, 36 Colo. App. 367, 543 P. 2d 533.

The evidence in the present case is persuasive that the defendant was not faced with any threat of harm while he was in the adjustment center, nor did he fear any harm to himself while he was there. His fears were related to the time of his return to the general prison population, and that return was some weeks away. Such general fears of future harm will not suffice to raise the defense of justification. The authorities had already taken favorable preliminary action upon a transfer request. There was no reasonable or even plausible excuse for the defendant's assault against prison personnel.

The evidence in this case establishes that any threat of harm was far enough in the future to afford the defendant ample time and opportunity to resort to other reasonable and viable alternatives. There was no justification for the violent assault. On the evidence here, the defense of justification was not available as a matter of law, and the District Court properly refused to instruct the jury on the defense of justification under section 28-834,

R. R. S. 1943. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., concurring in the result only.

I concur in the result only of the majority opinion and write this separate concurrence because I believe the opinion misinterprets the statute and the possible applicability of the defense of justification. L. B. 895, Laws 1972, now sections 28-833 to 28-843, R. R. S. 1943, is a rather comprehensive act relating to the general subject of justification of use of force, including among other things, the concept of self-defense. I think the act must be read and construed as a whole.

The majority opinion seems to assume, or at least is open to the construction, that the choice of evils principle might under some circumstances justify an assault upon a totally innocent person.

The evidence in this case shows an assault upon a nurse, who became a hostage as a result of the defendant's subterfuge. The defendant was not in the process of protecting himself from the unlawful use of force by the victim. Section 28-836, R. R. S. 1943, which provides in part: "(1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion," is the governing provision in this circumstance. I do not believe the justification doctrine of section 28-834, R. R. S. 1943, can be reasonably construed to permit assaults against wholly innocent persons who are not the source or cause of the evil to be avoided.

SPENCER, C. J., Pro Tem., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. HERSHELL STONER, APPELLANT.

271 N. W. 2d 348

Filed November 8, 1978. No. 41962.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Hershell Stoner, pro se.

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

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

WHITE, J.

This is a companion case to State v. Baker, *ante* p. 579, 270 N. W. 2d 922. Defendant was charged with the failure to make a state income tax return. On the Nebraska individual income tax return for the year 1976, the defendant supplied his name, address, town, and social security number. He objected to providing his zip code. He objected to providing his county of residence. He did not provide his school district and county numbers. He objected to setting forth his federal filing status and objected to all other information called for on the form. Attached to the form was a lengthy letter in which he explained that, where the word "object" appeared on the form, his refusal to provide the information called for was based on rights protected by the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Sixteenth Amendments to the United States Constitution. The defendant's argument relies primarily on a Fifth Amendment claim that it is his privilege not to disclose any information relating to his income on a tax return. The county court found the defendant guilty and assessed a fine against the defendant of $300 and

costs. The defendant appealed to the District Court and the District Court affirmed. He appeals to this court. We affirm.

The defendant contends principally on appeal that he was entitled to assistance of lay counsel and that he has a right under the Fifth Amendment to the United States Constitution not to disclose any information relating to income on an income tax return. The defendant told the trial court that he would proceed only with lay counsel. The court declined to allow lay counsel to represent him. He assigns this refusal as error. No purpose would be served by setting forth in detail the arguments of the defendant. They have been decided adversely to his position most recently in State v. Baker, *supra*, State v. Spurgeon, 200 Neb. 719, 265 N. W. 2d 224, and State v. Soester, 199 Neb. 477, 259 N. W. 2d 921.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS R. PAYNE, APPELLANT.

271 N. W. 2d 350

Filed November 8, 1978. No. 41972.

1. **Searches and Seizures: Affidavits: Controlled Substances.** In an affidavit for a search warrant the judge must be informed of some of the underlying circumstances from which the informant concluded that controlled substances were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.
2. **Searches and Seizures: Affidavits.** Affidavits for search warrants must be tested in a commonsense realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hyper-

technical rather than a commonsense manner.

3. **Searches and Seizures: Controlled Substances.** An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

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

MCCOWN, J.

After trial to the court, the defendant was convicted on two counts of possession of a controlled substance with intent to deliver. The defendant was sentenced to imprisonment for not less than 2½ nor more than 4 years on each count, the sentences to run concurrently. The defendant has appealed.

The only issue on this appeal is whether the District Court erred in overruling defendant's motion to suppress evidence seized under a search warrant obtained on the affidavit of a police officer.

It is the defendant's contention that the affidavit for the search warrant failed to allege any underlying circumstances from which the officer making the affidavit concluded that the informant was credible or reliable. It is defendant's position that there was nothing in the affidavit to indicate the reliability of the informant or where he obtained his information.

The affidavit sought a search warrant for narcotic drugs, including amphetamines and barbiturates reasonably believed to be located in apartment No.

221, Tudor Heights Apartments, 10638 Birch Street, Omaha, Douglas County, Nebraska. The stated grounds for the issuance of the search warrant, and the reasons for the officer's belief that the drugs were concealed or kept at that location were: "Officer O'Connor, Frank received information that Douglas R. Payne W/M DOB 12-25-55 of 10638 Birch St., Apt. # 221 is in possession of a large amount of capsules known by the street name as crystals, these are presently being sold from this apt. by Payne. Checking the record of Douglas R. Payne it was found that he has several criminal entries also a conviction for the delivery of a controlled substance which he received one years probation for this offense on 2-19-76.

"During the last 72 hours Officer O'Connor contacted an informant who made a controlled buy from Douglas R. Payne at 10638 Birch St. Apt. # 221. This informant advised Officer O'Connor that Payne had in his possession at this time several hundred capsules of crystal, also that Payne was interested in getting rid of the capsules in large quantity's (sic). From the above information Officer O'Connor believes that concealed inside Apt. # 221 at 10638 Birch St. under the control of Douglas R. Payne are (sic) a large quantity of illegal possessed narcotic drugs for street sale."

The affidavit was the only information presented to the judge at the time the search warrant was requested. The judge of the District Court issued the search warrant based on the affidavit. The police executed the warrant the same day, and found a quantity of controlled substances. This prosecution was then commenced. Defendant's motion to suppress the evidence seized was overruled, and this appeal followed conviction.

Essentially, the defendant contends that an affidavit must affirmatively show that the informant has previously been found reliable, and that the ab-

sence of such a statement is a fatal defect which invalidates a search warrant based upon the affidavit. Such a rule would invalidate any warrant based on information from a first-time informant.

It has been well established that affidavits for search warrants such as the one involved here must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. Recital of some of the underlying circumstances in the affidavit is essential. Where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, set out the rules applicable here. In that case the Supreme Court said: "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, (cit.) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, (cit.) was 'credible' or his information 'reliable.' "

The critical sentence in the affidavit involved in the case before us states: "During the last 72 hours

Officer O'Connor contacted an informant who made a controlled buy from Douglas R. Payne at 10638 Birch St. Apt. # 221." That sentence states that the contact with the informant was made by the officer affiant. Obviously the police had had some prior contact with the informant, which led the officer to seek the cooperation of the informant in attempting to make a controlled buy from the defendant at the location referred to. It would be absurd to presume that such prior contacts had established that the informant was unreliable, rather than reliable.

The affidavit does not spell out the meaning of the words "controlled buy." The testimony at the suppression hearing established that the term "controlled buy" in law enforcement parlance meant a purchase of controlled substances by a cooperating individual from a specific designated person or at a specific designated place, made under the personal supervision and control of an officer or officers. At the suppression hearing Officer O'Connor detailed the actions he took personally in this case, but conceded that the extent of control, supervision, and observation would vary from officer to officer and from case to case, dependent upon the circumstances. He did not present any evidence at the time of issuance of the warrant except that given in the affidavit. The affidavit, reasonably interpreted, indicates that the information given by the informant to Officer O'Connor immediately after the "controlled buy" resulted from the personal observation of the informant while he was on the defendant's premises. There is no evidence that the judge who issued the search warrant and Officer O'Connor attributed the same meaning to the term "controlled buy," but it can be reasonably inferred that the judge was familiar with local law enforcement terms and usage.

Although the affidavit in this case fails to establish that the informant was an untested citizen inform-

ant, neither does it establish that the informant was not a citizen informant. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. See, United States v. Simmons, 444 F. Supp. 500 (E. D. Pa., 1978); People v. Schulle, 51 Cal. App. 3d 809, 124 Cal. Rptr. 585; State v. Drake, 224 N. W. 2d 476 (Iowa, 1974). It has been held, however, that the status of a citizen informant cannot attach unless the affidavit affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred. See People v. Smith, 17 Cal. 3d 845, 132 Cal. Rptr. 397, 553 P. 2d 557. The affidavit here does not affirmatively set forth the circumstances from which the existence of a citizen informant status can reasonably be inferred.

This court has consistently held that affidavits for search warrants must be tested in a commonsense realistic fashion. See State v. Huggins, 186 Neb. 704, 185 N. W. 2d 849. A commonsense realistic interpretation of the affidavit involved here establishes that a police officer contacted an informant and obtained the informant's cooperation for the purpose of purchasing, or attempting to purchase, controlled substances from an individual at a specified location. The informant so selected, under the personal supervision and control of the officer, made a purchase of controlled substances from the defendant, delivered the substances to the officer, and informed the officer of what he had seen and heard at the time of the purchase. Those underlying circumstances were sufficient to establish that the informant was presumptively reliable, and that his information was credible in the absence of evidence to the contrary. In this case the defendant does not contend that any of the circumstances or information detailed in the affidavit was incorrect or inaccurate, but contends

only that the affidavit failed to affirmatively show the prior reliability of the informant.

The words "who has proven reliable in the past" do not constitute a magic formula, the recitation of which establishes the reliability of an informant. Neither does the absence of the words in an affidavit establish the fact that the informant was not reliable, nor render the search warrant fatally defective. Although the affidavit in this case may be marginal, and it may not be easy to determine that the affidavit demonstrates the existence of probable cause, nevertheless the trial court found probable cause for the issuance of the search warrant on the basis of the affidavit here. Constitutional policy demands that doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. See United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

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

AFFIRMED.

WHITE, J., dissenting.

I respectfully dissent. In Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, the United States Supreme Court established what has come to be known as the "two-pronged" test for judging the sufficiency of an affidavit for a search warrant. In order to pass that test, the affidavit must inform the magistrate of: (1) Some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded (a) that the informant, whose identity need not be disclosed, was credible, or (b) that his information was reliable. I feel that the affidavit before us entirely fails to satisfy the second prong.

In determining whether the magistrate was justified in the issuance of a warrant, the State is not per-

mitted to supplement information contained in the affidavit or given the magistrate for a search warrant at the hearing on the motion to suppress. See Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306.

Since the affidavit and the evidence at the hearing on the motion to suppress are devoid of any evidence that the informant was a "citizen informant," the majority opinion cannot and does not contend that his report of a crime would be presumptively reliable. Nor does the majority opinion contend that there is any indicia of previous reliability of the informant contained in the affidavit or presented to the magistrate. The second prong of the Aguilar test must then be met by the officer's affidavit of a "controlled buy."

It is conceded that an affidavit setting forth the underlying circumstances of a sufficiently controlled buy would justify a decision of the magistrate that the information provided by the informant in a particular case is "reliable" and thus obviate the necessity of an inquiry into the credibility of the informant in general. The vice in the majority opinion, it seems to me, is its interpretation of the words "controlled buy." As recited in the majority opinion, the police officer was permitted to testify at the suppression hearing that the words meant the purchase of a controlled substance by a cooperating individual from a specific designated person or a specific designated place made under the personal supervision and control of an officer or officers. Despite the officer's concession that the amount of "control" possible will depend on the circumstances, the majority opinion finds the term "controlled buy" to be capable of precise definition, reads that definition into the affidavit, and finds the affidavit sufficient. Again, it must be pointed out, the definition of "controlled buy" was not present in the affidavit nor presented to the magistrate.

In the affidavit for the search warrant in Jones v. United States, 336 A. 2d 535, a decision of the District of Columbia Court of Appeals, the first paragraph of the affidavit stated that the officer had "met with a reliable informant, this informant has proven reliable in at least 5 occasions in the past two months, all of which resulted in the arrest of narcotic violators and the seizure of narcotic drugs. This source stated that illicit narcotic drugs were being dispensed inside 1111 Mass. Ave. N. W. #308. This source of information further stated that it had illegally purchased illicit narcotic drugs in the past and that it was willing to purchase illicit narcotic drugs for the Third District Vice Unit." The affidavit went on to describe an oft-repeated scenario. The court there stated that: "A controlled purchase of drugs from the apartment was arranged. The officer and the informant went to the apartment building. The informant was searched by the officer and found to have no money or narcotics on his person. The officer then gave the informant police funds, and watched him enter the building. On the informant's return a few minutes later, as described in the affidavit, the 'affiant then searched the source of information and found it (the informant) to contain a quantity of brown envelopes all of which contained green plant material. The search also revealed the source of information to be free of any money.'

"The informant further told the officer that he had purchased the material from a particular person in that particular apartment, and a preliminary field test undertaken promptly reflected that the substance purchased was marijuana."

The court concluded that the observation of the informant by the police officer, which extended only to the door of the apartment complex and not to the door of the specific apartment, was sufficient based on previous criteria of reliability and that no direct

observation of the apartment door itself would be required. The differences between the two cases are obvious. In this case we have no previous indicia of credibility of the informant. There is no indication in the affidavit that the substance purchased actually turned out to be a controlled substance. More importantly, the decision in Jones as to whether the buy was "controlled enough" was made by the magistrate after consideration of underlying circumstances, while in the instant case, the magistrate merely accepted the conclusion of the officer on that issue. As Mr. Justice Jackson noted in Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436: "The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." This protection function of the warrant requirement affords protection in name only when the magistrate fails to inquire into the "underlying circumstances" as required by Aguilar and accepts instead the conclusions of the officer.

It appears from the record of the suppression hearing that the only evidence before the magistrate was the affidavit and that the amount of "control" in a controlled buy could vary depending on the circumstances. I have no hesitancy in saying that if testimony of the officer at the hearing on the motion to suppress had been contained in the affidavit, the evidence would be admissible. However, it is my understanding of the law that since the evidence was not before the magistrate, and the words "controlled buy" are not so precise that any particular meaning can be attributed to them, that we do violence to Whiteley v. Warden, *supra*, by approving this affi-

davit. The evidence is probably conclusive that the defendant was a large dealer in dangerous drugs and that suppression of the evidence would result in his freedom. As it was put by Mr. Justice (then judge) Cardozo: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N. Y. 13, 150 N. E. 585. I am as reluctant as the majority to bring about this result, but as Mr. Justice Clark responded in Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081: "* * * 'there is another consideration — the imperative of judicial integrity.' * * * The criminal goes free, * * * but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

I would reverse.

KUNS, Retired District Judge, joins in this dissent.

RICHARD J. COOK ET AL., APPELLEES AND CROSS-APPELLANTS, V. OTTO H. BEERMANN, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH ALLEN L. HEIKES, APPELLEE AND CROSS-APPELLEE.

271 N. W. 2d 459

Filed November 15, 1978. No. 41634.

1. **Real Property: Appurtenances: Intent.** Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. In determining this question, the following tests, while not all inclusive, have received general approval, viz: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is concerned; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.
2. **Real Property: Property: Appurtenances.** Ordinarily, the owner of the fee, by his annexation of personal property, renders it an accession to the land.
3. **Real Property: Intent.** Where the owner of property puts in im-

provements, the law at once raises a presumption of intention to make them a part of the land. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser.

4. **Contracts: Evidence: Trial.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
5. **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.
6. **Contracts: Evidence: Trial.** Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact.
7. **Pleadings: Evidence: Trial.** A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.
8. _____: _____: _____. Where one party desires to avail himself of the other's pleading, it is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed in part, and remanded with directions.

Pierson, Ackerman, Fitchett & Akin and Joseph E. Marsh, for appellant.

Maurice S. Redmond and Gleysteen, Harper, Eidsmoe & Heidman, for appellees Cook et al.

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

SPENCER, C. J., PRO TEM.

This is an action brought by purchasers of real estate to recover damages for the value of an irrigation pump and motor which their grantor removed from the property and sold to a third party. The District Court entered judgment in the amount of

$1,750. Defendant Otto H. Beermann appeals. Plaintiffs cross-appeal and seek to recover an additional $1,750 in damages. We sustain the cross-appeal, and reverse in part and remand with directions.

Plaintiffs purchased 62 acres of farmland from the defendant in April 1974. Negotiations for the sale were conducted between one of the plaintiffs, Richard Cook, and defendant's real estate broker, Ernie Albertson. When Cook inspected the property he observed an irrigation well complete with pump and motor. The pump was positioned in the well. The motor, which was supplied with fuel by an underground natural gas line running from the house, was bolted to a concrete pad directly adjacent to the well. The irrigation pipe and sprinkler system were unassembled and stacked behind the house, approximately 1,500 feet from the well. Cook informed Albertson he would have no use for the pipe or sprinkler system. He testified it was his understanding that the pump and motor would remain attached to the well.

A purchase agreement prepared by Albertson was signed by Cook on behalf of himself and the other plaintiffs on March 26, 1974. The printed form provides that included in the sale are "all fixtures and equipment permanently attached to said premises." The space provided for listing personal property included in the sale was left blank. The agreement contains the following typewritten provision: "The irrigation equipment is not included in this sale."

Albertson testified over defendant's objection that he intended the term "irrigation equipment" to refer only to the pipe and the sprinkler system, and that he would have employed different language to exclude the pump and motor from the sale. He stated there was no specific agreement concerning the pump and motor, however, as nothing was ever mentioned about these items. Albertson received

all his instructions from Otto Beermann's attorney, Rodney Smith.

Smith accepted the purchase agreement on behalf of his client on April 25, 1974, after making certain modifications. He had a power of attorney in the matter because Beermann was in Europe at the time. Smith testified he was informed about the irrigation pipe and sprinkler system but that he was not aware of the existence of the pump and motor. If he had been, he would have asked Beermann about them and made specific mention of those items in the purchase agreement.

Sometime after the sale plaintiffs were contacted by defendant's brother, Albert Beermann. He informed them the pump and motor did not go with the real estate. Plaintiffs disagreed and insisted the pump and motor were their property. Cook testified he discovered the pump and motor had been removed sometime in 1975. A demand for its return was made upon Albert Beermann by a letter from plaintiffs' attorney.

Allen L. Heikes purchased the pump, motor, irrigation pipe, and sprinkler system from Albert Beermann, who was acting as agent for his brother, in April 1975. Heikes hired a pump company to remove the pump and motor from plaintiffs' property. He paid Albert Beermann a total amount of $3,500. Heikes testified the pump and motor would be worth approximately one-half of that figure.

Richard Cook expressed the opinion that the pump and motor were worth $3,500. Plaintiffs unsuccessfully attempted to introduce as evidence of value defendant's answer to a cross-petition of Allen L. Heikes. In his cross-petition Heikes alleged that the reasonable value of the pump and motor was $6,000. Defendant answered by stating that the actual value of the pump and motor was $3,500. The trial judge ruled this was not an admission of value by the defendant.

The first question presented is whether the pump and motor were fixtures or items of personalty. In Swift Lumber & Fuel Co. v. Elwanger, 127 Neb. 740, 256 N. W. 875 (1934), this court stated: "Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. * * * In determining this question, the following tests, while not all inclusive, have received general approval, viz.: '1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.' Freeman v. Lynch, 8 Neb. 192; Frost v. Schinkel, 121 Neb. 784. The third test, namely that of 'intention,' appears by the clear weight of modern authority to be the controlling consideration."

In Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100 (1948), we said: " * * * ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land. * * * We said in Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381, that where the owner puts in improvements, the law at once raises a presumption of intention to make them a part of the land. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser."

Applying the foregoing rules, it seems clear the pump and motor were fixtures. The motor was bolted to a concrete pad which measured approximately 8 to 10 feet in length and 4 feet in width. Natural gas to power the motor was supplied from an underground line. The pump was inside the well casing and secured by bolts.

Finding the pump and motor to be fixtures, it becomes necessary to determine whether they were excluded from the sale by the terms of the contract. The purchase agreement provides: "The irrigation equipment is not included in this sale." Both Cook and Albertson testified the term "irrigation equipment" referred to the irrigation pipe and sprinkler system and not to the pump and motor. Smith, defendant's attorney-in-fact, testified as to the following conversation with plaintiffs' attorney after the dispute arose: "Well, you told me you were having problems about a motor in a well and I told you, at that time, that I didn't know that there was a motor in the well, but had I known I would have assumed it went with the property."

Defendant contends the testimony of his attorney-in-fact, as well as that of Cook and Albertson, should have been excluded as violative of the parol evidence rule. The attorney-in-fact was his representative in this transaction and made alterations in the contract before approving it for defendant. Actually, the contract was made by the attorney-in-fact.

In Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562 (1969), we said: "In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party."

In Olds v. Jamison, 195 Neb. 388, 238 N. W. 2d 459 (1976), we stated: "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.

"Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact."

Defendant argues in his reply brief that even if the pump and motor could be considered "fixtures and

equipment permanently attached to the premises," the irrigation pipe and sprinkler system which were stacked on the property definitely would not be included in this category. From this premise he argues that the provision "excepting irrigation equipment" from the sale must be read to apply to the pump and motor because it would be superfluous otherwise. Actually, there is authority that the irrigation pipe and sprinkler system were also fixtures even though they were not physically attached to the real estate. We said in Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659 (1931): "It should be a safe rule to say that parts of property which are not physically attached to realty, but which are absolutely necessary to the operation of machinery and equipment which is physically attached, become themselves governed by the same rules as that which is annexed to the freehold."

The contract was ambiguous. The parol testimony was properly admitted to ascertain the meaning of the term "irrigation equipment." The testimony preponderates that there was no intention to exclude the pump and motor from the sale. The clause excluding "irrigation equipment" was inserted in response to Richard Cook's assertion that plaintiffs had no need for the irrigation pipe and sprinkler system.

The trial court found as follows: "It is the judgment of this Court that the pump head and the motor were items, although personal, it was the intention of the parties that the said property pass to the purchaser of this property." The court's finding that the disputed items were personal property was erroneous. Such a finding would be inconsistent with the judgment because no items of personal property were included in the sale.

The issue on cross-appeal is whether defendant should be bound by an admission as to value made in his answer to the cross-petition. The cross-petition

was one filed by his codefendant against him. In his answer, he said as follows: "Comes now the defendant, Otto H. Beermann, and for answer to the cross petition of defendant, Allen L. Heikes, admits all of the allegations of said cross petition except that allegation of the fair and reasonable value of said motor and pump as $6,000.00. This answering defendant alleges that the actual value of said pump and motor is $3,500.00 and denies that cross petitioner has suffered or will suffer any damages by reason of said transaction." While this involved a dispute as to value between the codefendants, it constituted one of the issues on which the case was tried. The defendants at no stage of the proceedings attempted to amend the pleadings as filed. The trial court was bound to consider the evidence. A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. See, Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798 (1961); Stahlhut v. County of Saline, 176 Neb. 189, 125 N. W. 2d 520 (1964).

In Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173 (1938), this court quoted the following from 2 Wigmore, Evidence (2d Ed.), § 1064: " 'The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i.e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.' "

In this case, the plaintiffs offered the pleading in evidence. Defendant objected. An unreported discussion was held at the bench. The court then sustained the objection and stated its basis for doing so was that the statement as to value was made by defendant's attorney and the court was not convinced the pump and motor were worth $3,500. It was not within the province of the court to refuse to consider the judicial admission in the pleading. The defendant's statement of value was a part of the record and was a judicial admission as to value regardless of the fact that the pleading may have been signed by his attorney for him.

At the time the pump and motor were sold to Heikes, defendant's codefendant, defendant was aware that the plaintiffs claimed to be the owners of the property by virtue of the sales contract. As we view the record, this judicial admission of value is binding on the defendant.

For the reasons set out above, plaintiffs' cross-appeal is sustained. The judgment of the trial court is reversed in part, and the cause is remanded with directions to increase the award of damages to $3,500.

REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

H. STARR, APPELLANT AND CROSS-APPELLEE, V. P. STARR, APPELLEE AND CROSS-APPELLANT.

271 N. W. 2d 464

Filed November 15, 1978. No. 41640.

Divorce: Alimony. Alimony awards payable in the form of an annuity for life are not favored.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified.

Robert D. Mullin, Thomas A. Gleason, and Boland, Mullin & Walsh, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and VAN PELT, District Judge, and KUNS, Retired District Judge.

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the property of the parties; and awarded the petitioner alimony and attorney's fees. The petitioner has appealed and the respondent has cross-appealed.

The parties were married in 1949. They have three children, all of whom have reached their majority. Eric, now 27, was graduated from medical school and is completing his residency. Craig, now 25, has a degree in political science. Susan, now 21, is completing undergraduate studies.

The parties separated in 1969. This action was commenced in 1975.

The respondent was 57 years of age at time of trial and is a psychiatrist engaged in private practice in Omaha, Nebraska. His net income from his medical practice from 1970 to 1976 has ranged from approximately $79,000 to $51,000 per year. During this same period of time he had other income of from $2,750 to $15,710 per year. The evidence indicates that the income from his practice has been decreasing in recent years.

The petitioner was 54 years of age at time of trial. Although the petitioner was employed at the time she was married and continued to work until the birth of her first child, she has no particular skills or training and has not been employed for 26 years. She has a heart condition which is not seriously disabling but it is such that it is doubtful whether she should attempt to seek employment at this time.

The principal issue in this appeal is the division of property and award of alimony made by the trial

court. The total value of the property owned by the parties was approximately $550,000. The petitioner was awarded the residence of the parties including the furnishings, valued at $125,000, a 1974 Mustang automobile, and life insurance policies, securities, and cash items having a total value of $166,238 according to the findings of the trial court. The petitioner was awarded alimony at the rate of $1,250 per month until her death or remarriage.

The respondent was awarded the remainder of the property subject to indebtedness of approximately $143,000, a substantial portion of which was incurred by the respondent after the separation.

The petitioner claims that the division of property was unfair because the residence property should have been valued at approximately $80,000; that the petitioner should have been awarded approximately $14,000 additional for an inheritance which she received in the early 1960's; that she should have been awarded the $40,480 balance in an agency account at the Omaha National Bank; and that an additional award should be made to her to compensate for the depletion of assets which resulted from lavish gifts and other expenditures the respondent has made for the children since the parties separated in 1969. The petitioner further contends that the alimony should be increased to not less than $2,000 per month.

The respondent contends that award of property and alimony made to the petitioner was excessive; that the residence should have been valued at $140,000; and that the alimony award should be reduced to $500 per month and terminated when the respondent reaches age 65.

The evidence concerning the valuation of the residence was in conflict. We believe the record sustains the findings of the trial court as to the valuation of the residence and its furnishings and we adopt those findings as our own.

The life insurance policies awarded to the peti-

tioner are seven policies owned by the petitioner which have a net cash value of $18,524. The annual premiums amount to $4,125. Five of the policies have a face value of $105,000 and insure the life of the respondent. The other two policies insure the lives of Eric and Craig. We think a more equitable division of the property would result if the seven life insurance policies were awarded to the respondent and the agency account at the Omaha National Bank, or its monetary equivalent, were awarded to the petitioner.

The petitioner was awarded alimony for the remainder of her life or until her remarriage. Alimony awards payable in the form of an annuity for life are not favored.

If the amount awarded as alimony is increased to $1,700 per month and the time during which it is payable is reduced to 12 years, the alimony awarded will have approximately the same present value based upon the petitioner's expectancy although the total sum paid by the respondent will be less. Such a modification will relieve the respondent from making monthly payments during his retirement years and will give the petitioner the benefit of the award during her more active years.

The trial court allowed the petitioner $15,000 for the services of her attorneys in the trial court. While this was a substantial amount, we do not believe it was excessive under the circumstances in this case. The financial affairs of the respondent were quite complicated and considerable discovery procedures were necessary to develop the facts so that an adequate presentation of the case could be made.

The judgment of the District Court is modified to provide that the seven life insurance policies described in paragraph V(d) of the judgment are awarded to the respondent; the agency account in the Omaha National Bank, or its monetary equivalent, is awarded to the petitioner; and the alimony award

is modified to provide that the respondent shall pay to the clerk of the District Court for Douglas County, Nebraska, for the support and maintenance of the petitioner, the sum of $1,700 per month for a period of 12 years commencing July 20, 1977, said payments to terminate upon the death or remarriage of the petitioner but not upon the death of the respondent. The judgment of the District Court in all other respects is affirmed.

The petitioner is allowed the sum of $1,500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

JUANITA I. BLOME, APPELLEE AND CROSS-APPELLANT, V. HERMAN G. BLOME, SR., APPELLANT AND CROSS-APPELLEE, LOUIS E. BLOME, APPELLEE AND CROSS-APPELLEE.

271 N. W. 2d 466

Filed November 15, 1978. No. 41694.

1. **Divorce: Trial: Witnesses.** In an appeal from a decree of dissolution of marriage, 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.
2. **Divorce: Property.** The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
3. _____: _____. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Holtorf, Hansen, Kovarik & Nuttleman, Byron J. Brogan, and James W. Ellison, for appellant.

Richard A. Douglas, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

McCOWN, J.

This is a proceeding for dissolution of marriage. The District Court dissolved the marriage and made a property division. The husband has appealed and the wife has cross-appealed.

The petitioner, Juanita I. Blome, and the respondent, Herman G. Blome, Sr., were married in Pasadena, California, on May 9, 1970. At the time of the marriage the wife was 52 years of age and the husband was 77. Both had been married before and had grown children. At the time of the marriage the wife was living in California and was employed in taking care of an elderly couple. The husband was a farmer and rancher and lived in Morrill County, Nebraska. The parties lived in the wife's residence in California for a short while and then came to Nebraska.

Shortly after returning to Nebraska the parties purchased a residence in Gering, Nebraska, for $18,500, which was appraised at $30,000 at time of trial. For approximately 3 years the wife resided in the Gering residence and the husband lived during the week in another house which he owned in Bridgeport, Nebraska, approximately 30 miles away. The wife visited him in Bridgeport at least once a week and prepared and took meals to him, and he came to the Gering house on weekends. Until early 1974 the husband was active in the cattle business on the Bridgeport farmland in which he held a life interest. He had approximately 100 to 125 head of cattle on hand at all times. After he sold the cattle in early 1974 the parties lived together in Gering during the remainder of the marriage. The wife testified that the husband required extra care during this period of the marriage, and the husband conceded that she worked hard at all times.

At the time of the marriage the wife had a few hundred dollars in a checking account, some furniture, an automobile, and she owned a small house which was later sold for $2,000. She also received approximately $2,000 from an estate during the course of the marriage.

The evidence as to the husband's holdings at the time of the marriage is unclear and confusing. He had an interest in approximately 900 acres of farmland in Morrill County, Nebraska. Sometime in the 1960's the husband conveyed the farmland to his children and, according to his testimony, he retained a life estate in the property. On June 1, 1972, his children executed a deed conveying a life interest in the Morrill County farmland to him. During the period of the marriage the husband was entitled to all the current income from the farmland. His children sold one tract of the farmland in 1975 for $30,000, and the remainder for $190,000 in 1976. The record does not disclose the disposition made of the husband's life estate.

At the inception of the marriage the husband also owned a house in Bridgeport, Nebraska, worth $7,000, which he had transferred to a granddaughter prior to the trial here. The husband also testified that he had some stocks and bonds at the time of the marriage, but he could not identify the kinds or amounts.

The husband also testified that he made certain loans prior to the marriage which had been paid off during the marriage. The details and the allocation of amounts paid to periods of time before and after the inception of the marriage were uncertain and confusing.

During the marriage the parties acquired a substantial amount of stocks and bonds. At the time of trial the value of the securities acquired by the parties during the marriage was approximately $97,000. The husband transferred a substantial portion of

these securities into joint tenancy between himself and his son, Louis Blome, in July 1975. The son was made a party to this action.

The evidence also established that the husband had instituted several lawsuits stemming from activities conducted by him during the period of the marriage. In one of these the husband had won a summary judgment for $16,366.39 a few months before the trial here. Other suits involved claims of $2,578.25 and $12,600 by the husband against other parties. There were also suits and counterclaims pending against the husband on which his potential liability was substantially the same amount.

The parties also owned a station wagon valued at $1,900 and a pickup truck valued at $800, and the husband had savings and loan accounts in the sums of $2,479.57 and $3,483.16.

The petition for dissolution of marriage was filed on November 18, 1976, in the District Court for Scotts Bluff County. Trial was held in July 1977, and on August 12, 1977, the District Court entered its decree. The decree awarded the wife the residence in Gering, and the stock held in her individual name valued at $3,730, together with additional stocks and securities valued at $21,707.50. She also received the station wagon, household goods in her possession, and her own personal effects and bank accounts. The husband was awarded all remaining stocks and bonds, which had a value of approximately $72,000, all household goods in his possession, as well as his personal effects and bank accounts, and any remaining personal property. The court found that the stocks and bonds held in joint tenancy by the husband and son were held in constructive trust for the husband and wife, and directed the son to make transfers in accordance with the decree.

Both the husband and wife filed motions for new trial, which were overruled. The husband has ap-

pealed and the wife has cross-appealed. The son has not appealed.

It is the contention of the husband on appeal that all the money used to buy stocks and bonds came from assets owned by the husband prior to the marriage, and that the stocks and bonds were not properly marital property. The wife contends that the funds to purchase the stocks and bonds came from the husband's cattle operations and from rentals and other income derived from the life estate in the farmland, and that such stocks and bonds were part of the marital property. On her cross-appeal the wife asserts that the husband's interest in the farm real estate was something more than a life estate; that the value of the farm property increased during the marriage from $110,000 to $220,000; and that the wife is entitled to the benefit of a portion of that increased value. The wife also asserted in her motion for a new trial that the corporate debtor whose securities constituted the major portion of the securities assigned to her in the decree had instituted bankruptcy proceedings and therefore the decree should be revised.

The evidence as to the source of funds used for the purchase of stocks and bonds during the marriage is in direct conflict. Basically, the husband's evidence rests on the fact that the income tax returns for the years 1970 through 1974 show that the farming operation had a net loss of a few hundred dollars each year from 1970 through 1972, and showed a net profit of only $1,805.23 for 1973, and $3,800.48 for 1974. Apparently no returns were filed for 1975 or 1976. The argument is that the source of funds for the purchase of stocks and bonds must, therefore, have come from other property owned by the husband prior to marriage. Evidence as to the nature and extent of that property is inconclusive at best.

In addition, the husband's own testimony contradicted his reliance on the income tax returns. The

husband testified that during the years 1970 to 1974 he conducted an active cattle raising operation and maintained 100 to 125 cattle on hand at all times until early 1974, when he sold all his cattle. The income tax returns show no cattle sold in 1972 or 1973 and show only one cow sold in 1974.

The wife's evidence, on the other hand, was that there was substantial income during the marriage, both from the cattle operation and from rentals and other income sources. Her evidence tends to show that income for the years 1973 and 1974 was approximately $40,000 per year.

The trial court found that all the stocks and bonds were acquired from funds accumulated during the course of the marriage and that there was insufficient evidence to support the husband's contentions. This court has consistently held that in an appeal from a decree of dissolution of marriage, 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. Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407. The evidence is more than sufficient to support the determination of the trial court.

The husband also contends that under the circumstances here the property division was inequitable and the award to the wife was excessive. The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Hanisch v. Hanisch, *supra*. The division of property here is not inequitable and is within previously approved general standards.

This court is not inclined to disturb the division of property made by the trial court unless it is patently

unfair on the record. Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108. The division of property made by the trial court was not patently unfair and is supported by the evidence.

The issues raised in the wife's cross-appeal were also decided by the trial court on the basis of conflicting evidence. The trial court accepted one version of the facts and the determination of the trial court was not patently unfair.

The judgment is affirmed. The attorney for the plaintiff-appellee is allowed a fee of $750 for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GAYLORD MASON, APPELLANT.

271 N. W. 2d 470

Filed November 15, 1978. No. 41893.

1. **Criminal Law: Sexual Assault: Statutes: Evidence.** Section 28-408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The determination of the admissibility of evidence of the prosecutrix' prior sexual activity must be determined in each case upon its own circumstances.
2. **Criminal Law: Sexual Assault: Evidence.** In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.
3. **Criminal Law: Sexual Assault: Statutes.** A person shall be guilty of sexual assault in the first degree when such person subjects an-

other person to sexual penetration and overcomes the victim by force or threat of force, express or implied. § 28-408.03, R. R. S. 1943.

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

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury of the crime of sexual assault of the first degree and was sentenced to a term of 5 to 8 years in the Nebraska Penal and Correctional Complex. On appeal to this court, he makes and argues three assignments of error: (1) He was denied a fair trial because the trial court sustained the State's objection to the defendant's proposal to cross-examine the prosecutrix and a physician, called as a witness by the State, concerning the presence of an intrauterine device (hereafter IUD) detected by the physician during the course of a pelvic examination shortly after the assault. (2) The evidence was insufficient to sustain the verdict. (3) The sentence imposed was excessive. We affirm.

We treat the assignments in order. Pursuant to the provisions of section 28-408.05 (3), R. R. S. 1943, the court held an in camera hearing to determine whether inquiry would be permitted concerning the use by the prosecutrix (hereinafter P.) of an IUD and held that inquiry could not be made. Section 28-408.05 (3), R. R. S. 1943, provides: "(3) Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sec-

tions 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The State's theory is that inquiry concerning the IUD constituted an inquiry into the sexual activity of P. with persons other than the defendant and the evidence would not support a finding of the necessary pattern of conduct relevant to the issue of consent. The defendant does not contend that the finding of the court is erroneous on that point, but argues that the presence of the IUD tends to contradict P.'s testimony that she was frightened and hysterical at the time of the incident and therefore was relevant on the issue of her general credibility and the proposed cross-examination did not constitute a specific inquiry into her past sexual activity within the meaning of the statute.

P. acknowledged before the jury that she had had sexual intercourse several months previously with a boyfriend who did not reside in the city of Lincoln where the assault occurred. No other evidence was introduced to show any pattern of prior sexual activity. We do not believe that the statute and the evidence can be dissected as the defendant contends. If relevant at all, the evidence concerning the presence of the IUD was relevant on the issue of consent. Absence of fright or hysteria are relevant only because they would bear upon the issue of P.'s consent to intercourse. It seems obvious to us that the proposed inquiry did relate to prior sexual activity and came within the terms of the statute. We hold that the trial court did not abuse its discretion in excluding the proffered evidence. The determination of the admissibility of evidence of P.'s prior sexual activity must be determined in each case upon its own

circumstances. See United States v. Kasto, 584 F. 2d 268 (1978).

The argument that the conviction is not supported by the evidence has no merit. That argument is founded solely upon claimed contradictions and inconsistencies in the testimony of P. and the female friend who shared the apartment in which the assault happened. These raised only questions of credibility which were for the jury to decide. The defendant did not testify. P. testified that she submitted because the defendant threatened to cut and kill her. Her version of the offense was corroborated by her immediate complaint to her friend and by her emotional condition immediately after the event, by the results of medical examination, by a sizeable bruise upon her neck, and by other facts and circumstances. There is no question at all about the identity of the defendant as the person who committed the assault. The applicable rules are: "It is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue." State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387. Section 28-408.03, R. R. S. 1943, provides in part as follows: "(1) A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied . . ." This statutory rule seems but an adoption of the common law rule already applicable. We have previously held: "A victim of forcible rape is only required to make reasonable resistance in good faith under all the circumstances, and such that nonconsent and actual opposition are genuine and real." State v. Smith, 192 Neb. 794, 224 N. W. 2d 537.

The sentence of 5 to 8 years is not excessive. The

punishment prescribed by statute for the offense is imprisonment for not less than 1 year nor more than 25 years. § 28-408.03 (2), R. R. S. 1943. The evidence indicates that the victim was subjected to more than just forcible sexual penetration in the normal manner of sexual intercourse. She was also required to submit to various sexual perversions. The defendant apparently had prepared himself for commission of these acts by viewing visual demonstrations at a pornographic establishment in the city of Lincoln earlier in the evening and then deliberately went searching for a victim. We find no extenuating circumstance.

AFFIRMED.

WAYNE W. HEROLD, APPELLANT, V. CONSTRUCTORS, INC., APPELLEE.

271 N. W. 2d 542

Filed November 15, 1978. No. 41932.

1. **Workmen's Compensation.** Where the effect of an injury to a finger only is the usual and natural one, compensation cannot be allowed for the loss of use of the hand.
2. **Workmen's Compensation: Statutes: Appeal and Error.** Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. There is no longer provision in our statutes for de novo review in this court of workmen's compensation cases.

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

Hoch & Steinheider, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

This is an appeal from the Nebraska Workmen's Compensation Court. Plaintiff-appellant, Wayne W. Herold, was an employee of defendant-appellee, Constructors, Inc.; and on August 6, 1975, suffered certain injuries while engaged in the duties of his employment, as a result of an accident arising out of and in the course of his employment by the defendant.

The principal issue and dispute between the parties is pointed out in the opening paragraph of the briefs of the respective parties filed on appeal to this court. Under the heading "Nature of the Case," appearing on page 1 of appellant's brief, he states: "This is a case wherein the plaintiff injured his left *hand* in the course of his employment by the defendant and brought suit to recover benefits provided under the Nebraska Workmen's Compensation law." (Emphasis supplied.) In the corresponding paragraph of appellee's brief, it states: "This is a case wherein the plaintiff injured his left *thumb* in the course of his employment by the defendant and brought suit to recover benefits provided under the Nebraska Workmen's Compensation law." (Emphasis supplied.) In short, appellant claims that he should be compensated for his injuries on the basis of an injury to the hand, whereas appellee contends that the injuries suffered were to appellant's thumb only, and appellant should be compensated under the Workmen's Compensation Act on that basis.

The case was first tried July 29, 1977, before a single judge of the Workmen's Compensation Court, who determined that the plaintiff was temporarily totally disabled for a period of 69 4/7 weeks, from August 7, 1975, to December 5, 1976; that he sustained a 50 percent permanent partial disability to

his left thumb; and the judge also awarded plaintiff additional compensation for waiting time, and attorney's fees. On October 28, 1977, the matter was reheard before three judges of the Nebraska Workmen's Compensation Court, which court also found that the plaintiff was temporarily totally disabled for a period of 69 4/7 weeks from August 7, 1975, to December 5, 1976, and thereafter sustained a 50 percent permanent partial disability to his left thumb. The court made no award for waiting time compensation or attorney's fees. Appellant thereafter perfected his appeal to this court, assigning as error: (1) That the compensation court erred in not awarding the plaintiff 78 3/7 weeks of temporary total disability, representing the period of August 7, 1975, to February 4, 1977; and (2) the compensation court erred in not awarding the plaintiff 25 percent permanent partial disability to his left hand, rather than 50 percent permanent partial disability to his left thumb. He makes no assignment of error on appeal as to the action of the Workmen's Compensation Court in refusing him additional compensation for waiting time, and also an award of an attorney's fee.

It appears that Herold, while working for Constructors, Inc., on August 6, 1975, while cleaning a clogged pug mill, accidentally caught his left hand in a conveyor belt on the machine, as the result of which his left thumb was almost completely severed. Two operations were performed on his left hand by a Dr. Chester Q. Thompson, Jr., of Omaha, Nebraska, who is a specialist in reconstructive hand surgery. The cast on employee's left hand was removed on November 15, 1976. Dr. Thompson next saw Herold on November 29, 1976, and at that time, according to his testimony in his deposition, he recommended that Herold return to work the following week and come back to his office in 2 months for a follow-up examination. This is confirmed by a letter from Dr.

Thompson to appellee's insurance company, dated January 5, 1977, and received in evidence at the trial. Herold, however, testified that Dr. Thompson had told him on November 29, 1976, that he could return to "light duties." Dr. Thompson was questioned with reference to Herold's testimony that Dr. Thompson had told him on that occasion that he could return to light work and testified: "In referring to my office charts here, I have [sic] doing well, return to work and return also in two months for a checkup. I do not have light, heavy, normal work as part of the description. I honestly cannot recall, cannot tell the Court at this time. I assume I told him to return to his normal work, but I cannot be a hundred percent sure." In any event, at the subsequent appointment for the checkup, which occurred on February 4, 1977, appellant was given a complete release to return to work, and did so on March 1, 1977.

Thereafter, on April 1, 1977, Herold consulted Dr. Robert C. Weldon, Nebraska City, Nebraska, who examined him and gave his opinion at the trial that Herold's disability was a 25 percent permanent partial disability to his left hand. Dr. Weldon stated that his estimate was based upon the loss of the thumb function in the usage of the hand, and stated it was his opinion the thumb is such an integral part of the hand that if you lose the function of the thumb, you lose the function of the hand. He stated: "It seems shallow to consider the thumb as a single entity when it's the thing that makes our hand the valuable tool that it is, * * *." Dr. Thompson, who had rated Herold's permanent partial disability at 40 percent of the thumb, disagreed with Dr. Weldon's evaluation, but did state: "Injury to a finger always relates to the hand also. They cannot be separated because the fingers are essential to the total function of the other fingers and the entire hand, the thumb being the most important part of the hand be-

ing approximately 40 percent of the hand. Of course, it relates to the rest of the fingers and hand in unison." While it is undoubtedly true that an injury to a thumb does, to some extent at least, affect the entire performance of the hand, nevertheless, even the opinion of medical experts to that effect cannot change the express statutory provisions of the Nebraska Workmen's Compensation Law. Injuries to the thumb and to the hand are listed as separate specific scheduled injuries under section 48-121 (3), R. S. Supp., 1974. We have consistently held that where the effect of an injury to a finger only is the usual and natural one, compensation cannot be allowed for loss of use of the hand. Guerin v. Insurance Co. of North America, 183 Neb. 30, 157 N. W. 2d 779 (1968); Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186 (1964); Greseck v. Farmers Union Elevator Co., 123 Neb. 755, 243 N. W. 898 (1932). The same argument made by appellant in this case was also advanced and considered by this court in Runyan v. Lockwood Graders, Inc., *supra*; and we quote from the opinion in that case: "The general tenor of the medical testimony is that the loss of a finger is injurious to the functional use of the hand, the arm, and even the body as a whole. This view is based on the theory that an injury to a component part is injurious to the whole of which it is a part. That this is true as a general proposition cannot be questioned, whether or not there is an unusual or extraordinary condition present. But the workmen's compensation law disregards this theory in favor of an arbitrary distinction between injuries to fingers, the hand, or the arm. * * * The evidence in this case shows that the injury is to the fingers, it actually occurring to the middle phalanx of each finger. There was no injury to the hands, with the possible exception of one finger, which was amputated at the knuckle. The theory that the loss of use of a finger to some extent constituted the loss of use of the hand

has been dealt with by this court. In Greseck v. Farmers Union Elevator Co., *supra*, this court said: 'It is a matter of common knowledge that, when one's finger is severely lacerated and fractured, a consequential impairment of the usefulness of the hand follows, at least during the healing period. The same finger injury exerts a similar influence upon the arm, but in a lesser degree. In such cases, barring unexpected complications, the disability to the injured finger is greater than to the hand, and greater to the hand than to the arm, and in those states where workmen's compensation laws have been adopted, with classification of injuries and schedule of compensations similar to those in Nebraska, it is generally held that it is the disability to the injured finger, and not the consequential disability to the hand, which governs the compensation to the paid, and such in effect has been the holding of the court.' "

In the instant case there is no evidence in the record that plaintiff suffered any unusual or extraordinary injury to his hand, but only the generalization of the medical theory that an injury to a component part is an injury to the whole.

There is, however, a conflict in the evidence as to the date appellant's temporary total disability ended, as previously discussed. The compensation court found that the temporary total disability ended on December 5, 1976, 1 week following his examination by Dr. Thompson on November 29, 1976. At that time Dr. Thompson also testified there was no notation on his records of a limited release of any kind, as claimed by Herold.

In this connection, we point out that there is no longer any provision in our statutes for de novo review in this court of compensation cases, the statute having been amended in 1975. It now provides, among other things, as follows: "The findings of fact made by the Nebraska Workmen's Compensa-

tion 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 produced 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." § 48-185, R. S. Supp., 1976. See, also, Inserra v. Village Inn Pancake House, 197 Neb. 168, 247 N. W. 2d 625 (1976).

It is clear in this case that the compensation court did not act in excess of its powers, that the award was not obtained by fraud, and that there is more than ample competent evidence in the record of this case to sustain the findings and award of the compensation court on rehearing. Its decree must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. TAMBURANO, APPELLANT.

271 N. W. 2d 472

Filed November 15, 1978. No. 41979.

1. **Criminal Law: Instructions: Evidence.** It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser.
2. _____: _____: _____. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

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

WHITE, J.

The defendant was tried in the District Court for Douglas County on a charge of sexual assault, first degree. He was found guilty by a jury and sentenced to a term of from 6 to 10 years in the Nebraska Penal and Correctional Complex, whereupon he instituted this appeal.

The defendant here assigns a single error, that the District Court failed to instruct the jury on the lesser-included offense of second degree sexual assault. The definition of sexual assault in the first degree, pertinent to this case, is: "A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception." § 28-408.03, R. R. S. 1943. The definition of sexual assault in the second degree, to the extent pertinent here, is: "A person shall be guilty of sexual assault in the second degree when such person subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception." § 28-408.04, R. R. S. 1943. In other words, first degree sexual assault differs from second degree sexual assault in the additional element of penetration.

In the early morning hours of December 7, 1977, the complaining witness "R" was awakened in her

bed by a man. "R" assumed at first that the man may have been her boyfriend. In a short time she realized he was not. The intruder identified himself as Bill Osborne, told her to be quiet, and that she wouldn't get hurt. He removed "R's" clothes. "R" testified that the intruder had sexual intercourse with her 4 to 5 times over the next 45 minutes to an hour. "R" testified positively as to sexual penetration. "R" was able to get to a bathroom, lock the door, and, in an undressed condition, escape through an open bathroom window to the nearby door of her landlord where she secured help. The intruder had left a coat, evidently borrowed from his cousin, containing a checkbook with a name and address in the right front pocket. The police found the defendant asleep on a couch at the home of the cousin. "R" was having her menstrual period. "R" had described the assailant as having curly hair, a moustache, and wearing waist-high long underwear. The defendant, when apprehended, matched that description, and had the long underwear which was covered with blood. In addition, his hands were bloody.

The defendant does not question the sufficiency of the evidence to justify the verdict. Indeed, the evidence was overwhelming. No medical evidence was offered and the sole evidence relating to sexual penetration was that of "R". The defendant did not testify.

All parties concede that the offense of sexual assault, second degree, is a lesser-included offense of sexual assault, first degree. A lesser offense is one which must be committed if the greater offense is committed or, put slightly different, is one which is fully embraced in the higher offense. See State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359.

It is the defendant's theory that the jury could choose to disbelieve "R" on the issue of penetration and find the defendant guilty of only second degree sexual assault if it had been so instructed. Second

degree sexual assault requires only sexual contact as opposed to sexual penetration. Defendant's principal reliance is on the often-cited statement in Nebraska cases that where the defendant requests the trial court to submit a lesser-included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. See State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152. Since, as this argument points out, evidence sufficient to support a conviction on the greater offense would always, in a sense, be sufficient to "support" a conviction on the lesser offense, some confusion has arisen on the meaning of the rule. Hopefully, this appeal affords an opportunity to end that confusion.

In Fager v. State, 49 Neb. 439, 68 N. W. 611, the defendant was convicted of the rape of his daughter. There was no evidence to refute the fact of penetration although there was some disputed evidence with respect to whether the attack was by violence or putting in fear. The trial court refused a request to submit to the jury the lesser-included charge of assault with intent to commit rape. "It is argued that the court should have instructed the jury in such a manner that the accused might have been found guilty of an assault with intent to commit a rape. There was no evidence to justify the giving of an instruction of the nature suggested. The accused was either guilty of the crime charged or he was innocent of any offense whatever under any theory deducible from the proofs, and the instructions suggested could have subserved no purpose except to suggest a compromise verdict - an alternative which juries are, perhaps, sufficiently prone to adopt without suggestion." The syllabus in that case correctly sets forth the rule which has been uniformly applied in the State of Nebraska that: "When the evidence entirely fails to show an offense of a less degree than that charged in the information it is not prejudicial

error to omit to give an instruction defining an offense of such less degree." See, also, McConnell v. State, 77 Neb. 773, 110 N. W. 666; State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849.

We are aware that a number of states have adopted a rule contrary to the rule in this state. See, for example, Brown v. State (Fla.), 206 So. 2d 377; People v. Thompson, 76 Mich. App. 705, 257 N. W. 2d 268. However, the rule applied in Fager v. State, *supra,* has gained acceptance in many, and probably most, jurisdictions.

The Minnesota Supreme Court said in State v. McDonald, 251 N. W. 2d 705, that: "The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense." For similar language see A. L. I., Model Penal Code, § 1.07 (5). The Minnesota court, in explaining the application of the rule, quotes with favor Barnett, The Lesser-Included Offense Doctrine, 5 Conn. Law Rev., p. 255: "Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he wishes to have the benefit of a lesser offense instruction." As for the type of evidence which would require the lesser charge, Barnett goes on to say that: "The controverted evidence to dispute the proof of the element separating the crime charged from the lesser offense can be supplied by inference as well as by direct testimony." See State v. Crofutt, 76 S. D. 77, 72 N. W. 2d 435, for an application of that premise, and People v. Simpson, 57 Ill. App. 3d 442, 373 N. E. 2d 809, for an apparent rejection of it.

For other authority requiring at least some basis in the evidence to rebut the greater charge as a pre-

requisite to an instruction on the lesser, see, State v. Crofutt, *supra*; People v. McIntire, 78 Cal. App. 3d 844, 144 Cal. Rptr. 373; State v. Couch, 35 N. C. App. 202, 241 S. E. 2d 105; State v. Nolton, 19 Ohio St. 2d 133, 249 N. E. 2d 797; State v. Cozza, 19 Wash. App. 623, 576 P. 2d 1336; State v. Holt (Mo. App.), 559 S. W. 2d 44; Jackson v. State (Nev.), 572 P. 2d 927; State v. Piper (N. D.), 261 N. W. 2d 650; and State v. Hill, 153 N. J. Super. 558, 380 A. 2d 722.

The federal courts have clearly held since, at least, Sparf & Hansen v. United States, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895), that there was no error in refusing an instruction on a lesser-included offense where there was no evidence to require it. See, for example, United States v. Markis, 352 F. 2d 860 (2d Cir., 1965).

The rule is probably best stated by the Wisconsin court in State v. Bergenthal, 47 Wis. 2d 668, 178 N. W. 2d 16: "Only if, 'under a different, but reasonable view,' the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury."

Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis. It is sufficient to say that that evidence does not rise to that required level by speculating that an essential element uncontroverted in the evidence may be disbelieved by the jury. The trial court was correct in refusing the requested instruction.

The judgment and conviction of the defendant are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. BJORNSEN, APPELLANT.

271 N. W. 2d 839

Filed November 22, 1978. No. 41849.

1. **Criminal Law: Motor Vehicles: Blood, Breath, and Urine Tests.** In order to support a conviction for the offense of drunk driving based solely on a chemical test, the results of the chemical test, when taken together with its tolerance for error, must equal or exceed the statutory percentage.
2. **Criminal Law: Motor Vehicles: Blood, Breath, and Urine Tests: Burden of Proof.** Where a technician testifies that a blood alcohol test of a defendant yielded a reading exactly equal to ten-hundredths of one percent, which is the minimum percentage necessary for proof of the offense of drunk driving, but concedes that the test is subject to a tolerance for error of five-thousandths of one percent, the State has not, on that testimony alone, proven the elements of the offense beyond a reasonable doubt.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and dismissed.

Walker, Luckey, Sipple & Hansen, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellee.

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

WHITE, J.

Defendant appeals from a conviction of operating a motor vehicle while having ten-hundredths of one percent of alcohol by weight in his body fluid.

There is no evidence of the defendant's intoxication sufficient to sustain a conviction other than the results of a blood test. The testimony of the sheriff who arrested defendant following the accident merely disclosed the defendant had the odor of alcohol on his breath and that a partially-filled wine bottle was found at the scene.

The chemist who tested the blood sample of the defendant testified the test conformed to the standard

set forth in section 39-669.11, R. R. S. 1943. He testified on direct examination that the results of the test disclosed the presence of ten-hundredths of one percent of alcohol by weight in the sample. On cross-examination the chemist was asked: "Q- What is correct? Is it you are telling me it (the test) is 100% accurate. Is that correct?

"A- I'm telling you it's accurate within five thousandths of a percent. * * *

"Q- Well, I don't want it qualified. I want you to tell me if it — if it's off that much, no one can do it more accurately than that, in your opinion. Should that wouldn't then, put it below a .10? Would it or not?

"A- Yes. It would."

The contention of defendant is that the State has not met its burden of proof of the crime, namely, it has not offered evidence showing that defendant had the requisite percent of alcohol by weight in his blood. The State answers this contention by arguing that section 39-669.11, R. R. S. 1943, provides: "Any test * * * if made in conformity * * * shall be competent evidence in any prosecution * * *" and that any variances inherent in the testing process are irrelevant, providing the chemist testifies to the minimum content of alcohol by weight in the body fluid.

We do not agree. While there is a scarcity of authority on the subject, we think the correct rule is that announced in State v. Graham (Mo. App.), 322 S. W. 2d 188. In that case the Missouri Supreme Court, while judicially recognizing the validity of radar as a speed-measuring device and acknowledging that a reading of a radar device was admissible in evidence, discussed the tolerance or outer limits of the accuracy of the device, and stated: "The evidence given by the machine should not be accepted if the question involved falls within this tolerance." The evidence as to the tolerance was one mile per hour.

While the Legislature has the acknowledged right

to prescribe acceptable methods of testing for alcohol content in body fluids and perhaps even the right to prescribe that such evidence is admissible in a court of law, it is a judicial determination as to whether this evidence is sufficient to sustain a conviction, if the evidence is believed. The Legislature has selected a particular percent of alcohol to be a criminal offense if present in a person operating a motor vehicle. It is not unreasonable to require that the test, designed to show that percent, do so outside of any error or tolerance inherent in the testing process.

The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SPENCER, C. J., PRO TEM., dissenting.

I respectfully dissent from the majority opinion herein because the opinion in effect amends section 39-669.07, R. R. S. 1943, which section makes it unlawful to operate a motor vehicle while having ten-hundredths of one percent by weight of alcohol in the body fluid, as shown by chemical analysis of the blood, breath, or urine.

The chemist who tested the blood sample testified that the test conformed to the standards set forth in section 39-669.11, R. R. S. 1943, and disclosed the presence of ten-hundredths of one percent of alcohol by weight in the sample, as shown by chemical analysis. Under cross-examination the chemist testified that such tests were accurate within five-thousandths of a percent. On this evidence, the court holds that the test must disclose ten-hundredths of one percent plus five-thousandths of one percent to be sufficient to comply with the statute. This is a misinterpretation of the statute.

I am certain the Legislature in accepting the ten-hundredths of one percent figure was aware that there could be a miniscule variation on one side or the other in the test, and intended the ten-hundredths of one percent to be accepted without regard to a

miniscule variation which could not be determined in a test. The language is "as shown by chemical analysis."

The only case in the country I have been able to find directly in point is State v. Rucker, 297 A. 2d 400 (Del. Super. 1972). The defendant in that case was involved in an automobile accident and was taken to a police station where a breath test was administered. The state chemist testified he examined the breath test and found a reading of 0.104 indicated blood alcohol in defendant's blood. On cross-examination he testified that the reading from the breath alcohol test could have a variance of as much as 0.009 from a reading based on a test of the blood, thus the percentage of blood alcohol could have ranged from 0.095 to 0.113 if defendant's blood rather than his breath had been tested. The Delaware statute prohibited the driving of a motor vehicle while under the influence of intoxicating liquor, and further provided: "Any person who drives, operates or has in actual physical control a motor vehicle while such person's blood has reached a blood alcohol concentration of 1/10 of 1% or more, by weight, as shown by a chemical analysis of a blood, breath, or urine sample taken within 4 hours of the alleged offense, shall be guilty under this section."

The trial court dismissed the case because of the possible variance inherent in the test. The appellate court determined that the trial court had erred in dismissing the case. It stated: "In dismissing this case, the Court of Common Pleas noted that the possible discrepancy in the reading could have lowered it below the 'presumption'. The statute does not set up a presumption. It simply makes a blood alcohol concentration of 0.100%, or more, as shown by specified types of tests, an element of the offense. If one has that concentration while driving, as determined by the test specified in the statute and if that test was administered within 4 hours after the alleged of-

fense, 21 Del. C. § 4176 directs that such person 'shall be guilty'. * * *

"Under the terms of the statute the trier of fact must determine whether the test results show the required percentage of alcohol in the blood. The trier of fact is not free to disregard the mandate of the statute or to question the wisdom of the General Assembly in providing that test results constitute proof of that element of the crime.

"The possible variance in results between various types of tests and the possible variances in readings between tests taken while the accused was driving and those taken afterwards may be an inherent weakness of the statutory provisions. The General Assembly could have considered these possible variances when it enacted the legislation but the legislation is so worded as to preclude these factors from being considered as issues of fact.

"If there had been evidence that the test was improperly administered, such evidence could cast such doubt on the result as could be considered by the trier of fact in determining whether the statutory requirements had been met. But, as indicated, evidence that the types of tests already approved by the General Assembly when properly conducted are still subject to possible variations in results, is not a matter which is here left to the trier of facts."

The language of the Nebraska statute is similar to that of Delaware. Section 39-669.07, R. R. S. 1943, provides that it shall be unlawful for any person to operate a motor vehicle while under the influence of alcoholic liquor, while under the influence of any drug, "or when that person has ten-hundredths of one per cent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine." Any one of these three conditions will support a conviction. See State v. Weidner, 192 Neb. 161, 219 N. W. 2d 742 (1974).

In my judgment, the majority opinion is in error.

The blood alcohol test in this case was sufficient to sustain the State's burden of proof. The conviction should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. BEERS, APPELLANT.

271 N. W. 2d 842

Filed November 22, 1978. No. 41854.

1. **Criminal Law: Homicide: Statutes.** First degree murder includes the killing of a person "purposely and of deliberate and premeditated malice." § 28-401, R. R. S. 1943.
2. **Criminal Law: Homicide: Intent: Time.** Deliberation and premeditation must take place before the killing, but no particular length of time is required for deliberation provided the intent to kill is formed before and not merely simultaneously with the act which caused the death.
3. **Criminal Law: Homicide: Evidence.** Deliberation and premeditation may be proven circumstantially.
4. **Criminal Law: Homicide: Evidence: Intent.** Motive is not an essential element of the crime of murder, although its absence is a circumstance favorable to the accused and the existence of motive may be shown in support of proof of intention.
5. **Criminal Law: Homicide: Statutes: Lesser-Included Offenses.** Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943.
6. **Criminal Law: Homicide: Evidence: Lesser-Included Offenses.** Where murder in the first degree is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to be applicable to an instruction as to manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder.
7. **Criminal Law: Homicide: Intent.** Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
8. **Criminal Law: Homicide: Evidence: Instructions.** Where the evidence shows without dispute that one charged with murder pur-

posely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing.

9. **Trial: Witnesses.** If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

10. _____: _____. Whether the qualifications of a witness with respect to special experience are sufficiently established is a matter resting largely in the discretion of the trial court whose determination is final unless that discretion is clearly abused.

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

Richard H. Hoch of Hoch & Steinheider, for appellant.

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

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

CLINTON, J.

The defendant, Robert L. Beers, was charged with having killed Gary White, a Nebraska City policeman, purposely and with deliberate and premeditated malice, on July 9, 1977. Defendant was also charged with having on the same day maliciously shot Peter Rischel, also a Nebraska City policeman, with the intent to kill, wound, or maim. He was found guilty of both crimes by a jury and was sentenced to a term of life imprisonment on the first charge and a term of 16 years and 4 months to 50 years on the second, with the latter term to be served before commencement of the life sentence.

On appeal to this court, defendant makes and

argues three assignments of error: (1) The evidence is insufficient to support the conviction of murder in the first degree because there is no evidence of deliberation and premeditation. (2) The court erred in permitting a witness to the shootings, Steve Gruber, to give his opinion that the first shots he heard were those of a shotgun. (3) The court erred in failing to include in its instructions, with reference to the first charge, one which defined and would have permitted the jury to find the defendant guilty only of manslaughter.

We find the assignments of error are not meritorious and affirm the judgment.

Consideration of the first assignment of error requires a summary in conclusional form of the evidence supporting the charge. The testimony of eyewitnesses, admissions of the defendant, physical evidence at the scene, expert testimony, and reasonable conclusions from such evidence would permit the jury to find the following beyond a reasonable doubt.

On July 8, 1977, Robert L. Beers and his wife, residents of Nebraska City, were estranged and living apart. Beers was seeking a reconciliation. During the day of July 8, 1977, at his wife's request, he brought their two children to the place where Mrs. Beers lived for a visit. During the visit, Beers and his wife discussed their marital difficulties. Beers then did an errand for his wife. After performing the errand, he returned but could not find her. He then took the children to his home and left them with his daughter. By then, it was early evening. Beers went with a friend to a tavern and spent most of the evening until midnight drinking, visiting, or playing pool, moving from tavern to tavern. When he left the last tavern at about midnight he took with him a six-pack of beer, one can of which he immediately gave to an acquaintance. He then went home, put his .20 gauge double-barrel shotgun in his car, and

began driving about Nebraska City searching for his wife and drinking the beer.

About 3 a.m., Beers saw his wife and a man named Marty getting out of the back of a van and then kissing, after which Mrs. Beers entered a nearby house where she had a room. Shortly thereafter, Beers also entered the house and pulled her from her bed. A fight ensued and he forced her to go with him in search of Marty. They entered a home where Beers expected to find Marty, but the latter was not there, and another fight ensued. During these fights, Beers threatened to kill his wife. His wife fled the house, entered the nearby home of Steve Gruber, and informed the Grubers that her husband was threatening to kill her. Gruber, having no phone, left the house to report the matter to the Nebraska City police. While driving to police headquarters, Gruber observed the defendant driving a vehicle. Gruber continued to police headquarters and reported to White and Rischel, two officers on duty, what Mrs. Beers had told him as well as the fact he had seen Beers.

While Beers was driving about, his vehicle developed a flat tire. He drove to his home, obtained a pickup truck, took the loaded shotgun out of the car and placed it in the pickup, and then continued to search for his wife. He thought she might have gone to the police station and drove past the station by traveling through an alley which lies south of the police station entrance and parking lot. As he drove through the alley, the two officers and Gruber were in the parking lot. The officers were about to enter their patrol car to look for Beers in order to "settle him down." Gruber recognized the Beers pickup as it drove down the alley and he informed the officers. Rischel then shouted to Beers a request or command to stop. Beers heard the command, drove to the street, turned around, came back down the alley, and stopped his pickup in the alley adjacent to

the police station parking lot. Gruber walked toward the pickup and informed Beers the officers just wanted to talk to him. The officers, in the meantime, got out of the patrol car and began to walk toward the pickup by different routes.

Beers got out of the pickup, shotgun in hand, and Gruber warned the officers that Beers had a gun. Rischel directed Beers to put the gun down. Beers instead raised the shotgun and fired, wounding Rischel, immediately turned the gun toward White and fired again, also wounding him. The evidence would permit the jury to infer that, although Beers was unacquainted with the two men, the area was sufficiently well-lighted that he knew they were police officers because he could see the uniforms.

Rischel, although wounded, was able to fire his handgun once, while White was able to fire twice, but all shots missed Beers. Beers retreated to the south of his pickup, ejected the empty shotgun casings, reloaded the shotgun, leaned over the hood of the pickup, and fired one shot which struck the rear window of the patrol car parked near the officers. Beers then fled on foot, borrowed a car from a friend, and began driving. He was arrested at a rest stop on Interstate Highway No. 80 near York early on the morning of July 9, 1977.

White died as a result of his wounds shortly after the shooting. Rischel, although very seriously wounded, survived.

First degree murder includes the killing of a person "purposely and of deliberate and premeditated malice." § 28-401, R. R. S. 1943. The defendant points out that deliberation and premeditation must take place before the killing. Savary v. State, 62 Neb. 166, 87 N. W. 34. He then argues the evidence here is insufficient as a matter of law to show the purpose to kill was formed before the event and urges we so hold. He cites People v. Anderson, 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P. 2d 942, in which

the California Supreme Court analyzes the type of evidence which it considers sufficient to support a finding of prior deliberation and argues that in the case before us: (1) There is no evidence of prior planning to kill; (2) there is no evidence to show any motive for killing either of the officers, whom he did not know and with whom he had had no prior contact; and (3) the manner of killing does not show a preconceived design.

The mental process of forming an intent to kill cannot always, of course, be demonstrated by any direct evidence as in Savary v. State, *supra*, where the evidence included prior declarations of intent to kill the victim. However, deliberation and premeditation may be proven circumstantially. State v. Ortiz, 187 Neb. 515, 192 N. W. 2d 151. No particular length of time for premeditation is required, provided the intent to kill is formed before and not merely simultaneously with the act which caused the death. Savary v. State, *supra*; State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776. Motive is not an essential element of murder, although its absence is a circumstance favorable to the accused and the existence of motive may be shown in support of proof of intention. Sharp v. State, 117 Neb. 304, 220 N. W. 292.

In our view, the following combined circumstances which the jury could find from the evidence as fact, either from direct testimony or physical evidence or as reasonable inferences therefrom, justify a conclusion of deliberate and premeditated purpose. The defendant armed himself with a loaded shotgun with the announced purpose of killing his wife. When he drove through the alley the first time, he had the opportunity to observe and admittedly did observe persons in the vicinity of the patrol cars. Their presence was further called to his attention by a command to stop. He recognized two of the persons as police officers. He had time to deliberate while he drove past and then came back. Before Beers got

out of his vehicle, Gruber, whom he knew, approached him and stated that the officers wished to talk to him. Beers immediately got out of the truck carrying the loaded shotgun. Something about his demeanor may have indicated to Gruber that Beers intended to use the weapon, for Gruber shouted a warning and fled. Beers disregarded a command that the weapon be dropped and immediately raised the shotgun and fired, not at Gruber, but first at one officer and immediately at the other. The accuracy of the shots would permit the jury to find the shots were deliberately aimed and not random shots at dim shadows as Beers claimed. After both barrels of the shotgun were empty, Beers deliberately ejected the empty shells, reloaded, and fired again, this time hitting the rear window of the patrol car where a person could have been sitting. From all this, the jury could conclude Beers had formed a preconceived intent to kill.

In the recent case of State v. Johnson, 200 Neb. 760, 266 N. W. 2d 193, a jury found the defendant guilty of murder in the second degree, and it was argued on appeal to this court that the trial court had erred in giving an instruction which would have permitted the jury to find the defendant guilty of murder in the first degree. We held then that circumstances similar to those described above justified an instruction on first degree murder; we now hold the evidence here was sufficient to support the verdict of guilty of murder in the first degree.

Defendant also contends the court erred in permitting Gruber to testify the first shots he heard were those of a shotgun. At the time these shots were fired, Gruber was running for cover. Thus, his back was toward Beers, and the latter was not in his view when the shots were heard. The testimony was of some importance because Beers testified he thought someone had fired a shot at him before he fired. Gruber's testimony therefore corroborated the testi-

mony of Rischel that he was hit by the first shot fired and that Beers fired that shot. Objection was made to Gruber's testimony on the basis of insufficient foundation, in that the foundation testimony did not include evidence Gruber had previously heard and could identify the sound of the discharge of a police .357 magnum "gun." The officers were armed with .357 magnum revolvers.

The foundation testimony which preceded Gruber's opinion included Gruber's testimony that he had used shotguns and was familiar with the sound a shotgun makes; and that, although he had never used a "pistol," he had heard them fired and there was a difference in the sound. He described the first two shots as "roars" and not like a pistol shot. We hold the foundation was sufficient and the trial court did not abuse its discretion in admitting the testimony. The matter the witness was permitted to testify to is not unlike a number of other matters upon which lay witnesses may, depending upon their particular knowledge or experience, and provided the foundation is laid, be permitted to testify to, such as speed, intoxication, identity, nature of a sound, resemblance, and distance.

The applicable rules are: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." § 27-701, R. R. S. 1943. Whether the qualifications of a witness with respect to special experience are sufficiently established is a matter resting largely in the discretion of the trial court whose determination is final unless that discretion is clearly abused. Epperson v. Utley, 191 Neb. 413, 215 N. W. 2d 864; Bratt v. Western Air Lines, 155 F. 2d 850, 166 A. L. R. 1061.

Finally, we must determine whether the court

erred in not instructing the jury that it might find the defendant guilty of the lesser-included offense of manslaughter. In order to answer the question, it is necessary to consider the defendant's testimony.

The defendant substantially affirmed the description already given of the events of the afternoon and evening of July 8, 1977, until the point when he left the last tavern. He acknowledged drinking the five cans of beer as he drove about looking for his wife and Marty but stated he was not intoxicated. He related the two encounters with his wife and said his purpose in searching for her and Marty was "to scare her and him." Defendant admitted having told his wife he was going to kill her as well as having told one of the interrogating officers he had told his wife he was going to kill her and her lover boy. However, he stated he had no intention of actually doing so and his only purpose in making the threat was to scare his wife.

Defendant acknowledged transferring the loaded shotgun from his car to his pickup when he changed vehicles because of the flat tire. He testified he did not remember whether he had any shotgun shells other than those in the gun, but if he did he took them with him. However, on cross-examination, he said he had only two or three shells. He stated he drove to the police station because he thought his wife would go there and, as he drove through the alley by the station, he thought he saw four people there and heard someone "holler" at him. He turned around, drove back through the alley, stopped his pickup, got out and, "I asked him if they wanted — if somebody wanted to talk to me." Next, "Somebody shot at me I thought. I heard a shot." When asked why he got out of the pickup with the shotgun in his hand, he said, "I don't know because I didn't intend to use no shotgun, the only reason I had it with me was to scare my wife." He stated he heard no command to drop the gun and did

not see Steve Gruber at all or hear Gruber yell a warning.

When he heard the shot, he raised the gun and fired without raising the gun to his shoulder: "I seen a shadow down that way and I just fired that way." Hearing another shot, he turned and fired the other way and then ran behind the pickup. He does not remember ejecting the empty shells or reloading the gun. After that he ran.

Defendant denied seeing anyone in uniform in the alley. What he saw was "it looked like someone walked out from behind the cars out to the alley, just a shadowy." That is when he heard the shot. He was unacquainted with officers White and Rischel.

On cross-examination, defendant stated he was still in the truck when he asked, " 'Does somebody want to talk to me.' " Then, when someone started to walk out of the alley, he got out of the truck with gun in hand. Defendant said, "They was coming — they came around the cars and out into the alley," toward him. However, he then testified contrarily, "All I seen was one," and pointed out, on a diagram of the scene, where he had seen the person. He did not know where the shot came from and saw no gun or flash. Later, defendant said the shot came from between the cars and he fired at the only individual he saw. It is clear from the context of this testimony that defendant was referring to the first shot he fired. During the cross-examination, it is also made clear that defendant was shooting at a person when he fired the second shot. He denied reloading and firing a third shot.

On the basis of defendant's testimony, the court instructed the jury on the issue of self-defense; and the defendant does not point out any error in that instruction. Defendant also requested an instruction on manslaughter which the court refused to give.

It is the majority rule and the rule in this jurisdiction that, where murder in the first degree is

charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. Kraus v. State, 102 Neb. 690, 169 N. W. 3; Bourne v. State, 116 Neb. 141, 216 N. W. 173; State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. In order for the rule to be applicable in the present case, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. See, State v. Tamburano, *ante* p. 703, 271 N. W. 2d 472; Stevenson v. United States, 162 U. S. 313, 16 S. Ct. 839, 40 L. Ed. 980.

Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943.

The element which distinguishes first or second degree murder from the type of manslaughter which is usually referred to as voluntary manslaughter is the absence of malice. §§ 28-401, 28-402, 28-403, R. R. S. 1943. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Pembrook v. State, 117 Neb. 759, 222 N. W. 956.

In the case before us, the defendant's theory of defense was that of self-defense. Although he did not testify affirmatively that he fired the shots because he was in fear of his life or of great bodily injury, the implication of his testimony is that, without provocation by him, he was fired upon without warning and that it was necessary for him to shoot in order to protect himself from death or serious injury. If the jurors found this to be true, then he was innocent and it was their duty to acquit him. The question which we must resolve is whether there was some evidence in this case which would indicate that the crime was manslaughter rather than murder.

Only one reasonable construction can be placed on the defendant's own testimony. The record shows when defendant pointed the loaded shotgun and pulled the trigger, he knew he was firing at human beings. The pointing of the gun and the pulling of the trigger was, according to his own testimony, intentional. He did not claim that he intended merely to frighten or that the discharge of the gun was accidental. If his claim of being first fired upon was not true, as the jury by its verdict so found, then he was guilty of either first or second degree murder, depending upon whether the elements of premeditation and deliberation were present. There was nothing whatever in the evidence to indicate there was a sudden quarrel or the shooting was unintended and occurred during the commission of some unlawful act.

In Fields v. State, 125 Neb. 290, 250 N. W. 63, this court had before it a factual situation very like the one we are now considering. There the accused was charged with and convicted of murder in the second degree. On appeal, the claim was made that the trial court erred in not giving an instruction which would have permitted the jury to find the defendant guilty of manslaughter. The case is different from the one before us only in that the defense was different. There the defendant denied he was the person who did the shooting. In answering the contention that the court should have instructed on the issue of manslaughter, we said: "If . . . the accused pointed the gun at the deceased, or some other person, and purposely fired the gun, then the intent to kill became specific and the elements of the crime of manslaughter would be wholly lacking. This we must conclude from the record to be the mental attitude of the person who fired the fatal shot. Under the statute, one who purposely kills another is guilty of murder. A deadly weapon, intentionally pointed at a human being, which is discharged [without just

cause or excuse], and from a wound inflicted thereby death ensues, the only reasonable inference to be drawn is that such killing was purposely and maliciously done, and if deliberation and premeditation are absent, the crime of murder in the second degree is complete." See, also, Dean v. State, 128 Neb. 466, 259 N. W. 175.

Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing.

The trial court did not err in refusing to instruct the jury on manslaughter. The evidence was such that the defendant was either guilty of some degree of murder or was wholly innocent by reason of the justification of self-defense.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY CASADOS, APPELLANT.

271 N. W. 2d 849

Filed November 22, 1978. No. 41899.

1. **Trial: Witnesses: Service.** Process to secure the attendance of witnesses from another state may not be issued unless the testimony proposed to be elicited from such witness is relevant to the issues to be tried.
2. **Trial: Evidence: Motions, Rules, and Orders.** It is proper to sustain a motion in limine to prevent reference to or the offer of evidence concerning matters which are entirely extraneous or irrelevant to the issues of the case.
3. **Criminal Law: Assault and Battery: Evidence: Intent.** Pre-

vious acts of violence by the defendant against the victim of an assault may be shown for their bearing upon the issue of felonious intent. The trial court has broad discretion in determining the relevance of such testimony and the exercise of such discretion will be upheld in the absence of an abuse thereof.

4. **Criminal Law: Trial: Juries: Evidence.** Photographs purporting to show injuries received in two assaults, with proper foundation including evidence to enable the jury to distinguish the injuries resulting from the assault in issue, may be received in evidence. Unless an abuse of discretion appears, the ruling of the trial court will be affirmed.

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

Leo M. Bayer and Herbert M. Sampson III, for appellant.

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

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

KUNS, Retired District Judge.

This is an appeal from a judgment and sentence of imprisonment imposed upon Leroy Casados, the defendant, upon a verdict of the jury finding him guilty of assault with intent to do great bodily injury upon Susan Casados, his wife.

Defendant assigns the following errors for our consideration: (1) Refusal of the trial court to allow compulsory process for the attendance of witnesses from another state and the sustaining of a motion in limine to restrict the introduction of evidence of irrelevant matters; (2) the admission of testimony concerning other actions of the defendant prior to those upon which the charge was based; (3) the reception of certain photographs in evidence; and (4) the insufficiency of the evidence to support the verdict of the jury.

In the course of preparation for trial, defendant

made a showing and request for the issuance of compulsory process to secure the attendance of witnesses from another state. The showing indicated that the testimony to be elicited from the witnesses related entirely to the question whether such witnesses had had illicit relations with the complaining witness during the period of her separation from the defendant. The trial court determined that such testimony would be irrelevant and that it could not issue the certificate required by section 29-1908, R. R. S. 1943, that the named witnesses were material. The denial of process was correct. O'Rourke v. State, 166 Neb. 866, 90 N. W. 2d 820. In the same connection, the county attorney filed a motion in limine to prevent the introduction of evidence to show the fact of illicit relations between the complaining witness and others. The motion was sustained but without a restriction upon the cross-examination of the complaining witness. The defendant claimed that he was entitled to show such matters to explain the state of his mind at the time the alleged acts were done. The ruling of the trial court did not restrict in any way the right of the defendant to show his state of mind and the reasons which he thought he had for acting as he did. It should also be noted that the complaining witness testified she had told the defendant she had had relations with two other men during the period of the separation. The rulings of the trial court were correct and did not prejudice the rights of the defendant in any way.

Defendant next assigns error in the admission of evidence concerning acts of violence by him against the complaining witness on May 1, 1977, 2 days prior to the acts upon which the charge in the information was based. The intent with which the defendant acted was an element of the crime charged. The purpose of the offered testimony was not merely to show that defendant had committed violence against another person, but rather to show his con-

tinuing attitude and feeling toward the complaining witness and the acts he had done under the influence thereof. The very fact of the continuing existence of this state of mind was most relevant to the proof of the intent charged. The scope of testimony relating to other acts and offenses by the defendant is a matter to be determined in the discretion of the trial court. The exercise of such discretion by the trial court was proper within the scope of section 27-404 (2), R. R. S. 1943. See, also, Rice v. State, 120 Neb. 641, 234 N. W. 566.

Error is further assigned in the reception of several photographs of the complaining witness. These photographs were taken subsequent to the acts of May 3, 1977, when bruises and marks resulting from defendant's acts of May 1, 1977, were still visible. The foundation for the photographs included testimony from the complaining witness describing the injuries which she had received on both occasions. In view of the fact that the jury was entitled to have evidence of such prior acts of violence, the trial court correctly exercised its discretion to admit such photographs into evidence. State v. Stephenson, 199 Neb. 362, 258 N. W. 2d 824; Glass v. Harper, 195 Neb. 724, 240 N. W. 2d 48.

Finally, defendant claims that the evidence is insufficient to support the verdict of the jury and particularly the finding of the intent of the defendant to inflict great bodily injury. The alleged assault occurred in the home of the parties and the only testimony about the acts of the defendant came from the complaining witness, the defendant electing not to testify. In summary, the complaining witness testified that defendant had lived outside the family home from the summer of 1975 until April 25, 1977; upon questioning from the defendant, she told him that she had taken part in two extra-marital incidents during the time of their separation; he continued to question her seeking to learn of other acts and

relationships; on May 1, 1977, after such questioning, he ran water into the bath tub, then grabbed her by the back of the neck, and held her head under the water, repeating the act several times; then he forced her to eat dog food and to crawl into their dog house; and, after threatening to "dunk" her again, he struck her several times with a CB antenna causing her to bleed. On May 3, 1977, after further questioning, he ordered her into the bath tub again; she fought and wrestled with him; he got a knife and held it to her throat, then dropped the knife, and began choking her; he held her head under the water again and then got a boy's belt and tied her hands behind her back, pushing hard on her arms and injuring one shoulder; and he held her head under water again. Defendant told her that he was not going to kill her but that he was going to make her lose her mind. The recital of the uncontradicted evidence makes it clear that defendant did commit an assault and the jury was amply justified in finding he intended to commit a great bodily injury. It makes no difference whether defendant's general purpose was to torture her to secure information, to punish her for previous conduct, or to undermine her sanity — he was consciously inflicting injury and pain. The total circumstances clearly establish the felonious intent charged against defendant and the evidence supports the verdict.

None of the assigned errors having been established, the judgment of the trial court is affirmed.

AFFIRMED.

BONNIE K. SMITH, APPELLANT, V. UNIVERSITY OF NEBRASKA MEDICAL CENTER, APPELLEE.

271 N. W. 2d 852

Filed November 22, 1978. No. 41915.

1. **Workmen's Compensation: Appeal and Error.** The findings of

fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.

2. **Workmen's Compensation: Time: Notice.** In a workmen's compensation case, 50 percent shall be added for waiting time for all delinquent payments after 30 days notice has been given of disability.
3. **Workmen's Compensation: Time: Attorney's Fees.** Whenever an employer refuses payment or when an employer neglects to pay compensation for 30 days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed by the compensation court.
4. **Workmen's Compensation: Appeal and Error: Attorney's Fees.** Attorney's fees are not allowable for services on appeal in a compensation case where the appeal is instituted by the employee.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

David L. Herzog, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

WHITE, J.

The plaintiff, an employee of the University of Nebraska Medical Center, filed a petition in the Nebraska Workmen's Compensation Court for compensation for an injury which occurred on December 21, 1976. At a hearing before a single judge of the compensation court, she was awarded temporary total disability from the date of the accident to the date of the hearing and continuing thereafter until the termination of the total disability. The one-judge court left open the question of the percent of permanent disability as the same had not yet been determined and refused to assess an attorney's fee or the 50 percent penalty under the provisions of section 48-125,

R. S. Supp., 1976, for delay by the employer in making compensation payments.

On appeal to the three-judge compensation court, the temporary disability award was affirmed and the plaintiff was awarded a 10 percent permanent disability rating. The three-judge court also affirmed the denial of the fee for plaintiff's attorney and the 50 percent penalty for waiting time. Plaintiff appeals to this court.

Plaintiff makes two principal assignments of error: (1) That the compensation court erred in finding the plaintiff's permanent disability to be only 10 percent of the body as a whole; and (2) that the compensation court erred in failing to award an attorney's fee and penalty for waiting time under section 48-125, R. S. Supp., 1976, for the failure of the employer to commence compensation within 30 days of the accident.

We affirm in part and reverse in part.

On December 21, 1976, while working for the defendant, plaintiff was ordered to clean a vent in the Pathology Department of the University of Nebraska Medical Center in Omaha. She had no back problems prior to the incident in question. According to her various statements, it appears that the plaintiff developed a "catch" in her back and felt immediate pain when she was reaching to clean the vent or when she slipped off the boxes on which she had been standing. The plaintiff finished her workday and reported her injury to her supervisor, a Rebecca Hickman, on the following day. The plaintiff was immediately referred to Family Practice, i.e., the defendant's clinic, for examination and treatment. The treatment was unsuccessful and ultimately plaintiff consulted with Dr. Anil K. Agarwal, an orthopedist, who operated on the plaintiff's spine.

Without setting forth in detail the opinions of the various experts who testified both for the plaintiff

and the defendant, it is sufficient to say that the 10 percent permanent disability found by the Workmen's Compensation Court finds strong support in the record. Although Dr. Norman H. Hamm, a psychologist called by the plaintiff, testified to an impairment of 40 percent of the body as a whole, the plaintiff's own physician, Dr. Agarwal, assessed plaintiff's disability as 10 percent permanent impairment.

Section 48-185, R. S. Supp., 1976, provides in part: "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."

We said in Kudera v. Minnesota Mining & Manuf. Co., *ante* p. 235, 266 N. W. 2d 915: "This court is not free in workmen's compensation cases to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong." The plaintiff's assigned error relating to the proper percentage of disability is without merit.

The plaintiff's other assignments of error relate to the failure of the employer to make any compensation within 30 days. She therefore alleges that the compensation court erred in failing to award attorney's fees for the services of counsel at the one-judge hearing, and in failing to award the 50 percent waiting penalty. Both of these remedies are available under section 48-125, R. S. Supp., 1976, and are intended to encourage prompt payment of valid claims by the employer.

It is undisputed that the plaintiff did not receive any compensation for time lost or for medical expenses incurred for nearly 10 months from the date of the injury. The compensation court determined after both the one-judge and three-judge hearings that the plaintiff's injury was compensable. Indeed,

the State does not seriously contest the issue here nor did it do so in the compensation court. It does, however, attempt to bring its failure to make prompt payment within an exception to the waiting-penalty rule. The exception is that an employee is not entitled to attorney's fees or waiting penalty when the delay in payment was caused by a reasonable controversy on the issue of liability. See Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N. W. 2d 377. The employer claims, and the compensation court held, that there was such a controversy here. We disagree. Whether the "reasonable controversy" exception to the statutory penalty provisions is available depends on the facts of each case. See Marshall v. Columbus Steel Supply, 187 Neb. 102, 187 N. W. 2d 607.

The only argument in plaintiff's brief to support this reasonable controversy theory is its reference to four varying explanations by the plaintiff as to the cause of her injury. Upon a review of the record, it could be argued that these versions are not wholly contradictory, especially when read in the light of plaintiff's limited verbal skills. We simply note that as of 30 days after the accident, the plaintiff had given only one of these explanations. That version was, at the time, uncontroverted. The "controversy" created by the other versions appears to be an afterthought to justify what the plaintiff's counsel has rightly characterized as a case of bureaucratic indifference to the plaintiff's claim. For example, the State points to the version given before the compensation court on rehearing as being a contributor to the controversy; but that rehearing was almost a year after the accident and several months after compensation had belatedly commenced. It is inconceivable that this could have been an element in any controversy contemporaneous with the initial decision to deny compensation. Indeed, the only solid evidence of a reasonable controversy is that of

the testimony of a secretary in the State Claims Board concerning a conversation she had with a member of the staff of the Attorney General assigned to pass on the compensability of claims by state employees. During that conversation, it was decided that there had been no showing of an "accident" since the report merely showed that the plaintiff's injury occurred while she was reaching up to clean a pipe. It is clear this determination was an application of the old law prior to the 1963 amendment to section 48-151 (2), R. R. S. 1943. That amendment substituted unforeseen "injury" for unforeseen "event" in the definition of accident. "The statutory change has removed Nebraska from the minority of states which require a showing that the employment exertion which produced the result was in some way unusual in order to establish its accidental character." See Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

The overwhelming evidence was that the plaintiff suffered an unforeseen injury in the course of her employment; that her supervisor had notice on the day following the accident; that no payments were made within 30 days; and that the claim was rejected on the basis of what can only be termed an erroneous understanding of the then current law of the State of Nebraska. The attempt to find, as justification for the delay, minor variations in the plaintiff's version of how the incident produced the injury is patently an afterthought. It is precisely to prevent this type of situation that the remedial provisions of section 48-125, R. S. Supp., 1976, were designed. The compensation court should have awarded the 50 percent penalty as provided in that section and a suitable attorney's fee for services rendered before the one-judge court. The cause is remanded for that purpose.

The plaintiff also seeks a reasonable attorney's fee for services before the three-judge panel and before

this court. Attorney's fees are not allowable for services on appeal in a compensation case where, as in this case, the appeal is instituted by the employee. See Lee v. Lincoln Cleaning & Dye Works, 145 Neb. 124, 15 N. W. 2d 330.

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

RHODA BRINGEWATT, EXECUTRIX OF THE ESTATE OF MERLE BRINGEWATT, DECEASED, APPELLANT, V. TOM MUELLER ET AL., APPELLEES.

272 N. W. 2d 37

Filed November 29, 1978. No. 41620.

1. **Trial: Summary Judgments.** The trial court, in its discretion, may permit the renewal and resubmission of a motion for summary judgment which has previously been overruled.
2. **Trial: Summary Judgments: Evidence.** In the course of ruling upon a motion for summary judgment, the evidence should be viewed in the light most favorable to the party against whom the motion is directed and such party should receive the benefit of all favorable inferences which may be drawn from the evidence.
3. **Summary Judgments.** A motion for summary judgment may be granted only when the moving party is entitled to judgment as a matter of law, where it is clear what the truth is and no genuine issue remains for trial.
4. **Negligence.** Actionable fault exists only when the injury or loss is the proximate result thereof; if the alleged fault produces only the condition or occasion amounting to an opportunity for a subsequent independent cause to produce such result, the causes are not concurrent and the subsequent independent cause is the proximate cause.
5. **Landlord and Tenant: Negligence.** The fault, if any, of a landlord whose fences are out of repair is not the proximate cause of injury or loss caused by his tenant's animals straying from the premises.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed as to defendants Klahn, and reversed and remanded as to defendant Ted Mueller.

Christensen Law Offices, P.C., for appellant.

William F. Rohn and Ray C. Simmons, for appellees Klahn.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee Ted Mueller.

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

KUNS, Retired District Judge.

This is an action brought by Rhoda Bringewatt, executrix of the estate of Merle Bringewatt, deceased, the plaintiff in the District Court for Dodge County, Nebraska, and appellant herein, against Ted Mueller, Mildred Klahn and Ardyne Klahn, defendants and appellees. Tom Mueller is also a defendant but not a party to this appeal. The appellees filed motions for summary judgment. The trial court sustained the motions and entered judgments in favor of all defendants except Tom Mueller, from which appellant prosecutes this appeal. We affirm in part and reverse in part.

The record shows that the defendants Mildred and Ardyne Klahn, as joint tenants, owned a tract of property abutting State Highway No. 275 near Scribner, Nebraska. Beginning in 1971, they had rented such pasture to Ted Mueller by oral lease for cash rent. The tenancy continued through the years 1972 and 1973. There is a dispute whether the pasture was leased to Ted or to Tom Mueller for 1974. Some lease was made with one or the other and Tom Mueller put horses in the pasture. On June 4, 1974, one of the horses got out of the pasture where the fence was down or nearly so. Plaintiff's decedent, driving a truck tractor, struck one of the horses on the highway. Fire ensued which caused the death of such driver. Plaintiff brought this action alleging negligence against all parties and praying judgment for

the damages resulting from the collision.

After issues had been made up in the action, both the defendants Klahn and the defendant, Ted Mueller, filed motions for summary judgment. The motions were submitted to the Honorable Robert L. Flory, then the presiding judge, and each motion was overruled. Subsequently, after the retirement of Judge Flory and after his successor had assumed his duties, the defendants renewed their motions. The court overruled motions to quash such motions, considered them upon the same showing and record, sustained each motion and entered judgments dismissing the action against the defendants Klahn and Ted Mueller. Plaintiff contends that it was error for the court to allow the renewal of motions without an additional showing of facts. The previous order overruling the motions was not a final order and was not appealable. Pressey v. State of Nebraska, 173 Neb. 652, 114 N. W. 2d 518. The order was interlocutory and none of the issues considered and decided by the court at the hearing became res judicata. The trial court has discretion to determine whether and under what circumstances a motion may be renewed. No abuse of that discretion has been shown. The procedure followed by the court was proper and the assignment of error is overruled.

Before proceeding to the consideration of the remaining assignments of error, it should be noted that, at a hearing upon a motion for summary judgment, the evidence should be viewed in the light most favorable to the party against whom the motion is directed and that such party should receive the benefit of all favorable inferences which may reasonably be drawn from the evidence. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451; Hall v. Hadley, 173 Neb. 675, 114 N. W. 2d 590. A summary judgment may be granted only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is and no genuine is-

sue remains for trial. Hall v. Hadley, *supra.*

As to the defendants Klahn, the record is clear that they owned real estate which they had leased to one or the other of the Muellers, with the agreement that the lessee should maintain the fences and use the pasture for grazing horses. The horses placed therein were owned by the defendant, Tom Mueller, and not subject to any control on the part of the Klahns. Plaintiff's allegations of fault against the Klahns were two-fold; that they negligently failed to keep the fences in a state of good repair or to require their tenant to do so, and that the mere existence of an unrepaired fence constituted a nuisance. Extensive arguments have been submitted concerning the duty and measure of responsibility resting upon a landlord whose land is poorly fenced. If this case turned upon such questions, there would be questions of the knowledge of a hazard and of reasonable conduct, which would require that a motion for summary judgment disposing of such issues be overruled. Liability, however, cannot be imposed upon a landlord either for negligence or for the maintenance of a nuisance unless his fault is the proximate cause of the injuries alleged. In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, it was said:

"Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. An efficient, intervening cause is a new and independent force which breaks

the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it while the occasion is that which provides an opportunity for the causal agency to act. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The existence or activities of inanimate things are usually mere conditions and not causes."

The case of Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117, deals with this same subject. There it appeared that an employee of the defendant took down a flagpole for repair and laid it across a driveway; plaintiff sat upon or near the end of the flagpole and was injured when an automobile belonging to a club member was driven against the pole. In holding that a verdict should have been directed in favor of the defendant, the court pointed out that the alleged negligence in the placing of the flagpole might have existed for years as a condition without injury to the plaintiff, had it not been for the subsequent negligent act of the driver of the automobile. The court also held: "It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." To the same effect, see Bruno v. Gunnison Contractors, Inc., 176 Neb. 462, 126 N. W. 2d 477, and Connolley v. Omaha Public Power Dist., 185 Neb. 501, 177 N. W. 2d 492.

The evidence here is conclusive that the alleged fault in connection with the maintenance of and repairs to the fences amounted only to the prior establishment of a condition and that the exercise of control over the horses by the owner thereof constituted a subsequent and independent cause. For this reason, liability against the defendants Klahn cannot be established and they are entitled to judgment as a

matter of law. The court correctly sustained the motion for summary judgment and dismissed the action as to them.

The remaining assignment of error is directed against the order sustaining the motion of Ted Mueller for summary judgment. As previously noted, there is a dispute whether Ted Mueller was a tenant or not and, consequently, whether or not he was a sublessor to Tom Mueller. It is also possible there might be evidence indicating some connection between this defendant and Tom Mueller which might amount to the exercise of control over the horses. We do not find any basis in the record upon which it may be concluded that Ted Mueller should be held free from liability as a matter of law. The trial court erred in sustaining his motion for summary judgment; its order of dismissal as to Ted Mueller is reversed and the cause is remanded for further proceedings.

AFFIRMED AS TO DEFENDANTS KLAHN, AND REVERSED AND REMANDED AS TO DEFENDANT TED MUELLER.

LEONARD LAUTENSCHLAGER, JR., APPELLEE, V. PEGGY JEAN LAUTENSCHLAGER, APPELLANT.

272 N. W. 2d 40

Filed November 29, 1978. No. 41664.

1. **Divorce: Custody: Courts.** The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties; the court always has power either to approve or disapprove stipulations or agreements.
2. **Divorce: Custody: Evidence: Statutes.** An award of custody will not be upheld when the evidence is insufficient to show the requirements of the best interests of a minor child in accordance with the provisions of section 42-364, R. S. Supp., 1976.

3. **Divorce: Custody: Evidence.** When the trial court disapproves a stipulation for custody or support, the parties shall be given an opportunity to secure and present evidence relevant to a reexamination of such issue, if such evidence has not previously been presented to the court.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Thomas A. Wagoner, for appellant.

James A. Kelly of Kelly, Kelly & Kelly, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from the findings and order for child custody in a decree of dissolution of marriage entered by the District Court for Hall County, Nebraska.

The action originated with a petition for dissolution of marriage filed by Leonard Lautenschlager, Jr., appellee, against Peggy Jean Lautenschlager, the appellant. Both in the petition and in the responsive pleadings, the parties alleged that appellant was a fit person to have custody of the parties' only child, Lonnie Lautenschlager, then nearly 4 years of age. Later by stipulation, the parties agreed that appellant should have custody and support in the amount of $100 per month. At the hearing, both parties testified in accordance with the pleadings and the stipulation. At the conclusion of appellant's testimony in chief, the trial court made inquiry concerning the receipt of ADC payments by the appellant. The appellant made a false answer to a question about the date she had received her last payment. A check of the record was made and the answer was corrected, whereupon the trial court

stated: "The respondent, in the Court's opinion, lied to this Court and that certainly is not conducive for custody." In response to a question by the court, appellee stated that if he were granted custody, his mother would care for the child during the daytime, and he would look over his son at nights and on weekends. No further evidence on the subject appears in the record.

Appellant first contends the trial court did not have jurisdiction to make an order inconsistent with the pleadings and the stipulation of the parties. Section 42-364, R. S. Supp., 1976, provides, in part, as follows: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing.

"(1) In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to:

"(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing;

"(b) The desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and

"(c) The general health, welfare, and social behavior of the children."

The rule that custody and visitation of minor children shall be determined on the basis of their best interests, long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this re-

sponsibility cannot be superseded or forestalled by any agreements or stipulations by the parties. It continues throughout the period of the minority of the child even without objections or requests on the part of the parents. Stipulations and agreements, when made, are subject to the approval of the court, which may be granted or denied according to the best interests of the child. Appellant's contention in this respect is not well-taken.

Appellant's second contention is that the record does not contain sufficient evidence to support the findings and order by the trial court. The evidence, shown in the record, relates only to the parties and not to the child. It does not contain any basis for the consideration by the court of the relationship of the child to each parent nor the general health, welfare and social behavior of the child as mentioned in section 42-364, R. S. Supp., 1976, (1) (a) and (c). Evidence concerning these matters must appear in the record. Personal observations by the court are not sufficient to support findings. Jorgensen v. Jorgensen, 194 Neb. 271, 231 N. W. 2d 360. In cases where the trial court concludes that a stipulation should not be approved, an opportunity should be given to the parties to secure and to present evidence relevant to a complete reexamination of the question of custody and the best interests of the child. In the present case, the findings and order for custody are vacated and the cause is remanded for hearing in accordance with this opinion.

The remainder of the decree of dissolution of marriage shall be and remain in effect from the date thereof.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

ROBERT DAHMS, DOING BUSINESS AS "THE DEPOT," APPELLANT, V. EVELYN JACOBS ET AL., DOING BUSINESS AS "THE DENIM DEPOT," APPELLEES.

272 N. W. 2d 43

Filed November 29, 1978. No. 41676.

Trade Names. One trade name is not an infringement of another if ordinary attention of persons or customers would disclose the differences.

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

Blevens, Blevens & Jacobs, for appellant.

Conner & Schelstraete, P.C., for appellees.

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

WHITE, J.

The plaintiff appeals from an order of the District Court refusing to enjoin the defendants from using the name "The Denim Depot" in connection with their clothing store in Crete, Nebraska. He alleges that the District Court erred in failing to find that this was an infringement upon the trade name "The Depot" which he had appropriated by registration and prior use in connection with his clothing store in York, Nebraska.

This is an equity case. While the judgments of the District Courts in equity cases are tried de novo in this court, nevertheless, upon review in this court, we place due consideration on the fact that the trial judge had an opportunity to and did observe the witnesses and weighed the evidence and believed one version of the facts rather than another. Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179.

In their briefs, the parties discuss the threshold issues of whether the name "The Depot" is a proper subject for private appropriation as a trade name

and whether the plaintiff has taken the steps necessary to so appropriate it. Our resolution of the case makes it unnecessary to reach those issues, for even if it is assumed that the plaintiff has properly appropriated "The Depot" as a trade name, he must still demonstrate that there has been an infringement of that trade name. This he has failed to do.

The applicable principles of law are set forth below. With certain exceptions, the rules are substantially similar whether plaintiff's claim of infringement is made under the statutes or under the common law right. See Peterson & Co. v. Jay, 158 Neb. 305, 63 N. W. 2d 174.

Under our economic system, competition between enterprises is thought to be a desirable objective. Protection of trademarks promotes this objective in two ways: The trade names allow the public to distinguish between the goods and services of the various merchants, and the merchants reap the benefits (or suffer the consequences) of their efforts. See Weber, The Reasons Behind The Rules in The Law of Business Torts, 38 Neb. L. Rev. 608, 614; Harryman v. Harryman, 93 Kan. 223, 144 P. 262.

Thus, the evil sought to be eliminated by trade name protection is confusion. The likelihood of such confusion is the ultimate question, and the burden of answering the question is on the plaintiff. "If then it can be said that ordinary persons, dealing with ordinary caution, are likely to be misled, then it follows that deception is the natural and probable result of the defendant's acts. Either actual or probable deception, or confusion, must be shown to entitle the plaintiff to the protection of the rule. This is usually accomplished by showing circumstances from which courts might justly conclude that persons are likely to transact business with one party under the belief they are dealing with another. Where there is no probability of deception, there can be no unfair competition." Personal Finance Co. v. Personal Loan

Service, 133 Neb. 373, 275 N. W. 324.

No precise rules can be laid down to determine whether this confusion exists or is likely to arise. Among the considerations are: (1) Degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.

The testimony in this case disclosed that the cities of York in York County, and Crete in Saline County, are approximately 49 miles distant, one from the other by the shortest route, Crete being southeast of York.

Without detailing the evidence, it can be said that, when viewed in the light most favorable to the plaintiff, it indicates at least some overlap of trade areas for York and Crete and a substantial similarity of product in certain areas. The plaintiff indicated he had already taken steps to open a "depot" in Fairbury and also to change the name of his store in Seward to "The Depot." Less testimony was offered on the trade areas of these towns than on that of York, but again, we accept the proposition that there is some competition with Crete. In a close case, those factors would add to the weight of the plaintiff's evidence in that they would increase the likelihood of confusion between two similar names.

We turn now, however, to what we consider to be the determinative issue in this case, i.e., the actual degree of similarity in the two names. Ray Root, the plaintiff's marketing expert, expressed his opinion that the names were similar enough to be confusing, as did the plaintiff himself. The defendants disagreed and on their behalf, Ralph Englert, the Deputy Secretary of State who approved the registration of "The Denim Depot" name, testified that

the addition of the descriptive word "Denim" was sufficient to distinguish the two trade names. The issuance of the permit by the Secretary of State is a ministerial act and we do not need to recognize his finding of fact, but we do note that he deals frequently in similar matters and for that reason take his opinion for its evidentiary value. To his opinion we add our own. We are unable to find that "The Depot" and "The Denim Depot" are so alike that they are likely to cause confusion in the minds of the public. Whether seen side-by-side, or at different times, the names, although similar, are distinguishable. One trade name is not an infringement of another if ordinary attention of persons or customers would disclose the differences. See Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552.

We should not be understood to say that the addition of a single word will always entitle a defendant to judgment in a suit alleging infringement of a trade name. We simply hold that the plaintiff in this case has failed to show, as he must, either actual or probable confusion.

The decision of the District Court is affirmed.

AFFIRMED.

ELSIE ROZANEK ET AL., APPELLEES, V. CITY OF FREMONT, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

272 N. W. 2d 45

Filed November 29, 1978. No. 41706.

1. **Municipal Corporations: Ordinances: Statutes.** A public improvement ordinance need not recite the necessity for its enactment unless the statute expressly requires that it do so.
2. **Municipal Corporations: Ordinances.** The passage of an ordinance requiring construction of a public improvement is in itself a finding of necessity because necessity is a legislative question rather than a judicial question.

Appeal from the District Court for Dodge County:

MARK J. FUHRMAN, Judge. Reversed and remanded with directions.

Lyle B. Gill, for appellant.

William G. Line, for appellees.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and RIST, District Judge.

BOSLAUGH, J.

The plaintiffs are residents and owners of real estate along the east side of Nye Avenue in the City of Fremont, Nebraska. On June 29, 1976, the city council adopted a resolution providing that sidewalks should be constructed along Nye Avenue where sidewalks had not been constructed or were not in good repair. This action was brought to declare the resolution void and enjoin the City from enforcing the resolution against the plaintiffs.

The trial court found that the resolution was void because it did not contain a finding that sidewalk construction was necessary as required by section 26-18 of the municipal code of the defendant, and enjoined the defendant from constructing sidewalks and assessing the cost against the plaintiffs' property under the resolution. The defendant has appealed.

Section 26-18 of the municipal code of the City of Fremont provides: "Whenever the city council shall deem it necessary that a sidewalk should be constructed * * *" the council shall so order and the property owner shall be notified. The ordinance prescribes the procedure to be followed and provides that in the event the owner fails to construct the sidewalk within 30 days the City may construct the sidewalk and assess the cost against the property.

Under section 16-661, R. R. S. 1943, the mayor and council of a city of the first class are authorized to construct or cause and compel the construction of

sidewalks in the city of such material and in such manner "as they may deem necessary."

The general rule is that a public improvement ordinance need not recite the necessity for its enactment unless the statute expressly requires that it do so. The passage of an ordinance requiring construction is in itself a finding of necessity because necessity is a legislative question rather than a judicial question. See 13 McQuillin, Municipal Corporations (3rd Ed.), § 37.67, p. 178. This rule was followed in Burrows v. Keebaugh, 120 Neb. 136, 231 N. W. 751, and Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734, which were cases involving similar statutes relating to paving districts. In the Morse case this court said a formal declaration of necessity was not required by a statute which authorized construction of improvements when "declared necessary by the mayor and city council."

The resolution involved in this case was adopted pursuant to a comprehensive plan in which the streets were classified and priorities assigned upon the basis of need as determined by a consideration of various factors. The plan was based upon a report prepared by a consulting engineer employed by the City. Nye Avenue was classified as both a vehicle-arterial and pedestrian-collector street and had the third highest exposure index of the streets in that district. The plaintiffs complain that the plan did not take into account the fact that sidewalks had been constructed along one side of Nye Avenue.

The answer to the plaintiff's contention is that the City considered it necessary to construct sidewalks on both sides of Nye Avenue. That determination was a legislative question and not a judicial question.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment dismissing the action.

REVERSED AND REMANDED WITH DIRECTIONS.

S & S LP GAS CO., A CO-PARTNERSHIP, ET AL., APPELLANTS, V. ROBERT F. RAMSEY, APPELLEE.

272 N. W. 2d 47

Filed November 29, 1978. No. 41936.

1. **Workmen's Compensation: Statutes.** Even though there is no present prospect of improvement of a condition of total and permanent disability or of further rehabilitation, the employer continues to be responsible for further nursing care and therapy under the terms of section 48-120, R. R. S. 1943.
2. _____: _____. The Nebraska Workmen's Compensation Court has continuing authority to determine the necessity, character, and sufficiency of medical services furnished or to be furnished and to order a change therein when it deems such change is desirable or necessary. § 48-120, R. R. S. 1943.

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

Girard and Gale, for appellants.

Kenneth W. Payne, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from the Nebraska Workmen's Compensation Court.

Robert F. Ramsey, the appellee, was injured in a truck-train accident on April 15, 1974, while in the course and scope of his employment by S & S LP Gas Co., one of the appellants. Appellee was totally and permanently disabled by his injuries. The appellants paid his medical and hospital expenses together with full disability benefits of $80 per week. Appellee, after leaving the hospital, entered the Good Samaritan Village, a nursing home, where he has subsequently received necessary care and therapy. It appears from the evidence that at some time after April 1, 1976, the prospects for the cure and rehabilitation of the appellee had become entire-

ly negative. Appellee continued to be helpless and unable to perform any physical function without assistance and therapy is required on a maintenance basis, that is, to preserve his physical condition and mental attitude. It is not essential that the assistance to appellee be furnished by a doctor, nurse, or other medical person. The appellee, however, has no home and is unable to secure the necessary care and attention except at the Good Samaritan Village or at a similar facility.

On January 14, 1977, the appellants filed their petition with the Nebraska Workmen's Compensation Court setting forth the facts mentioned above and praying for an adjudication that they should not continue to be liable for the monthly custodial expense of the appellee to the Good Samaritan Village, or if appellants were required to pay such custodial expense, the monthly disability benefits accruing to the appellee should be reduced by the amount of such custodial expense.

A single judge held the initial hearing and found the above facts. He also found the monthly custodial expense for room, board, and laundry for the appellee at Good Samaritan Village was $185 and ordered that such amount be charged against the disability benefits due the appellee. On rehearing to the three-judge court, the following findings were made: That appellee suffered total and permanent disability from April 15, 1974; that he has achieved full healing, but needs assistance in eating, bathing, dressing, going to the toilet, and getting in and out of bed; that he needs nursing-type care on almost a 24-hour basis and special therapy to maintain his physical condition and positive mental attitude as provided by the Good Samaritan Village; that disability benefits are separate from hospital and medical benefits and may not be charged for any portion of such expense. Appellants were ordered to continue the payment of $80 per week disability benefits

together with the reasonable hospital, medical, custodial, and nursing home charges by the Good Samaritan Village. An appeal was taken to this court. We affirm the judgment.

The primary question sought to be raised by the appeal is whether or not an employer may be held liable for the care of a totally and permanently disabled employee after the time when maximum cure and rehabilitation have been achieved. This question was resolved in Spiker v. John Day Co., *ante* p. 503, 270 N. W. 2d 300, filed since the briefing and submission of the present action. The holding there was that, even though there was no present prospect of improvement of a condition of total and permanent disability or of further rehabilitation, the employer continues to be responsible for further nursing care and therapy under section 48-120, R. R. S. 1943.

It is conceivable that the possibility of cure or rehabilitation may be subject to reexamination in the light of medical progress or unexpected changes in the employee's condition. The means for dealing with this possibility are provided in the final paragraph of section 48-120, R. R. S. 1943, which provides: "The court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of doctor, physician, hospital, or rehabilitation facility when it deems such change is desirable or necessary." The order of the compensation court is within the scope of the authority granted by the statute. If there are further developments either as to the condition of the appellee or as to the kind of care and treatment appropriate to that condition, a further order may be made by the compensation court.

Under section 48-185, R. S. Supp., 1976, no ground has been shown for modifying, reversing, or setting aside the order of the Nebraska Workmen's Compensation Court, and such order is affirmed.

Since the employer instituted the appeal to this court and did not secure a reduction in the award to the employee, an attorney's fee of $750 is allowed.

AFFIRMED.

CLARENCE L. PARSON, APPELLEE, V. GERALD E. CHIZEK, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

272 N. W. 2d 48

Filed November 29, 1978. No. 41995.

1. **Administrative Law: Notices: Appeal and Error: Time.** Benefit Regulation No. 8 promulgated by the Commissioner of Labor is invalid insofar as it requires that a claimant's notice of appeal when given by mail be actually received within 10 days after mailing of the notice of the deputy's determination.
2. **Appeal and Error: Notices: Statutes: Time.** A notice of appeal filed pursuant to section 48-634, R. R. S. 1943, which is properly addressed and to which sufficient postage has been affixed, shall be valid if it is deposited in the United States mail within 10 days after the mailing of the notice of the deputy's determination.

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

James R. Jones and John W. Wynkoop, for appellant.

Glenn H. Stevens of the Legal Aid Society, for appellee Parson.

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

CLINTON, J.

This is an appeal from an order of the District Court for Douglas County which reversed a decision of the Nebraska Appeal Tribunal, Department of La-

bor, State of Nebraska, entered on October 8, 1976. The Nebraska Appeal Tribunal had dismissed the appeal of the plaintiff Parson from a deputy's determination that the plaintiff was not currently entitled to unemployment compensation. See § 48-630 et seq., R. R. S. 1943. The sole issue on this appeal is whether the plaintiff-claimant gave timely notice of appeal from the deputy's determination. The resolution of that issue depends upon the validity of Benefit Regulation No. 8, promulgated by the Commissioner of Labor, which prescribes the time and manner of giving notice of appeal. We affirm.

Section 48-634, R. R. S. 1943, provides the statutory authority for appeal from determinations of the deputy. It states in part: "The claimant or any other party entitled to notice of a determination as herein provided, may file an appeal from such determination with an appeal tribunal within ten days after the date of mailing of the notice to his last-known address, or, if such notice is not mailed, within seven days after the date of delivery of such notice." The notice referred to in this section is the notice of determination by the deputy which is mandated by section 48-632, R. R. S. 1943. The latter provides in part: "Notice of a determination upon a claim shall be promptly given to the claimant by delivery thereof or by mailing such notice to his last-known address."

The Commissioner of Labor is charged with administering the employment security law and, to accomplish that purpose, is given authority to adopt, amend, and rescind rules and regulations ". . . if the same are consistent with the provisions of [the Employment Security Law]." § 48-606, R. R. S. 1943. See §§ 48-601 to 48-669, R. R. S. 1943. Accordingly, as section 48-634, R. R. S. 1943, prescribes the time for appeal, but does not prescribe the manner, the manner of filing an appeal is provided for by the regulation in question.

Benefit Regulation No. 8 provides: "Presentation of Appealed Claims. (a) The party appealing from a determination or redetermination of the deputy shall file with the Commissioner, any local employment office, or at the central office of the Division of Employment, Lincoln, Nebraska, a notice of appeal, either on a form prescribed by the Commissioner setting forth the grounds upon which the appeal is sought and other information which may be required thereby, or by letter expressing a desire to appeal. Such notice or letter must be received in one of said places within seven calendar days after delivery of the notice of the determination or redetermination by the deputy or within ten calendar days after notification was mailed to his last known address."

It is to be observed that notice of the determination may be given to the claimant by mail and that, in such case, the claimant's appeal time begins to run from the date of the mailing of the notice and not from the date of its receipt. Benefit Regulation No. 8 is consistent with the statute in that, if notice of determination is given by mail, claimant's time for appeal begins to run with the mailing and not from time of receipt. However, under Benefit Regulation No. 8, the mailing of the notice by the claimant within the 10-day period is not sufficient to give notice to the Department of Labor; actual receipt of the notice in one of the specified offices of the Department of Labor within the 10-day period is necessary.

The evidence shows that the claimant deposited his notice of appeal in an official U. S. mail receptacle on Friday, October 1, 1976. The notice was in a properly addressed envelope with sufficient postage attached and was mailed at an hour which would permit pickup by the postal service on that day. This was on the 9th day after the mailing of the deputy's determination and 6 days after its receipt by the claimant. The notice of appeal was

mailed in Omaha and addressed to a local employment office of the Department of Labor as permitted by law; however, it was apparently not received by the office until Tuesday, October 5. Had it been received on Monday, October 4, it would, even under the regulation, have been timely filed since Saturday and Sunday must be excluded from the 10-day computation. §§ 25-2221 and 49-1203, R. R. S. 1943.

The arguments of the parties, reduced to their essence, may be briefly stated. The commissioner asserts that, since he is granted rule-making power, interpreting the statutory word "filed" to require actual receipt, as recited in Benefit Regulation No. 8, is not unreasonable since the statute does not specifically cover the matter. Therefore, since claimant's letter was not actually received within the 10-day period, the appeal was untimely. The claimant argues, since the statute provides that the mailing of the notice of determination by the commissioner begins the running of the appeal period — that is, the counting of days begins on the day following mailing irrespective of the time of receipt — it follows that the mailing of the notice by the claimant within the 10-day period conforms to the general statutory pattern and should be sufficient. He argues that the regulation is unreasonable and void and it deprives him of due process.

The statutes we have cited contemplate filing the notice of appeal by using United States mail but do not specifically provide when service or filing is complete. The procedural aspects of the statute ought to be liberally construed in order to accomplish the beneficent purposes of the Employment Security Law. Smith v. Iowa Employment Security Commission, 212 N. W. 2d 471 (Iowa). Thus, for reasons hereafter set forth, we hold that the portion of Benefit Regulation No. 8 requiring timely receipt of a mailed notice of appeal in one of the enumerated offices, for the notice to be effective, is invalid.

First: Section 48-634, R. R. S. 1943, establishes a statutory policy which should cut both ways. The deposit in the United States mail by the Commissioner of Labor of the notice of the deputy's determination begins the 10-day appeal period. The period does not begin with receipt of the mailed notice by the claimant. Thus, in the absence of a definitive statutory requirement, deposit in the mail by the claimant of the notice of appeal, properly addressed with sufficient postage attached, within the 10-day appeal period, ought to be construed as filing within the period. Section 48-606, R. R. S. 1943, provides that rules and regulations of the commissioner must not be inconsistent with the provisions of the Employment Security Law. Benefit Regulation No. 8 is, in the respect indicated, inconsistent with the pattern of section 48-634, R. R. S. 1943.

Second: The Legislature has, since the enactment of the Employment Security Law, established a public policy which ought to prevail in the absence of a specific statutory provision. Section 49-1201, R. R. S. 1943, says in part: "Any . . . statement . . . authorized to be filed or made to the State of Nebraska . . . which is: (1) Transmitted through the United States mail; (2) mailed but not received by the state or political subdivision; or (3) received and the cancellation mark is illegible, erroneous, or omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the . . . statement . . . was deposited in the United States mail on or before the date for filing . . . ." Although this statute may not be literally applicable, it is clearly indicative of legislatively approved public policy.

Third: Respectable precedent from other jurisdictions supports the interpretation of the statute we here give. See Smith v. Iowa Employment Security Commission, *supra*. State v. Peck, 158 Ohio St. 122, 107 N. E. 2d 145, seems directly on point. There the

Supreme Court of Ohio held that, where notices were authorized to be filed by United States mail, such notices were deemed filed when properly deposited in the mail. Griffin v. Board of County Commissioners, 20 S. Dak. 142, 104 N. W. 1117, also follows this view.

The judgment is affirmed and the cause is remanded with directions that the Nebraska Appeal Tribunal hear the claimant's appeal on the merits.

AFFIRMED.

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

272 N. W. 2d 51

Filed November 29, 1978. No. 42030.

1. **Criminal Law: Burglary: Words and Phrases.** Breaking is an essential element of the crime of burglary; any physical force, however slight, in making any entry is sufficient to constitute a breaking.
2. **Criminal Law: Courts: Witnesses: Evidence.** It is the duty of the trial court, sitting without a jury, to determine the credibility of witnesses and to weigh and resolve conflicts in the evidence. Its findings, when supported by sufficient, competent evidence, will be upheld.

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

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, for appellant.

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

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

KUNS, Retired District Judge.

In this case, the State of Nebraska charged that

Robert Crispell, the defendant and appellant, committed the crime of burglary in Lancaster County, Nebraska, on October 23, 1976. Appellant pleaded not guilty, waived trial by jury, and was found guilty as charged by the court. He appeals from the judgment of conviction. We affirm the judgment.

The only question raised by the appeal is whether the evidence was sufficient to support the findings of the court, particularly as to the finding of a breaking by appellant. The record shows that appellant did take some golf clubs and two .410 gauge shotguns from a garage at the date and place charged. The complainant testified that he had put property in the garage during the latter part of September or the first week of October 1976, that there were no holes in the wall at that time, and that he had then locked the garage doors. Appellant's companion testified that appellant handed the golf clubs to him through a hole in the wall and later emerged through the hole; the hole was about 12 to 18 inches high and 2 feet long, located about 6 feet 6 inches above the floor. Another witness said that she had heard shuffling sounds and perhaps the sound of boards breaking. The witness who bought the stolen property from appellant testified that appellant had told him that he was involved in "the breaking of this garage." The appellant testified that during the past year he had observed the hole in the wall a couple of dozen times while he was working in the garage space from which the entry was made; he further stated that he had no recollection of entering the garage or taking the property. Upon this evidence, the trial court found that the charge had been established.

A breaking is an essential element of the crime of burglary; mere entry through an existing opening is not a breaking. McGrath v. State, 25 Neb. 780, 41 N. W. 780. No particular amount of force in breaking is necessary and any exercise of physical force to ef-

fect an entry, however slight, is sufficient to amount to a breaking. Metz v. State, 46 Neb. 547, 65 N. W. 190; Young v. State, 133 Neb. 644, 276 N. W. 387. The trial court was obliged to determine the credibility of witnesses, weigh the evidence, and resolve conflicts. It did so. Its findings will be upheld, if there is sufficient, competent evidence to support them. State v. Smith, 199 Neb. 368, 259 N. W. 2d 16; State v. Tiff, 199 Neb. 519, 260 N. W. 2d 296. The only conflict in the testimony relating to the existence of the hole in the wall was raised by the appellant; this statement was weakened by appellant's own reference to the breaking. The competent evidence is sufficient to support the court's findings.

No error having been shown, the judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF KING'S LIMOUSINE SERVICE, INC. GENTRY REAL ESTATE CO., DOING BUSINESS AS THE GENTRY LIMOUSINE CO., AND HAPPY CAB CO., DIVISION OF HUNT TRANSPORTATION, INC., APPELLANTS, V. KING'S LIMOUSINE SERVICE, INC., APPELLEE.

272 N. W. 2d 359

Filed December 6, 1978. No. 41668.

1. **Public Service Commission: Statutes: Motor Carriers.** Under section 75-311, R. R. S. 1943, a certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the requirements, rules, and regulations of the Nebraska Public Service Commission thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity.
2. **Public Service Commission: Burden of Proof: Motor Carriers.** An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission.

3. **Public Service Commission: Appeal and Error: Motor Carriers.** This court will not disturb an order of the Public Service Commission unless its order is illegal, arbitrary, capricious, or unreasonable.
4. **Public Service Commission: Evidence: Appeal and Error: Motor Carriers.** Where the fitness of an applicant is an issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the Commission if the order of the Commission is supported by competent evidence.
5. **Public Service Commission: Motor Carriers.** Illegality of past operations does not necessarily bar a carrier from seeking and obtaining an additional certificate for operating authority.

Appeal from the Nebraska Public Service Commission. Affirmed.

Peterson, Bowman, Larsen & Swanson, for appellants.

Richard T. Kizer of Hotz, Kluver & Kizer, for appellee.

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

BRODKEY, J.

This is an appeal from an order entered on June 14, 1977, by the Nebraska Public Service Commission, granting an application filed on October 22, 1976, by King's Limousine Service, Inc., of Omaha, Nebraska, (hereafter referred to as King's), which sought authority to operate in intrastate commerce in Nebraska a luxury limousine and van-type service transporting passengers and their baggage between points in Omaha, Nebraska; and between points in Omaha, Nebraska, on the one hand, and, on the other hand, points throughout the State of Nebraska. Following a hearing, the Public Service Commission on May 12, 1977, denied King's application; but on June 14, 1977, sustained King's motion to rehear and/or reconsider its order dated May 12, 1977; and in its order of June 14, 1977, granted authority to King's to engage in the "Transportation of passen-

gers and their baggage in limousine-type vehicles of nine (9) passenger capacity or less. * * * Between points in Omaha, Nebraska, and between points in Omaha, Nebraska, on the one hand, and, on the other hand, points throughout the State of Nebraska." The order further provided that a certificate of public convenience and necessity should be issued to King's upon compliance with certain terms and conditions set forth in the order, and that King's should not conduct operations until a certificate of public convenience and necessity was issued. Notice of appeal to this court was thereafter filed by Happy Cab Co., Division of Hunt Transportation, Inc., one of the original protestants, and Gentry Real Estate Co., doing business as The Gentry Limousine Co., which had filed a petition for leave to intervene in opposition to King's application, and thereafter took part in the hearing before the Commission. In addition, protests to the granting of the application were also filed by Greyhound Lines, Inc., and Yellow Cab, Inc. It appears that Greyhound Lines, Inc., subsequently withdrew from the case; and Yellow Cab, Inc. on September 14, 1977, gave notice to the Commission of its desire to become a party to the appeal, but did not file a brief in this court.

In their brief, protestants-appellants assign as error the following findings by the Public Service Commission: (1) That the public convenience and necessity require the operations of the applicant under the authority sought in this application; (2) that the applicant showed any need whatsoever for operations beyond the city of Omaha; and (3) that the applicant was fit to conduct operations under the authority sought in this application. They also claim the Commission erred in failing to find that existing carriers would be injured by a grant of the application. We affirm the action of the Public Service Commission.

It appears from the record Edward Lanning King

and his wife are co-owners of King's Limousine Service, Inc., which was incorporated in October or November of 1976. King originally commenced his operations in the city of Omaha in 1970, at which time he was engaged in supplying limousine and driver's services for funerals and funeral homes in the city, which is an excepted operation under section 75-303(7), R. R. S. 1943. Over the years the demand for luxury or VIP-type limousine service has expanded. He has frequently supplied that type of service for weddings and for various businesses and organizations in the city, including the City Auditorium, Central States Health & Life Company of Omaha, the First National Bank, The Omaha National Bank, the Orpheum Theater, Weyerhaeuser Company, Omaha Steaks International, Mutual of Omaha, Aksarben, KETV, KMTV, WOW-TV, Methodist Hospital, Brandeis, Boys Town tours, and others. King's supplied drivers with their limousines, and the normal method of operation is that the drivers pick up the clients in the limousines and deliver them to the requested locations. The drivers then wait for the client until the client wishes to move on to a new destination. King testified the bulk of his business originates in the Omaha area, but in the past he has been hired to transport people in his limousines to other towns, such as Lincoln or North Platte. King freely admitted he had been operating his luxury limousine services without a certificate of public convenience and necessity as long as 2 to 3 years prior to 1976, at which time he was advised he should obtain such a certificate if he desired to continue with the limousine service. He also testified he was contacted by a member of the Public Service Commission, who told him to "honor his obligations", which had already been booked by the applicant. It further appears he had also been advertising in the yellow pages of the telephone book for VIP services; but an agent of the Commission

requested that he change this advertising, which he did. King incorporated his business in October or November of 1976, and immediately filed an application to operate a luxury limousine service with the Public Service Commission. In explaining his failure to obtain a certificate of public convenience and necessity for his operations prior to his application in 1976, King testified: " * * * I didn't get it because this, this stuff worked up on me so gradual that I didn't realize how much I was doing. The amount of money and stuff that it would cost to get it, it just didn't seem worthwhile at the time. And there was so little of it, and nobody seemed to be making any, many fusses about it."

In addition to King, other witnesses appeared at the hearing before the Public Service Commission for the purpose of establishing the need for the special type of limousine services supplied by King's. One of the largest users of those services was the Omaha Civic Auditorium. Charley Mancuso, Auditorium, Stadium, and Theater manager for the city of Omaha, was an important witness in support of the applicant, King. His duties included the making of arrangements for attractions to appear in the City Auditorium, stadium, and Orpheum theater. In answer to a question as to whether the contracts for such attractions contain riders making limousine service mandatory, he replied: "A. No question about that. The limousine service definitely is mandatory, the type of limousine service is, and it's one of the most important ones. We have, in the last five or six years, haven't had any problem whatsoever. Prior to that time we did get a few complaints, but because we only had [a] few concerts, our complaints weren't great. Q. How many outfits are you aware of in the City of Omaha who, who serve your needs as far as the limousine service is concerned? A. Only one. King's Limousine."

Also appearing as a witness in support of King's

application was Jack Wolff, Supervisor of Claims for Central States Health & Life Company of Omaha, who testified his company had used the services of King's Limousine Service in the past for a charity fund-raising event, and could use luxury limousine service for sales meetings with regional managers and their employees.

Thomas Jenkins, at that time president of the Student Bar Association of Creighton University School of Law also appeared and testified in support of the application to the effect speakers of interest to the legal community are brought into the Omaha area, and he felt a limousine would be the most appropriate form of transportation for them and would be preferable to having a cab meet the individual at the airport. Also introduced into evidence was an affidavit by F. Phillips Giltner, corporate president of the First National Bank of Omaha, stating the limousine service provided by applicant was, in his opinion, unique to the area.

Paul M. Grieger, owner of the Gentry Limousine Co., and Harold Hunter, vice president of Happy Cab Co., testified in opposition to the application. Grieger testified his company had been granted authority to operate a limousine service between points and places within an 80-mile radius of Lincoln, Nebraska, over irregular routes and from said radial area on the one hand, and on the other hand, points and places throughout the State of Nebraska. The authority was restricted against traffic originating at Omaha, Nebraska, unless it was destined to Lincoln, Nebraska. This would clearly restrict the Gentry Limousine Co. from operating a limousine service within the city of Omaha as long as the traffic originated in said city and was not destined for Lincoln; hence appellee contends Gentry is not a competitor of King's within the city of Omaha and could not provide limousine service solely within said city. Hunter, testifying on behalf of Happy Cab Co., stated his

company had been granted a certificate of public convenience and necessity to operate taxicabs within the city of Omaha and vicinity and at the time was operating 30 pieces of equipment with an additional 6 on order. He also testified his firm had made arrangements with various Omaha companies to rent luxury cars, and drivers employed by his firm would operate those cars when people requested such service. In its order of June 14, 1977, the Public Service Commission found that although Happy Cab may have contractual arrangements with automobile leasing firms for luxury automobiles, such operations cannot be run under Happy Cab's certificate of public convenience and necessity unless they assume full control of the operation and charge the rate schedule of $6 per hour with a 2-hour minimum charge, called for in their rate structure, instead of the increased charge of a minimum of $50 per night proposed by Happy Cab. The Commission found the existing carriers could not adequately perform the proposed services. When asked why he was opposing the application, Hunter replied the city was saturated with taxicabs and the cab industry did not need any more competition.

A review of certain pertinent and applicable principles of law will be helpful at this point. Section 75-311, R. R. S. 1943, provides, in part, as follows: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future public convenience and necessity;

otherwise such application shall be denied." We have also held that under section 75-311, R. S. Supp., 1976, an applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Dilts Trucking, Inc. v. Peake, Inc., 197 Neb. 459, 249 N. W. 2d 732 (1977). In Dilts we also held that where the evidence is in conflict, the weight of the evidence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable.

We believe there is ample evidence in the record to sustain the finding of the Commission that there is a need for the type of luxury limousine service which has in the past been supplied within the city of Omaha and environs, and to a limited extent, elsewhere in the state; and that applicant is fit, willing, and able to provide that service. We do not believe the evidence sustains the generalized fear of the protestants that the granting of the certificate will injure existing carriers providing the same or similar service. Appellants' principal contention appears to be that because of King's past violations in providing such services without having first obtained a certificate of public convenience and necessity, applicant should be denied the right to provide such needed services henceforth, and should be punished for his past violations. We agree with appellants' contentions that this case is not a "color of right" or "color of authority" case because it is clear King was not operating under any misunderstanding as to the extent of his right or authority to provide the services in question, and he freely admitted he operated without authority to do so. His explanation for operating without proper authority has previously

been set forth in this opinion. We agree it is proper that those violations be considered in connection with the determination of his "fitness" under the statute. However, we have held where the fitness of the applicant is an issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the Commission if the order of the Commission is supported by competent evidence. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603 (1950). Illegality of past operations does not necessarily bar a carrier from seeking and obtaining an additional certificate for operating authority. North American Van Lines, Inc. v. I. C. C., 386 F. Supp. 665 (1974). The fitness of the applicant was clearly an issue in this case. The Commission had all of the foregoing evidence before it, and apparently reached the conclusion applicant was not unfit to provide the service in question. Under the authority previously cited, we conclude the Commission acted within the scope of its authority; the order of the Commission was not illegal, arbitrary, capricious, or unreasonable; and we affirm the decision of the Public Service Commission.

AFFIRMED.

GRETNA PUBLIC SCHOOL, DISTRICT NO. 37, APPELLEE AND CROSS-APPELLANT, V. STATE BOARD OF EDUCATION, STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

272 N. W. 2d 268

Filed December 6, 1978. No. 41683.

1. **Administrative Law: Statutes: Appeal and Error.** The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
2. _____: _____: _____. Section 84-917, R. R. S. 1943, does not provide a right of appeal from a declaratory ruling of an administrative agency pursuant to section 84-912, R. R. S. 1943.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and dismissed.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

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

SPENCER, C. J., PRO TEM.

This action originated before the Nebraska State Board of Education for a declaratory ruling pursuant to section 84-912, R. R. S. 1943, directed to the computation of the amount of state-apportioned school funds withheld from Gretna Public School, District No. 37. We determine the District Court was without jurisdiction in this matter, so reverse and dismiss.

On January 23, 1975, the Commissioner of Education notified Gretna Public School District No. 37, its share of the upcoming distribution of school funds would be reduced by 10 percent because it had employed a teacher during the 1973-74 school year who did not possess a valid certificate. The school superintendent promptly requested a reconsideration of the matter. However, the school district took no formal action to challenge the imposition of the penalty until May 1976. At that time it filed a petition before the State Board for a declaratory ruling pursuant to section 84-912, R. R. S. 1943. The State Board conducted a hearing on August 13, 1976, in response to the petition. On September 24, 1976, the Board found the school district lacked legal capacity to sue and that necessary parties had not been named as defendants. The Board further found that even if the pleading defects were ignored, the action of the Commissioner in assessing the penalty was proper.

The school district filed a petition in the District Court for an appeal pursuant to section 84-917, R. R. S. 1943. The State Board of Education was named as respondent. A special appearance and a demurrer filed by the board were both overruled.

The District Court determined the penalty had been properly imposed but improperly computed. The court found the penalty should have been assessed in 1974, when the uncertified teacher was in the employ of the school district, and the Commissioner was not authorized to deduct 10 percent from the district's 1975 entitlement because this would result in a larger penalty. The order of the State Board was reversed. The matter was remanded for entry of a declaratory ruling in accordance with the judgment. The court further directed the Commissioner to henceforth make a determination as to whether all teachers are certified before the funds are distributed to the school districts. The State Board has perfected an appeal from this judgment and the school district has cross-appealed.

Section 84-912, R. R. S. 1943, provides: "On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged unless it is altered or set aside by a court. *Such a ruling is subject to review in the manner provided in the code of civil procedure.* Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition." (Italics supplied.)

It is clear from the language of the section we have italicized that the Legislature did not intend to provide a right of appeal under the Administrative Procedure Act from declaratory rulings made by an

agency. It is significant to note that the Model State Administrative Procedure Act, which served as a pattern for the Nebraska Act, does provide for such an appeal. Section 7 of the original Model Act, which is in all other respects identical to section 84-912, R. R. S. 1943, reads: "Such a ruling is subject to review in the [District Court] in the manner hereinafter provided for the review of decisions in contested cases."

Although section 84-917, R. R. S. 1943, confers the right of appeal upon "any person aggrieved by a final decision in a contested case" a proceeding to obtain a declaratory ruling from an agency is not a contested case as that term is used in the Act. "Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. § 84-901 (3), R. R. S. 1943.

The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Lydick v. Johns, 185 Neb. 717, 178 N. W. 2d 581 (1970). We hold that section 84-917, R. R. S. 1943, does not provide a right of appeal from a declaratory ruling of an administrative agency pursuant to section 84-912, R. R. S. 1943.

Because of the disposition we make of this case, it is unnecessary to consider the other assignments of error advanced by the State Board, or the cross-appeal of the school district.

The judgment of the District Court is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

SCHOOL DISTRICT, THE CITY OF YORK, APPELLEE AND CROSS-APPELLANT, V. STATE BOARD OF EDUCATION, STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

272 N. W. 2d 363

Filed December 6, 1978. No. 41684.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and dismissed.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

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

SPENCER, C. J., PRO TEM.

This action originated before the Nebraska State Board of Education for a declaratory ruling pursuant to section 84-912, R. R. S. 1943, directed to the computation of the amount of state-apportioned school funds withheld from the school district in the City of York. This case is controlled by our decision in Gretna Public School, District No. 37 v. State Board of Education, *ante* p. 769, 272 N. W. 2d 268 (1978).

For the reasons stated in Gretna Public School, District No. 37 v. State Board of Education, *supra*, the judgment of the District Court is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

MARION W. BRUCKNER, APPELLEE, V. RICHARD J. BRUCKNER, APPELLANT.

272 N. W. 2d 270

Filed December 6, 1978. No. 41733.

1. **Divorce: Parent and Child.** A decree fixing child support is subject to modification upon a showing of a material change of circumstances.
2. _____: _____. Where, subsequent to a decree fixing child support, there is a material reduction in earnings of the husband due to illness, an increase in his debts, and an increase in the earning capacity of the wife, the mere showing of a rise in the cost of living is insufficient as a change in circumstances to warrant an increase in the husband's child-support obligations.

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

Richard E. Shugrue, for appellant.

Russell S. Daub, for appellee.

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

WHITE, J.

Appellee Marion Bruckner filed an application for modification of the order of child support in the District Court. Appellant Richard Bruckner responded by requesting a reduction of child support, filed a motion seeking a determination that his obligations under the original decree for child support had been fully met, and prayed for an order releasing him from further obligations.

The trial court increased the child support for three children from $87 per month each, to an amount of $100 per month for the older child, to $135 per month each for the two younger children. The trial court denied appellant's request for a reduction and did not pass on appellant's request for an order determining he had fully paid the child-support obligation.

The parties were divorced in January 1967. In the decree, the court approved a property settlement agreement, and a stipulation for child-support payments of $87 per month for each of seven children. The appellant further agreed to pay high school and college tuition for each of the children.

The appellant, a successful practicing lawyer, complied with the support order and, in addition, contributed substantial sums to his children and to his former wife to complete her education. The evidence introduced by him, which is largely conceded by appellee, indicates payments in excess of $36,000 over the obligations in the decree. Whether these additional payments can properly be credited as support payments, or as gifts, or fulfillment of other obligations under the decree, was not decided by the trial court and will not be decided by this court.

The evidence disclosed the appellant's practice was curtailed and because of illness he suffered a substantial loss of income, to the extent that his income in 1977 was approximately $6,000. Debts to the Internal Revenue Service and others exceeded $100,000. There was some indication the appellant had resumed active practice and might reasonably be expected to have increased income in future years.

The appellee, who herself had been the recipient of large gifts from appellant after the divorce, had, with appellant's help, completed her requirements, received her Ph. D., and was employed as a teacher earning approximately $8,000 per year. She testified her monthly expenses were $660 per month.

A decree fixing child support is subject to modification upon a showing of a material change of circumstances. See Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542.

The trial court could have properly found that the amount of the original support was not unreasonable. The appellant's financial position was poor, but it was likely his return to active law practice

would remove some of the difficulties. The court's order refusing a reduction of support is affirmed.

However, the court went beyond that and increased the payments when the evidence showed, at the time of the hearing, that the appellee herself was in better position than the appellant to contribute to the support of the minor children. This determination was a clear abuse of discretion. The judgment of what is fair includes not only a consideration of the circumstances of the children but of the father as well. See Fogel v. Fogel, 184 Neb. 425, 168 N. W. 2d 275. The decision of the trial court increasing the child support is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

AMES BANK, A CORPORATION, APPELLEE, V. PACENCO, INC., DOING BUSINESS AS BENSON CAR SALES, A CORPORATION, ET AL., APPELLANTS.

272 N. W. 2d 271

Filed December 6, 1978. No. 41736.

Summary Judgments: Motions, Rules, and Orders. The purpose of a motion for summary judgment is to pierce the allegations of a pleading and show conclusively that the controlling facts are otherwise than as alleged.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Judgment on petition affirmed. Cause remanded for further proceedings on defendants' cross-petition.

John M. DiMari and William R. Gores of Respeliers & DiMari, for appellants.

J. Michael Coffey and Lee H. Hamann of The Law Offices of Emil F. Sodoro, P.C., for appellee.

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

BOSLAUGH, J.

This was a suit on a promissory note executed by the defendant, Pacenco, Inc., and a guaranty agreement executed by the defendants, Paul C. Centineo and Marjorie I. Centineo. The plaintiff filed a motion for summary judgment on the grounds that the pleadings showed there was no genuine issue as to any material fact and the plaintiff was entitled to judgment as a matter of law.

The defendants' answer alleged a failure of consideration for the note and a general denial. After the motion for summary judgment had been filed the defendants filed a cross-petition alleging that the plaintiff and the defendants had been engaged in a course of dealing for a period of 10 years or more; that as a part of that course of dealing the defendants borrowed money from the plaintiff to purchase automobiles; that the plaintiff extended the notes of the defendants beyond their maturity dates, if necessary, until the automobiles financed by the notes had been sold; that as a part of the consideration for the guaranty agreement the plaintiff had agreed to extend a line of credit to the defendants in the amount of $100,000; and that on or about May 1, 1976, the plaintiff unreasonably and without good cause withdrew the defendants' line of credit damaging the defendants and rendering them unable to properly operate their business and pay their obligations to the plaintiff and others. The plaintiff's answer to the cross-petition was substantially a general denial.

At the hearing on the motion for summary judgment the plaintiff introduced the note and guaranty agreement, admissions of the defendants, and other evidence which established that the plaintiff was entitled to recover on the note and guaranty agreement. No evidence was introduced relating to the cross-petition other than the cross-petition itself which was offered by the defendants.

The trial court found that the plaintiff's motion

should be sustained and that the plaintiff should recover the sum of $10,534.35 with interest from the defendants. There was no finding or order which referred to the cross-petition.

The purpose of a motion for summary judgment is to pierce the allegations of a pleading and show conclusively that the controlling facts are otherwise than as alleged. The plaintiff did this with respect to the answer and established that it was entitled to summary judgment on the petition.

With respect to the cross-petition there was a complete failure to pierce its allegations. The plaintiff did not establish a right to summary judgment on the cross-petition. As we interpret the record the judgment of the trial court was in the nature of a partial summary judgment. The trial court did not dismiss the cross-petition and it is still pending in the District Court.

The judgment for the plaintiff on the petition is affirmed. The cause is remanded for further proceedings on the cross-petition.

JUDGMENT ON PETITION AFFIRMED.
CAUSE REMANDED FOR FURTHER
PROCEEDINGS ON DEFENDANTS'
CROSS-PETITION.

SHIRLEY A. SIMMONS, APPELLANT, V. LEO E. O'BRIEN, APPELLEE.

272 N. W. 2d 273

Filed December 6, 1978. No. 41739.

1. **Divorce: Names.** Nothing in the law of Nebraska limits the common law power of a married woman to bear a different surname from her husband.
2. _____: _____. Where a petition for dissolution of marriage is filed in the maiden name of a woman who has never adopted the surname of her husband and the parties are otherwise entitled to a decree of dissolution, refusal of the trial court to enter the decree in the maiden name of the wife is error.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded with directions.

Sally Millett Rau of Walsh, Walentine & Miles, for appellant.

No appearance for appellee O'Brien.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

WHITE, J.

This is an appeal from the order of the District Court denying a decree of dissolution. We reverse and remand with directions.

The sole and only issue is whether the District Court erred in refusing to grant a decree of dissolution on the ground that it lacked jurisdiction because of the form of name used in the petition for dissolution. At the time of marriage, petitioner-appellant Shirley A. Simmons did not take the married name of her husband, respondent-appellee Leo E. O'Brien. Throughout the marriage each of the parties practiced their professions in their former surnames. Appellant commenced the action in her own surname. The basis of the trial court finding was section 42-353, R. R. S. 1943, which describes the form of the petition in marriage dissolution cases. " * * * The petition shall include the following: (1) The name and address of petitioner and his attorney; (2) The name and address, if known, of respondent; * * *." At common law a married woman could legally bear a different name from her husband. The King v. The Inhabitants of St. Faith's Newton (1823), 3 Dowling & Ryland's Reports 348, Kruzel v. Podell, 67 Wis. 2d 138, 226 N. W. 2d 458.

Change of name statutes do not abrogate or supersede the common law but affirm the common-law right and afford an additional method by which name

change may be effected as a matter of public record. Piotrowski v. Piotrowski, 71 Mich. App. 213, 247 N. W. 2d 354. There are no constitutional or statutory provisions which require a married woman to take her husband's surname. "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska." Section 49-101, R. R. S. 1943. A married woman, being free to adopt or not to adopt her husband's surname at common law, remains free to do so.

The evidence was clear and the trial court found that there were irreconcilable differences between the parties and that the property settlement was fair and not unconscionable. The judgment is reversed and the cause remanded to the District Court with directions to enter a decree of dissolution and to approve the property settlement.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD SHEPOKA ET AL., APPELLANTS, V. ED KNOPIK ET AL., APPELLEES.

272 N. W. 2d 364

Filed December 6, 1978. No. 41986.

Constitutional Law: Public Officers and Employees. A resolution of a county board fixing the salaries of elected county officers at an amount plus an annual adjustment for changes in the cost of living as determined by an independent federal agency does not violate Article III, section 19, of the Constitution of Nebraska.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Ginsburg, Rosenberg, Ginsburg & Krivosha, and Douglas L. Curry, for appellants.

Philip T. Morgan of Morgan & Morgan, for appellees.

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

BOSLAUGH, J.

This was an action for a declaratory judgment to determine the validity and meaning of a resolution of the county board of Nance County, Nebraska, fixing the salaries for county officers for 1975 and following years. The plaintiffs are elected officers of Nance County or their deputies. The defendants are the members of the county board and the county.

This is the second appeal in this case. In Shepoka v. Knopik, 197 Neb. 651, 250 N. W. 2d 619, a prior judgment of the District Court was reversed because the County of Nance, an indispensable party, had not been made a party to the action. After a second trial the trial court found generally for the defendants and dismissed the petition. The plaintiffs have appealed.

The statute requires that the salaries of all elected officers of the county be fixed by the county board at least 60 days prior to the closing of filing of certificates of nomination for the primary election. § 23-1114 (1), R. R. S. 1943. In compliance with this requirement the county board of Nance County, Nebraska, adopted the following resolution on December 11, 1973: "RESOLUTION: WHEREAS, the Laws of Nebraska provide that the salaries of the following County elected officials be established by the Board at least sixty (60) days prior to the closing of filing of certificates of nomination to place names on the primary ballot for the offices; and WHEREAS the salaries of the following elected officials cannot again be raised until 1979; being the next term and because of the inflation cost of living increases should be made at this time to allow for the next four years;

NOW THEREFORE be it resolved by the Nance County Board of Supervisors that the salaries of the offices of the County Clerk, County Treasurer, County Assessor, County Attorney and County Sheriff be established at $8,750 for the calendar year 1975, plus an annual adjustment during the term of office based on the previous years salary equivalent to the most recent recommended adjustment in the salaries authorized by the Cost of Living Council, an independent federal executive council created by Presidential Executive Order."

On December 17, 1974, the board adopted a further resolution which provided as follows: "RESOLUTION: WHEREAS, The Nance County Board of Supervisors did at a regular meeting on December 4, 1973, consider and adopt a Resolution providing for cost of living increases for all county employees, the Board realizing that the salaries of elected officials cannot again be raised for four years and that the high rate of national inflation must be taken into account, and WHEREAS the Board wishes to continue its policy of cost of living increases but wishes to make the first cost of living increase effective for the calendar year 1976 rather than 1975 the increases to include three years rather than four, NOW THEREFORE be it resolved by the Nance County Board of Supervisors that the salaries of the offices of the County Clerk, County Treasurer, County Assessor, County Attorney and County Sheriff be established at $8,750 for each of the calendar years 1975, 1976, 1977 and 1978. BE IT FURTHER RESOLVED that commencing January 1, 1976, the salaries include an annual adjustment based on the previous years salary equivalent to the most recent recommended adjustment in salary authorized by the Cost of Living Council, an independent executive council created by Presidential Executive Order. That said cost of living increases each year shall be based upon the twelve most recent monthly cost of living increases

or decreases in the twelve-month period ending on the first full month the percent of adjustment is available prior to the setting of the annual budget. Provided however that the minimum annual salary for any year shall not go below $8,750."

The resolution of December 17, 1974, purported to amend the resolution of December 11, 1973, but was ineffective because the 60-day period prior to the closing of filing of certificates of nomination for the primary election had commenced before the resolution was adopted. The resolution of December 17, 1974, is important, however, because it reveals that the board considered the 1973 resolution to provide for a salary in 1975 of $8,750 *plus* an adjustment based on the increase in the cost of living. Although ineffective to amend the 1973 resolution, the 1974 resolution is important because it amounts to a construction of the 1973 resolution by the county board.

At the trial the defendants were allowed, over objection, to introduce the testimony of two members of the board as to what the intention of the board was at the time the 1973 resolution was adopted. This testimony was clearly inadmissible. See, Ralston v. County of Dawson, 200 Neb. 678, 264 N. W. 2d 868; Board of Education v. Presque Isle County Bd. of Ed., 364 Mich. 605, 111 N. W. 2d 853; 2A Sutherland Statutory Construction, § 48.16, p. 222 (4th Ed., 1973); 73 Am. Jur. 2d, Statutes, § 169, p. 372.

The defendant's principal contention in regard to the validity of the 1973 resolution is that it contravenes Article III, section 19, of the Constitution of Nebraska, which provides that the compensation of any public officer shall not be increased or diminished during his term of office. The contention is without merit because the constitutional prohibition relates to legislative changes and does not prohibit changes based on independent factual standards.

In Hamilton v. Foster, 155 Neb. 89, 50 N. W. 2d 542,

this court held that the salary of a public officer may be changed during his term where the salary is fixed upon the basis of population and there is a change in population during the term. In that case we said: "We are of the opinion that when a statute enacted and in effect prior to the election of a public officer fixes the compensation of such officer upon the basis of population and an increase or decrease in compensation occurs during the officer's term because of a change in population after his election, such increase or decrease in compensation does not violate our constitutional provision that the compensation of a public officer shall not be increased or diminished during his term. It is a factual and not a legislative change."

Here the resolution based the change upon an independent factual standard, an index established by a federal agency. The constitutional provision prohibiting any increase or decrease in the compensation of a public officer during his term of office was not applicable because any change made pursuant to the resolution was not a legislative change.

We have considered the other contentions of the defendants and find they are without merit.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEVEN C. RISTAU, APPELLANT.

272 N. W. 2d 274

Filed December 6, 1978. No. 42111.

1. **Trial: Evidence: Intent.** The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from words or acts and the facts or circumstances surrounding the act.
2. **Criminal Law: Assault and Battery: Intent.** It is not essential

to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated.

3. **Criminal Law: Assault and Battery.** To constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to injure, but no actual battery need occur.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Original sentence vacated. Sentence modified in accordance with this opinion.

Raymond B. Johansen, for appellant.

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

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

MCCOWN, J.

The 17-year-old defendant pleaded guilty to a charge of assault with intent to inflict great bodily injury and was sentenced to imprisonment for a term of not less than 3 years nor more than 8 years. The defendant has appealed.

The defendant was charged as an adult with the offense of robbery on September 28, 1977. A motion to treat the defendant as a juvenile and proceed in juvenile court was denied. Pursuant to a plea bargain the robbery charge was dismissed and a charge of assault with intent to inflict great bodily injury was substituted. The defendant pleaded guilty to the amended charge on February 10, 1978.

The record established that the defendant threw an intoxicated woman to the pavement, took her purse, and ran. The woman bumped her head on the pavement and wrenched her back, but did not require or seek medical attention. The defendant was also intoxicated at the time.

At the arraignment, before accepting the guilty plea, the court thoroughly explained to the defendant the options he had and the constitutional rights which would be waived by a guilty plea. When the court inquired as to whether there had been any plea bargaining, the court was advised the plea bargain was that the robbery charge would be dismissed if defendant pleaded guilty to the assault charge here; that there was a chance for probation; and that the State would not object to probation nor make any recommendation as to any sentence other than probation. The court explained to the defendant that the court was not a party to any plea bargain, would not be bound by any such agreement, and that the court could very well impose the maximum sentence. The court asked whether the defendant understood that and whether he still wished to plead guilty. The defendant responded "yes."

In the discussion at the arraignment the defendant denied that he intended to beat the victim or hurt her, but admitted that he intended to take her money and to use as much "hassle" as was necessary to get it.

The court accepted the defendant's plea of guilty, finding that it was voluntarily, intelligently, and knowingly made. On March 7, 1978, the defendant was sentenced to not less than 3 nor more than 8 years in the Nebraska Penal and Correctional Complex.

The defendant first contends that there is no factual basis upon which the trial court could find a specific intent to inflict great bodily injury. The position of the defendant is that because he said he did not intend to inflict great bodily injury, and great bodily injury did not actually result, there was no factual basis for a plea of guilty. We disagree.

The record establishes that the defendant not only threw the victim to the pavement but admitted that he intended to use whatever force was necessary to

take her purse. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from outward manifestations, words, or acts, and the facts or circumstances surrounding or attendant upon the assault. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. State v. McDaniels, 145 Neb. 261, 16 N. W. 2d 164.

To constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to injure, but no actual battery need occur. State v. Lang, 197 Neb. 47, 246 N. W. 2d 608. In any event, the defendant's guilty plea represented a voluntary and intelligent choice among the alternative courses of action open to him.

The defendant next contends that his plea of guilty was rendered involuntary simply because he believed that he would get probation. The record refutes that contention. The trial court made it clear that the court was not bound by any plea bargain agreement, and that the court might well impose the maximum sentence. The court complied in all respects with the standards relating to pleas of guilty as outlined in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The record establishes that the defendant understood the nature of the charge, the possible penalty, his rights, and the effect of a plea of guilty. He understood also that there was only a chance of probation and no guarantee. His plea was intelligently, knowingly, and voluntarily made.

Finally, the defendant contends that the sentence was excessive. The defendant was 17 years old at the time of the crime and at the time of sentencing. The presentence investigation report shows that defendant was adjudicated a juvenile delinquent in Oc-

tober 1974, when he was 14 years old. The offenses were the theft of a bicycle and attempted larceny. He was placed on probation at his mother's home at that time. In May 1975, he was committed to the Youth Development Center at Kearney, Nebraska, for probation violation based upon allegations of possession of marijuana and curfew violation. In October 1975, he was released from the Youth Development Center and placed on parole in the home of his mother. In May 1976, his parole was revoked because he left the state without permission and he was returned to the Youth Development Center. In October 1976, he was again paroled to reside with his father in Kansas. On March 28, 1977, he was released and discharged from parole.

Defendant's conviction in the present case is his first felony conviction and a motion to have him charged as a juvenile was denied. The penalty for assault with intent to inflict great bodily injury is imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 year nor more than 20 years. § 28-413, R. R. S. 1943. Under the circumstances here a minimum sentence was called for. The sentence of imprisonment in the penal complex for not less than 3 years nor more than 8 years is excessive.

The sentence is vacated and set aside and the defendant is sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term of 1 year from March 7, 1978, with credit to be given for 55 days in jail prior to the original sentencing.

ORIGINAL SENTENCE VACATED.
SENTENCE MODIFIED IN ACCORDANCE WITH THIS OPINION.

CLINTON, J., dissenting in part.

I dissent from that portion of the opinion which reduces the sentence. The trial court is in a position to best judge the defendant's attitude. We are in no position to do that. Only chance prevents this case

from being one of felony murder as in State v. Harris, 194 Neb. 74, 230 N. W. 2d 203, which also was a crime which had its origin in a "purse snatch."

SPENCER, C. J., PRO TEM., and BOSLAUGH, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. CURTIS L. HAYEN, APPELLANT.

272 N. W. 2d 277

Filed December 6, 1978. No. 42122.

1. **Criminal Law: New Trial: Appeal and Error.** Where there has been an appeal to the District Court in a misdemeanor case, a motion for new trial must be filed in the District Court if there is to be a review in this court of errors of law occurring at the trial or the sufficiency of the evidence.
2. **Constitutional Law: Statutes: Police Officers and Sheriffs.** Section 28-729, R. R. S. 1943, punishment for abuse of an officer, held constitutional.

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

Owens & Owens, for appellant.

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

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

BOSLAUGH, J.

The defendant was convicted of operating a motor vehicle while having ten-hundredths of one percent or more of alcohol in his blood and of abusing an officer. He was convicted in the county court and fined $100 on count I and sentenced to 15 days in the county jail on count II. Upon appeal to the District Court the conviction and sentence on both counts were affirmed. The defendant has now appealed to this court.

The conviction on count I was based upon an anal-

ysis of a urine sample taken after the defendant's arrest which showed an alcohol content of twenty-seven hundredths of one percent. The defendant contends that this evidence should have been excluded because he was not permitted to choose between a blood or urine test and was not allowed to have a physician of his choice evaluate his condition at the time the sample was taken. The defendant further contends that section 28-729, R. R. S. 1943, relating to abuse of an officer, is unconstitutional.

The defendant did not file a motion for new trial in the District Court and the State contends this prevents the defendant from raising any question concerning evidentiary rulings.

Generally, a motion for new trial is necessary in a law action for this court to review the sufficiency of the evidence or errors of law occurring at the trial. Parker v. Christensen, 192 Neb. 117, 219 N. W. 2d 235. A motion for new trial is necessary for consideration of errors of law or issues of fact which can be preserved only by a bill of exceptions. Progressive Design, Inc. v. Olson Bros. Manuf. Co., 190 Neb. 208, 206 N. W. 2d 832.

Although an appeal to the District Court in a misdemeanor case is heard and determined upon the record made in the county court, the same issues presented to the county court may be presented to the District Court for determination by it. § 29-613, R. R. S. 1943; State v. Clark, 194 Neb. 487, 233 N. W. 2d 898. After the appeal has been determined in the District Court, it is the determination of the issues by the District Court that may be reviewed in this court.

If review is sought as to alleged errors of law occurring at the trial or the sufficiency of the evidence, the questions must be presented to the District Court in a motion for new trial. See State v. Allen, 195 Neb. 560, 239 N. W. 2d 272. Since a motion for new trial was not filed in the District Court in

this case, the questions relating to the admissibility of the analysis of the urine sample taken from the defendant will not be considered.

The defendant contends that section 28-729, R. R. S. 1943, is unconstitutional because it is vague. The defendant argues that there is no ascertainable standard of guilt to determine what constitutes abuse of an officer.

A similar contention was considered in State v. Boss, 195 Neb. 467, 238 N. W. 2d 639 and held to be without merit. The evidence in this case clearly sustained the finding of guilt on count II.

The judgment of the District Court is affirmed.

AFFIRMED.

JOHN E. ENGLISH, APPELLEE, V. BRUIN ENGINEERING, INC., ET AL., APPELLEES, IMPLEADED WITH ARNE M. MATTSON, APPELLANT.

272 N. W. 2d 753

Filed December 13, 1978. No. 41709.

1. **Trial: Witnesses: Evidence: Statutes.** Subsections (a) through (f) of section 25-1267.04(3), R. R. S. 1943, describe alternative conditions under which a deposition of a witness may be used at trial whether or not the witness is a party. Thus, where the plaintiff resided out of the county where trial was had and was shown to be elderly and infirm, the trial court was correct in admitting his deposition into evidence without requiring a further showing that unusual circumstances existed.
2. **Fraud: Damages: Intent.** The essential elements of a cause of action founded upon fraud or deceit are: That a representation be made as a statement of fact, which was untrue and known to be untrue by the party making it or was recklessly made; that it be made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party be induced by reliance on it to act to his injury or damage.
3. **Fraud.** A person is justified in relying upon a representation made to him in all cases where the presentation is a positive statement of material fact, and where an investigation would be required to discover the truth.

4. _____. Where one deliberately gives another a false statement in writing, knowing the purpose for which it is to be used, which the other uses to deceive a third party, he is a joint wrongdoer and must be held responsible for the consequences which follow.
5. _____. It is not essential to actionable fraud that the guilty party receive any benefit. The gravamen of the action is injury to the plaintiff, not benefit to the defendant.
6. _____. The right of joint tort-feasors to contribution as among themselves does not affect their liability to the injured party. It is still the law in this state that an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them jointly and severally liable.

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

Daniel W. Ryberg, for appellant.

Rollin R. Bailey of Bailey, Polsky, Huff, Denney & Cada, for appellee English.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

CLINTON, J.

This is an action by the plaintiff John E. English to recover damages allegedly caused by false representations made by the defendants for the purpose of inducing the plaintiff to loan $10,000 to the defendant Bruin Engineering, Inc. The jury rendered a verdict for the plaintiff against all defendants, namely Bruin Engineering, Inc.; L. W. Mattson, its president; and Arne M. Mattson, an investor in Bruin Engineering, Inc., and brother of L. W. Mattson. Only Arne M. Mattson has appealed from the judgment, and we will hereafter usually refer to him as the defendant and the other defendants by their names. The principal question on appeal is the sufficiency of the defendant's participation in the claimed fraudulent representations.

Three assignments of error are made and argued: (1) The court erred in denying a continuance to the

defendant at the beginning of trial for the purpose of taking the deposition of the plaintiff English. (2) The court erred in permitting the testimony of the plaintiff English to come in by a previously taken deposition. (3) The court erred in refusing the motion of the defendant for a directed verdict for him on the ground that the evidence was insufficient to permit a finding of actionable fraud by the defendant. We affirm.

The evidence shows that, on September 4, 1974, the plaintiff loaned $10,000 to Bruin Engineering, Inc., and received from Bruin a promissory note for that amount plus interest. L. W. Mattson also executed the note personally as principal. The defendant guaranteed the note to the extent of $3,300.

The allegations of fraud by Bruin and L. W. Mattson are several but, for purposes of this opinion, we need mention only that the financial statements of Bruin and L. W. Mattson, which were presented to plaintiff in order to induce him to make the loan, were alleged to be false and fraudulent in that they substantially misrepresented the net worth of said defendants. As to the defendant Arne M. Mattson, it is alleged he knowingly and willfully aided Bruin and L. W. Mattson by representing that he owned an interest in Bruin of the value of $11,000 and by authorizing his own net worth statement which contained that item to be presented to plaintiff by L. W. Mattson. It is also alleged the defendant knew or should have known the representations made by the other defendants were false and were made for the purpose of inducing the loan.

The evidence shows without contradiction that L. W. Mattson, in order to induce the loan by plaintiff, presented to him the following: (1) The financial statement of L. W. Mattson which showed a net worth of $386,132.50. The principal assets of this statement were L. W. Mattson's interest in Bruin which was shown as being worth $250,000 and an in-

terest in Mattson Enterprises which was shown as being worth $129,600. (2) A balance sheet of Bruin which showed a stockholders' equity of $790,933.51. (3) The balance sheet of the defendant which showed net assets of $138,316.80, including the interest in Bruin of $11,000 which we have previously mentioned. The evidence shows that, as of the date shown on the various financial statements and on the date they were presented to plaintiff, Bruin had no assets and no income, was not an operating corporation, and had been evicted from its leased premises on the Lincoln Airport Authority property because of nonpayment of rent in the amount of about $23,000. It also showed Bruin had turned over to the Airport Authority what property it had in order to secure the back due rent, and that property was worth far less than the rental owed. The evidence further showed Mattson Enterprises was defunct or in grave financial trouble.

The evidence is clearly sufficient to show the defendant knew L. W. Mattson intended to present the financial statements, including the defendant's own, to plaintiff for the purpose of inducing the loan; and defendant knew Bruin and Mattson Enterprises were defunct businesses without assets. The evidence does not show the financial statement of the defendant was false except insofar as it indicated a value of $11,000 for his interest in Bruin. There was no personal communication between the defendant and the plaintiff. The evidence shows, however, that the defendant furnished his own financial statement to L. W. Mattson for the purposes above mentioned.

The assignments of error relating to the denial of a continuance and the use of the deposition of the plaintiff are related and we will discuss them together. The plaintiff was 79 years old at the time of trial, and at all relevant times he was a resident of Lancaster County, Nebraska. The defendant was a

resident of Douglas County, Nebraska. L. W. Mattson, at the time of bringing of suit and thereafter, appears to have been a resident of California; but, during the period when negotiations for and consummation of the loan were taking place, he was in the State of Nebraska and living, at least a part of the time, with his brother, the defendant. The action was filed in Douglas County as was proper under section 25-409, R. R. S. 1943.

Prior to trial and pursuant to proper notice, the deposition of plaintiff was taken. Counsel for defendants did not cross-examine the plaintiff during the taking of that deposition. At the beginning of trial, counsel for the defendant became aware that the plaintiff would not testify in person but his deposition would be used instead, and moved for a continuance in order that he might take the plaintiff's deposition for purposes of cross-examination. The court at that time overruled the motion, because the case had been set for trial for a considerable length of time and the court did not consider a postponement justified. When the deposition was actually offered, the court sustained a renewed objection to the deposition since the conditions prescribed by section 25-1267.04, R. R. S. 1943, permitting the use of depositions had not yet been met. A showing was then made that the plaintiff was not in Douglas County and that he was in a state of health which made his appearance at trial inadvisable. At that time the court indicated it would adjourn the trial in order to permit the defendant to take the plaintiff's deposition. Defendant's counsel declined the opportunity because of "expense" and delay. The court then overruled the objection to the deposition.

The court clearly did not err in overruling the objection. Section 25-1267.04, R. R. S. 1943, provides in part: "At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was pres-

ent or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions: . . . (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (b) that the witness is out of the county of the place of trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition; (c) that the witness is unable to attend or testify because of age, sickness, infirmity, ..." The evidence clearly supports the court's findings that plaintiff was out of the county, that his absence was not "procured" by the party offering the deposition, and that the witness was unable to attend because of sickness or infirmity.

The defendant argues that a party's deposition may not be used by the party except upon compliance with subsection (3) (e) of section 25-1267.04, R. R. S. 1943, which provides that a deposition may be used at trial: "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used;" and that the defendant had no notice the plaintiff would not be present in person to testify until the beginning of trial. The defendant misreads the statute. Subsections (a) through (f) of that statute describe alternative conditions under which the deposition may be used whether or not the witness is a party.

The defendant's contention that the evidence does not sustain the verdict revolves mostly around the following propositions: (1) Defendant made no false representations. (2) If he did, plaintiff had no right to rely on them. (3) The misrepresentations in any event were immaterial. (4) Any representations made by the defendant were not the cause of the plaintiff's loss. (5) The defendant did not in any

way profit from the fraud of Bruin and L. W. Mattson. (6) In any event, the plaintiff's loss should be apportioned among the three joint tort-feasors, and the defendant should be responsible for only one-third of the total loss.

The first four aspects of the plaintiff's contentions will be discussed together. The evidence would support the following conclusions by the finder of fact: The defendant furnished his own property statement to L. W. Mattson, knowing it would be submitted to the plaintiff together with the statements of Bruin and L. W. Mattson for the purpose of inducing the plaintiff to make a loan of $10,000 to Bruin. The defendant was familiar with those financial statements as they had been shown to him by L. W. Mattson prior to presentation to the plaintiff and the defendant knew the contents of the statements of Bruin and L. W. Mattson were false in the respects already mentioned. He also knew his own interest in Bruin was worthless and his brother was insolvent, because he was contributing to his brother's support and lending him money on which to live and to promote the proposed manufacturing enterprise of Bruin. The evidence shows that plaintiff relied upon these various financial statements in making the loan.

Is the evidence sufficient to impose liability on the defendant? We hold that it is. The essential elements of a cause of action founded upon fraud or deceit are: That a representation be made as a statement of fact, which was untrue and known to be untrue by the party making it or was recklessly made; that it be made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party be induced by reliance on it to act to his injury or damage. Bellairs v. Dudden, 194 Neb. 5, 230 N. W. 2d 92.

The defendant argues that since, on his own financial statement his interest in Bruin is valued at cost,

the plaintiff had no right to rely thereon. He further contends that investigation by plaintiff would have shown him the financial statements of Bruin and L. W. Mattson were false. It is clear the defendant knew that the purpose of a financial statement is to show value and that worthless or nonexistent items should not be included on such statements. The inclusion of the Bruin item in his own statement, even showing it to be valued at cost, tended to support and give added credibility to the statement of worth of the other two joint tort-feasors. Those statements did not indicate the assets were valued at cost but could properly be read as showing real value. Since the defendant's guarantee was limited to $3,300, it seems obvious plaintiff was thus relying on Bruin and L. W. Mattson's worth as to the balance. The defendant's implicit representation that his own interest in Bruin was worth $11,000 at least impliedly supported the inference that Bruin's statement of worth was true and that the statement of L. W. Mattson was also true to the extent it consisted of an interest in Bruin. It seems clear enough the fact finder was entitled to conclude that the representation by the defendant was material and the plaintiff was entitled to rely thereon.

"A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of material fact, and where an investigation would be required to discover the truth." Mid-States Equipment Co. v. Evans, 191 Neb. 230, 214 N. W. 2d 496. The facts in this case are similar to those in Hall-Doyle Equity Co. v. Crook, 245 Mich. 24, 222 N. W. 215, where it is said: " 'Where one deliberately gives another a false statement in writing, knowing the purpose for which it is to be used, which that other uses to deceive a third party, he is a joint wrong-doer, and must be held responsible for the consequences which follow.' "

It must be conceded on the basis of the evidence in this case that the defendant did not profit from the fraud, nor does it appear he intended to profit. However, it is not essential to actionable fraud that the guilty party receive any benefit. The gravamen of the action is injury to the plaintiff, not benefit to the defendant. Hall-Doyle Equity Co. v. Crook, *supra*; 37 C. J. S., Fraud, § 44, p. 297.

The opinions which the defendant cites in support of the proposition that liability for damages caused by the fraud must be apportioned among joint tort-feasors do not support that proposition and, with one exception, we will not waste space in discussing them. Defendant cites Royal Ind. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N. W. 2d 183. That case involved the right of contribution of joint tort-feasors as among themselves. It had nothing at all to do with the nature of their liability to the person injured. The rule in this state is: " 'An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.' " Gergen v. The Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE PARTRIDGE, APPELLANT.

272 N. W. 2d 366

Filed December 13, 1978. No. 41965.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed. See Rule 20.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellant.

Paul L. Douglas, Attorney General, and Paul E. Hofmeister, for appellee.

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

KUNS, Retired District Judge.

In this case, Dale Partridge seeks post conviction relief. At an evidentiary hearing appellant testified and also offered testimony from other witnesses including the attorney who had represented him in the original proceedings. The State offered no testimony.

The trial court found the appellant should have credit on his sentence for time in custody, but found that his plea had been entered knowingly and understandingly; that he had received effective assistance of counsel; and that counsel had not been at fault for failure to appeal. Therefore, appellant was denied any further relief. These findings resolved all conflicts in the evidence.

AFFIRMED. SEE RULE 20.

STATE OF NEBRASKA, APPELLEE, V. ALLEN REED, APPELLANT.

272 N. W. 2d 759

Filed December 13, 1978. No. 42001.

1. **Hearsay: Evidence: Trial.** For a hearsay statement to qualify for admission as an excited utterance, the following conditions must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event.
2. **Hearsay: Evidence: Statutes: Time.** A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement is admissible under section 27-803 (22), R. R. S. 1943, if the statutory conditions precedent to admission are met.

3. **Criminal Law: Evidence: Intent.** Evidence of other crimes, wrongs, or acts is admissible to show intent and lack of mistake or accident.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

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

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

CLINTON, J.

The defendant, Allen Reed, was found guilty by a jury in the District Court for Douglas County of maliciously shooting Russell Woodward, an Omaha, Nebraska police officer, with intent to kill, wound, or maim and was sentenced to a term of not less than 12 nor more than 15 years in the Nebraska Penal and Correctional Complex. On this appeal he assigns and argues the following errors: (1) The court erred in permitting a witness, over proper objection that the testimony was hearsay, to testify to a statement made within a minute or two before the shooting by a young child to an investigating officer at the scene to the effect that the defendant Reed knew that the police officers were outside Reed's apartment and did not intend to come out; and (2) the court erred in admitting testimony of prior incidents in which the defendant allegedly shot at one Cooper, whose complaint brought about the police investigation which led to the shooting of Woodward. We affirm.

The State's evidence indicated the following sequence of events. On July 20, 1977, at about 6:37 p.m., Woodward and other police officers responded to the complaint of James Cooper that the defendant

had threatened him with a shotgun during an argument. The two were neighbors, and Cooper was in his own yard and Reed in his during the argument. When the threat was made, Cooper ran into his own house and called the police. On one previous occasion, Reed had shot at Cooper; and the police, including the victim Woodward and the officer who regularly worked with him, had investigated that incident. These two officers were among those who responded to Cooper's complaint on July 20th.

Woodward and his partner went to an Omaha residence at 4615 North 37th Street which they had been told was Reed's address. The house at that location contained two apartments numbered 1 and 2. The front doors of the two apartments were adjacent to each other and both were served by a common porch. The two officers rapped at the door of apartment 1, and a woman answered the door. They asked where Reed lived. The woman at first said she did not know but then, by pointing, indicated that Reed lived in the second apartment. A small child, who apparently overheard the request for information and who was either on the porch or in the yard nearby, spontaneously volunteered the information that Reed was in apartment 2, knew the police were there, and did not intend to come out. Circumstantial evidence rather clearly indicates that the child making the statement was the 6-year-old son of the woman with whom the defendant lived and who at that time was present with him in apartment 2.

The officers then rapped loudly on the door of apartment 2, called Reed by name, identified themselves as officers, and stated that they wished to talk to him. This process was repeated about three times. They got no response and heard no noise of any kind coming from the apartment. As a consequence of the pounding by the officer on the door, it opened slightly. One of the officers at the door then

advised the police sergeant in charge of the operation, who had stationed himself at the back door of apartment 2, of the fact that the door had opened. The sergeant told the officers to enter the apartment. They were about to do so when Reed, who was just inside the door, fired a .20 gauge shotgun through the glass window in the upper part of the door and severely wounded Woodward, who fell from the porch. The other officers took cover, and one of them fired a bullet through the window of the door. In a brief time, the defendant came out and surrendered. The officers' statement that they had identified themselves in the manner indicated was corroborated by the occupant of apartment 1 and by a neighbor who lived across the street. The latter also witnessed the wounding of officer Woodward.

The shotgun which Reed used, together with a box of shells and an empty shotgun shell, were found inside the apartment. The evidence indicated that the trigger of the shotgun did not function and that the gun had to be discharged by pulling back the hammer and then releasing it. The hole in the windowpane of the door made by the shotgun blast was about the size of a fist, indicating that, when fired, the muzzle of the gun was quite close to the door. Particles of glass were found in Woodward's wounds. One of the two drapes which hung over the door of the window bore powder marks and was partially shredded by the shot.

The evidence indicates that there was enmity between Reed and Cooper arising out of the fact that Cooper was then living with the woman who had previously lived with Reed.

Cooper testified as to the previous shooting incident of July 14th and his story was corroborated by photographic evidence of the marks of shotgun pellets in the wood exterior of a building where the shooting is said to have occurred. His version of the incident of July 20th was that he was working in the

garden of his home and Reed came toward him, berated him, and threatened to shoot him with the shotgun Reed held in his hands. Cooper told Reed he was going to call the police, ran into his home, and did so.

Reed did not testify in his own behalf. However, a tape recording of a statement which he gave to police after his arrest was played to the jury with the defendant's consent. He thus had the advantage of having his version of the incident presented to the jury without being subject to cross-examination. His version was that, on four previous occasions, Cooper had shot at Reed in various places in the city of Omaha. As to the incident of July 20th, Reed said at the time of the argument on July 20th, each man was in his own yard. This portion of Reed's story thus conformed to Cooper's. Reed then said that, during the argument, Cooper went into his own house to get a gun. At that time, a cousin of Cooper's was present. Reed, accompanied by Cooper's cousin, went to the door of Reed's apartment and there had a conversation in which Reed stated he wanted no trouble with Cooper and the cousin indicated that he would intervene. The cousin did not testify. Reed did not know the name of Cooper's cousin and denied hearing Cooper say that he was going to call the police.

Reed stated that, after he went inside his apartment, someone began kicking on both doors of his apartment. The implication of his testimony was that he thought it was Cooper coming to shoot him. Reed then picked up his shotgun and aimed it at the window of the door. He said he did not then intend to shoot; the gun just went off accidentally, apparently when he pulled back the hammer. After the shooting, he saw the police car and realized that there was more than one person out there. He then walked out the front door and was arrested. Reed claimed he did not know the man outside the door

was a police officer when he shot. He heard nothing except the pounding on the door. The reason he could not hear was because of the noise made by the television set and a fan. He could see only the outline of the man outside the door and could not tell it was a policeman.

Reed claimed two defenses to the charge. First was the right of self-defense. Second, although he acknowledges that he picked up the gun and pointed it at the figure on the other side of the door, he asserts that he did not purposely fire the weapon but that it went off accidentally. The instructions given by the court placed on the State the burden of proving beyond a reasonable doubt the shooting was intentional and done with the requisite intent. The court gave also a self-defense instruction to which no objection is made. This instruction placed on the State the burden of proving beyond a reasonable doubt that the shooting was not in self-defense.

We now turn to the assignments of error. The portion of the statement of the child reciting that Reed knew of the presence of the police and did not intend to come out was, if admitted for the purpose of showing the truth of its contents, on its face hearsay and did contradict Reed's claim that he thought it was Cooper who was attempting to break in. Also, the statement inferentially contradicted Reed's claim of fear for his life, for he did not assert he had anything to fear from police action. The boy's statement was offered by the State on the basis that it tended to explain the conduct of the police in approaching apartment 2. However, the part of the statement indicating that Reed was in the apartment was sufficient to explain that action. The portion of the statement to which objection was made — the statements as to Reed's knowledge and state of mind — did not need to be placed before the jury to explain police conduct and, as a practical matter, was likely to be considered for its truth by the jurors

despite the trial court's cautionary instruction that they should not consider it for that purpose.

Two possible grounds of admissibility present themselves. First: Was the statement admissible under the excited utterance exception to the hearsay rule? § 27-803 (1), R. R. S. 1943. Second: Was the statement admissible under the provisions of section 27-803 (22), R. R. S. 1943, because of "circumstantial guarantees of trustworthiness" equivalent to those which permit the admission of hearsay statements under other exceptions to the hearsay rule?

The statement clearly did not qualify as an excited utterance because it was not made under the stress of a startling event or condition. To qualify as an excited utterance, the following must exist: (1) There must have been a startling event. Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552. (2) The statement must relate to the event. Hamilton v. Huebner, *supra*. (3) The statement must have been made by the declarant while under the stress of the exciting event. Roh v. Opocensky, 126 Neb. 518, 253 N. W. 680; Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435. In this case, when the statement was made no startling event had yet occurred. The child's statement was made as a spontaneous statement arising from having overheard a request for information directed to the lady in apartment 1. There is no showing that the statement was the consequence of excitement,

Section 27-803 (22), R. R. S. 1943, provides: "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purpose of these rules and the interests of justice will

best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

It appears that the child's statement had circumstantial guarantees of trustworthiness. It was, if the testimony of the officers is to be believed, clearly a spontaneous statement made at the time of the event. The circumstantial proof indicates that it was probably made of personal knowledge since the child was an occupant of apartment 2 in which Reed lived. It was, in our judgment, the type of statement which the court could have admitted under section 27-803 (22), R. R. S. 1943. See, Sullivan v. State, 58 Neb. 796, 79 N. W. 721; McCormick v. State, 66 Neb. 337, 92 N. W. 606; Collins v. State, 46 Neb. 37, 64 N. W. 432; Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. However, there was no compliance with the conditions laid down by section 27-803 (22), R. R. S. 1943, which are conditions precedent to admission. The court made no determination that the circumstances described in (i), (ii), and (iii) of section 27-804 (2) (e), R. R. S. 1943, were met. Neither does it affirmatively appear that notice of intention to use the statement was timely given to the defendant by the State. We therefore find for the reasons indicated that the court erred in overruling the objection. However, we also conclude that the error was not so prejudicially erroneous as to require a new trial.

A careful reading of the evidence and a careful hearing of the defendant's statement convinces us that the jury's decision did not turn upon the child's statement as to the defendant's knowledge and state of mind. We are convinced that the jury based its decision upon a weighing of Cooper's version of the

circumstances that led to the incident and the officers' version of their efforts to identify themselves against Reed's statement that he heard no words or calls and his version of the argument with Cooper. The following significant factors would, we believe, weigh far more heavily with the jury than the boy's statement which the court instructed the jury to disregard. The jury had to determine whether Reed's alleged fear for his safety was reasonable. Cooper's version was verified by the undisputed fact that he did call the police and they responded. The jury must have believed this rather than Reed's claim that Cooper had gone to get a gun. To find as it did, the jury also had to disbelieve Reed's contention that he did not know it was the police who were at the door. Reed admits the gun was very close to the door, but he nevertheless testified he could not hear the officers speaking although the woman in apartment 1 who had retreated to the far bedroom and a neighbor across the street clearly heard the officers identify themselves. Clearly, there was strong evidence other than the hearsay statement upon which a jury could base its decision to reject Reed's version of the shooting. We hold, therefore, there was no prejudicial error in the admission of the boy's statement.

The defendant's second assignment of error is clearly without merit. Section 27-404 (2), R. R. S. 1943, provides in part: "(2) Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In State v. Hoffmeyer, 187 Neb. 701, 193 N. W. 2d 760, we said that evidence of other crimes, wrongs, or acts is admissible to show intent and lack of mistake or accident. That statement fits the evidence in this case exactly.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. JAMES B. SOMMERS, APPELLANT.

272 N. W. 2d 367

Filed December 13, 1978. No. 42025.

1. **Criminal Law: Motor Vehicles: Burden of Proof.** In an action charging motor vehicle homicide, the burden is upon the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles.
2. **Criminal Law: Statutes: Blood, Breath, and Urine Tests: Waiver.** 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.
3. **Criminal Law: Homicide: Negligence.** By "proximate cause" is meant a moving or effective cause or fault which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred.
4. **Criminal Law: Evidence: Burden of Proof.** 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.
5. **Criminal Law: Evidence: Judgments.** In determining the sufficiency of 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.
6. **Criminal Law: Appeal and Error: Evidence: Verdicts.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.

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

Kirk E. Naylor, Jr., of Naylor & Keefe, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellee.

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

SPENCER, C. J., PRO TEM.

Defendant appeals his conviction for the offense of motor vehicle homicide. The action was prosecuted as a felony by virtue of the allegation that he unlawfully operated his vehicle by having ten-hundredths of one percent or more by weight of alcohol in his body fluid. The case was tried to the court. There are two assignments of error: (1) Should the blood alcohol test have been suppressed because defendant was not afforded an opportunity to choose between a blood or urine test; and (2) was the evidence legally sufficient to find the defendant guilty of the crime charged. We affirm.

The information filed charged that defendant "did cause the death of Victor W. Johnson without malice while engaged in the unlawful operation of a motor vehicle, to wit: did unlawfully operate a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine."

In Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201 (1957), we said: "In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisons relating to the operation of motor vehicles."

The State had the burden to establish that defendant operated his motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, as shown by chemical analysis of his blood, breath, or urine. It then had the further burden to establish that this unlawful act was a

proximate cause of the death of the deceased.

We consider the defendant's first assignment of error. Sommers was taken by ambulance to the Lincoln General Hospital. Officer Kawamoto was directed by a police radio call to obtain a blood specimen from him. With this purpose in mind he met Sommers in the emergency room at the hospital. Kawamoto testified he read the defendant the implied consent form used by the police department to inform an accused of his rights. After reading the form he directed the attending nurse to draw the blood for the test. Defendant complains the test should be suppressed because the officer did not give defendant an opportunity to elect between a blood or urine test. There is no merit to this assignment. This issue was settled in State v. Wahrman, 199 Neb. 337, 258 N. W. 2d 818 (1977). We there said: "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."

The evidence clearly established that defendant was engaged in the unlawful operation of a motor vehicle as charged in the information. Chemical analysis of the blood sample, which was properly admitted, revealed sixteen-hundredths of one percent by weight of alcohol. Apart from the test evidence there was ample testimony from which it could be determined that defendant, at the time in question, was under the influence of alcoholic liquor.

The main issue on this appeal is whether defendant's unlawful operation of his vehicle was a proximate cause of the death of decedent. By "proximate cause" is meant a moving or effective cause or fault which, in the natural and continuous se-

quence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred. See NJI No. 3.41.

The collision occurred at approximately 1 a.m., on March 20, 1977, while deceased was operating a 1972 Mazda sedan, traveling south on the Tenth Street viaduct between Charleston and Avery Streets in Lincoln, Nebraska. Defendant, who was operating a 2 ½-ton Ford pickup from the south, crossed the center line on the viaduct and collided head on with the deceased's automobile. The point of impact was 2 feet 6 inches west of the center line, over into deceased's traffic lane. The deceased's car was propelled backward to the north and into the guard rail on the west side of the viaduct. The car came to rest near the center of the road, almost 50 feet north of the point of impact. Following the collision, defendant's vehicle began to spin. It struck the curbs on both sides of the road several times. It came to rest some 320 feet north of the point of impact. The viaduct was covered with ice but the street on either side of the viaduct was only wet. It was stipulated that on the evening of March 19, 1977, commencing at about 10 p.m., Lincoln experienced a rapid cooling trend. Between approximately 10 p.m. and midnight, the temperature dropped from 32 degrees to 20 degrees Fahrenheit.

Prior to the impact defendant's vehicle left a skid mark in the ice caused by the application of his brakes. The skid mark started approximately 20 feet north from a power pole used as a reference line for measurement. It also started 20 feet prior to the point where it crossed the center of the roadway, and thereafter continued for 80 feet but faded 15 feet from the point of impact. The power pole or reference point was approximately 350 feet from the southwest corner of the viaduct so that defendant traveled approximately 480 feet on the viaduct to the point of impact.

The only living witnesses to the collision, the defendant and his passenger, were injured in the collision and have no recollection of it. Defendant testified his speed was approximately 30 to 35 miles per hour as he proceeded north on Tenth Street. Two other witnesses testified he passed their car, which was traveling 30 to 35 miles per hour, approximately 2 blocks before the approach to the bridge. One of the witnesses said he went flying by. The posted speed was 35 miles per hour.

Officer Kubicek of the Lincoln police department testified that about 11:30 p.m., on the evening of March 19, 1977, while on routine patrol, he drove over the viaduct. At that time he noticed ice forming on it caused him to lose traction. He radioed, suggesting that a sand crew be sent to the viaduct, but none ever arrived.

Christine Creal testified she approached the viaduct from the south at about 11 p.m. that evening. She did not observe anything unusual about the street conditions before reaching the viaduct. As she started up the incline, traveling about 30 miles per hour, her car began to swerve. The car spun completely around once or twice, before coming to a halt in the southbound lane. The car struck the curb on the west side of the viaduct. She had not had anything to drink that night.

Daniel Burbach testified he crossed the viaduct from the north at approximately 10:30 p.m., on March 19, 1977. The street to the north of the viaduct was wet but not icy. About halfway up the viaduct he slipped into the northbound lane. At the time he was traveling about 30 miles per hour. He had consumed three beers during the evening.

The first vehicle to arrive at the scene of the accident was an automobile driven by Bruce Maske. Maske testified defendant's vehicle passed him as he was driving north on Tenth Street, about 2 blocks south of the viaduct. He testified his speed was 30 to

35 miles per hour, and estimated defendant was traveling at least 5 miles per hour faster. In a statement given to the police after the accident he had said defendant was going 10 to 15 miles per hour faster. Maske did not see the collision. As he started up the viaduct, he hit a patch of ice and began to slide into the southbound lane. He then saw the car of the deceased in the middle of the road and managed to regain control and get around the car on the east side. He stopped his car between defendant's pickup and the car of the deceased. He testified the street south of the viaduct was not slick, although it had been snowing and misting all day. He had had two or three drinks during the evening.

Deonne Fuehring, a passenger in Maske's car, also did not see the collision. Because she was not looking at the road when they went up the viaduct, she did not realize they had swerved into the other lane or narrowly missed hitting the car of the deceased. When she got out of the Maske car to render assistance, she slipped and fell on the ice. As she approached the defendant's car, she said, "Bruce, that's the same pickup and it's headed the other way now."

Jolene Kreifels was the next person to approach the viaduct from the south. She testified Tenth Street was not slippery, although it was wet. She started up the viaduct at about 30 to 35 miles per hour. As she neared the top she saw deceased's vehicle in the middle of the road. She took her foot off the accelerator and her car began to slide out of control. The car swerved to the right and hit the viaduct. The car then spun completely around. It came to a stop about one car length from the car of the deceased. When she got out of her car, she nearly fell down as the road was very slick.

Robert Kubicek, one of the officers called to the scene of the accident, testified the defendant was under the influence of alcoholic liquor. He stated

defendant appeared uncoordinated, his speech was slurred, and he had a strong odor of alcohol on his breath. Defendant asked him "Wow man. What'd I hit?" He continuously repeated this question although the officer had answered it. The officer was of the opinion the defendant was under the influence to the point he was physically impaired. The officer testified the viaduct was slick from ice, and fog was beginning to form. He had to walk slowly to avoid falling down.

The officer who made the measurements at the accident scene testified the viaduct was slippery enough to make it difficult to drive on it. The parties stipulated defendant's blood alcohol level was sixteen-hundredths of one percent. The test was taken 45 minutes after the impact. The blood alcohol level of the deceased was three-hundredths of one percent. The deceased died as a result of injuries sustained in the accident.

Doctor Orin Hayes, a physician, testified a person having a blood alcohol level of sixteen-hundredths of one percent would be decidedly under the influence. At that level motor coordination and judgment would be affected to a prominent degree. His sight and other faculties would be affected.

Defendant's argument that the evidence is insufficient to sustain his guilt is premised on his theory that the accident was a natural and unavoidable consequence of the viaduct being covered with ice. To sustain this point, he calls attention to the fact that other cars had great difficulty in stopping, some drivers momentarily losing control of their vehicle. In fact, one car hit the bridge abutment in an attempt to avoid a collision with the deceased's Mazda.

The burden was on the State to prove that the unlawful act charged, operating a motor vehicle when defendant had ten-hundredths of one percent or more by weight of alcohol in his body fluid, was a

proximate cause of decedent's death. The evidence adduced is circumstantial. It is sufficient to prove that the alcohol level in defendant's body was an important link in the cause of decedent's death. Our rule on the sufficiency of circumstantial evidence is as follows: "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, 199 Neb. 405, 259 N. W. 2d 277 (1977).

In State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977), we said: "In determining the sufficiency of evidence to sustain a conviction, however, 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." Those matters are for the trier of fact.

Defendant had a concentration of sixteen-hundredths of one percent or more by weight of alcohol in his body fluid 45 minutes after the impact. A medical witness testified that a person with this concentration of alcohol would be decidedly under the influence. His motor coordination and judgment would be affected to a prominent degree. His sight and other faculties would be affected. A trained police officer called to the scene of the accident testified defendant was under the influence of alcoholic liquor. He stated defendant appeared to be uncoordinated, his speech was slurred, and he had no idea what he had hit. There can be little question but that the trier of fact could reasonably find the defendant had a sufficient quantity of alcohol to be physically impaired.

Accepting the fact that the viaduct was extremely

icy on the evening in question, the defendant traveled 480 feet on that ice to the point of impact. He testified he was traveling at the speed limit, but traveling 35 miles an hour for 480 feet on an icy surface would also indicate an impairment of judgment. The unlawful act with which defendant is charged is not speeding, although the evidence is ample to have permitted the trial court to have concluded that defendant was driving at an excessive speed. The testimony of the witnesses, the force of the impact after a skid of approximately 90 feet, the fact the car defendant had passed 2 blocks from the bridge, which was traveling between 30 and 35 miles an hour, was not close enough to hear or see the impact, would indicate excessive speed.

As the trial judge reasoned, defendant's condition was undoubtedly responsible for the speed, considering the condition of the surface. It must also be observed that all other cars which approached the bridge at the speed limit were able to bring their cars under control without colliding with another vehicle. The Maske car, after a skid, was able to drive around the decedent's vehicle and to stop midway between that vehicle and the defendant's pickup. Jolene Kreifels, after she saw the defendant's vehicle, although with some difficulty, was able to stop within a car length of it.

The medical witness testified that the defendant's faculties would be impaired. Defendant should have seen the reflection from the decedent's headlights, as he entered on the viaduct. That he did not is evident from the fact he did not know what he had hit. From the physical evidence, particularly the force of the impact, the trial court reasonably could have assumed the defendant made no attempt to control his vehicle until he had traveled approximately 370 feet on the slick surface of the viaduct, that being the point where the skid mark starts.

Occupants of both vehicles received serious injur-

ies. The autopsy report indicates that the deceased had multiple internal injuries. These injuries included rupture of the heart, and multiple skeletal fractures, with additional injury to the lung and liver. Cause of death was multiple injuries secondary to the automobile accident. On the record, we can say the evidence was sufficient to permit the trier of fact to find that defendant's condition was a proximate cause of decedent's death. We cannot say the District Court was incorrect in the conclusion reached. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson, 200 Neb. 341, 263 N. W. 2d 485 (1978).

The judgment is affirmed.

AFFIRMED.

HAROLD R. NEWBANKS, APPELLANT, V. FOURSOME PACKAGE & BAR, INC., APPELLEE.

272 N. W. 2d 372

Filed December 13, 1978. No. 42056.

1. **Workmen's Compensation: Evidence: Burden of Proof.** Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment.
2. **Workmen's Compensation: Words and Phrases.** Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of any preexisting condition.
3. **Workmen's Compensation: Evidence: Burden of Proof: Damages.** In a workmen's compensation case involving a myocardial infarction, where the claimant has a preexisting disease or condition which contributes to the injury, he has the burden of estab-

lishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The injury is compensable only if the employment contribution involves an exertion greater than that of nonemployment life.

4. **Workmen's Compensation: Evidence.** In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case.
5. **Workmen's Compensation: Evidence: Judgments.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
6. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

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

John B. Ashford of Bradford & Coenen, for appellant.

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

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

MCCOWN, J.

This is a workmen's compensation case in which the plaintiff sought to recover benefits for a heart attack. A single judge of the Nebraska Workmen's Compensation Court awarded plaintiff benefits for temporary total disability. Upon rehearing, a three-judge panel of the Workmen's Compensation Court found against the plaintiff and dismissed his petition.

The plaintiff, Harold R. Newbanks, was the bartender and manager of a bar owned and operated by the defendant, Foursome Package & Bar, Inc., a corporation, owned and managed by the plaintiff

and his wife. The plaintiff was nearly 55 years old and had been working at the bar for 7 to 8 years prior to the incident here. His duties at the bar, in addition to his duties as bartender and manager, included such tasks as cleaning up, moving cases of whiskey and beer, and stocking shelves.

On December 15, 1976, sometime before noon, the plaintiff was engaged in cleaning the bar. In the process of picking up a case of whiskey which weighed approximately 60 pounds, the plaintiff experienced a pain in his head, neck, and chest. He sat down for approximately 30 minutes and then called his wife to have her make an appointment with the family physician. The doctor gave the plaintiff an appointment for December 17, 1976. Plaintiff continued to work on December 15 until sometime in the afternoon. The next 2 days the plaintiff opened the bar in the morning but apparently did little else.

On December 17, 1976, plaintiff was examined by his family physician. The doctor testified that an electrocardiogram taken on that date showed an abnormal tracing compatible with coronary angina, or an impending heart attack. He prescribed nitroglycerin and advised complete rest. Plaintiff testified that while the pain subsided, it did not go away.

On the night of December 21, 1976, plaintiff awoke with sharp pains and the doctor ordered him to the hospital where he was admitted at 3 a.m., on December 22, 1976. The electrocardiogram taken at the hospital on December 22, 1976, was substantially the same as the electrocardiogram taken on December 17, 1976, and both of them demonstrate ischemia, an inadequate supply of blood and its nutrients to the heart. Enzyme tests taken at the hospital on December 22, 1976, showed no abnormalities. The doctors agreed that the plaintiff had arteriosclerosis, commonly called hardening of the arteries, which is a progressive disease, common

among men of plaintiff's age. They also agreed that ischemia could result from, or be caused by, hardening of the arteries.

The evidence is virtually uncontradicted that at approximately 1:20 a.m., on December 23, 1976, while the plaintiff was in bed and asleep at the hospital, a myocardial infarction, or heart attack, occurred. Plaintiff remained in the hospital until January 2, 1977, and for 6 months thereafter he suffered temporary total disability and was restricted from returning to work.

Plaintiff's family doctor testified that plaintiff's lifting of the whiskey case on December 15, 1976, probably precipitated the heart attack on December 23, 1976. Plaintiff's cardiologist testified that ischemia is usually associated with hardening of the arteries, and that plaintiff's ischemia and pain could have been brought on by the labor he was performing on December 15, 1976. The defendant's cardiologist testified that the lifting incident of December 15, 1976, was not the cause of the heart attack of December 23, 1976, but that the heart attack was caused by hardening of the arteries.

The Workmen's Compensation Court found that plaintiff's injury resulted from exertion combined with an existing diseased condition and that the degree of exertion demonstrated by the evidence was not greater than that found in nonemployment life, and dismissed plaintiff's petition.

The plaintiff contends that the Workmen's Compensation Court erred in finding that the exertion of lifting the whiskey case on December 15, 1976, was not greater than that found in nonemployment life; in finding that arteriosclerosis rather than exertion caused, or contributed to cause, plaintiff's disability; and that the judgment of the Workmen's Compensation Court is not supported by the evidence.

The evidence is virtually undisputed that the plaintiff was suffering from arteriosclerosis, a pro-

gressive disease commonly called hardening of the arteries, and that the heart attack suffered by the plaintiff on December 23, 1976, could result from, or be caused by, hardening of the arteries alone. The evidence is also undisputed that the heart attack for which the plaintiff sought compensation occurred at 1:20 a.m., on December 23, 1976, while he was asleep in bed at the hospital, and that the lifting incident occurred at his place of employment on December 15, 1976. The critical issue here is whether the exertion in his employment on December 15, 1976, substantially increased the risk created by arteriosclerosis, and precipitated or contributed in some material and substantial degree to cause the heart attack of December 23, 1976.

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

Since 1963, the problem in heart attack cases such as the one now before us has been causation and whether the injury is the result of personal rather than employment risk. In Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461, in a case involving a stroke, where there was no evidence of any preexisting disease or condition, this court said: "In a workmen's compensation case such as this, the plaintiff now has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in

some material and substantial degree to cause the injury. Obviously, the presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment."

In a later case we said: " 'If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life.' " See Beck v. State, 184 Neb. 477, 168 N. W. 2d 532.

In a case closely paralleling the present case in many respects, this court held that in myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92.

Issues of causation are for determination by the fact finder. There is ample evidence in the record to sustain the findings of the Nebraska Workmen's Compensation Court. The plaintiff failed to meet his burden of proving that the heart attack here arose out of and in the course of his employment, and the determination of the Workmen's Compensation Court was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD S. LAFLIN, APPELLANT.

272 N. W. 2d 376

Filed December 13, 1978. No. 42078.

1. **Criminal Law: Forgery: Intent: Burden of Proof.** In order to prove the offense of forgery of a check, the State must show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with intent to defraud.
2. **Criminal Law: Forgery: Intent.** Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud.
3. **Criminal Law: Evidence: Judgments.** 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.
4. **Criminal Law: Forgery: Evidence.** Where the evidence clearly establishes the forgery of a bank check, it is immaterial whether the check was ever presented to a bank for payment.
5. **Criminal Law: Venue: Trial: Juries.** Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place.
6. **Criminal Law: Venue: Evidence.** 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.
7. **Probation and Parole.** This court will not overturn an order of the trial court denying probation in the absence of an abuse of discretion.

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

Gary G. Thompson, for appellant.

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

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

CLINTON, J.

The defendant, Lloyd S. Laflin, was found by a jury to be guilty of the offense of forgery and was sentenced to serve not less than 1 year nor more than 18 months in the Nebraska Penal and Correctional Complex. On appeal to this court, the defendant makes several assignments of error. For reasons hereafter stated, we find the assignments of error to be without merit and affirm the judgment.

Defendant asserts that the evidence was insufficient to permit submission of this case to the jury. A review of the uncontroverted trial testimony and the exhibits leads to the conclusion that the evidence was ample.

Vernon Rogge testified that he operated a filling station in Beatrice, Gage County, Nebraska. On October 24, 1977, Rogge gave cash and cigarettes to the defendant in exchange for a check imprinted with the legend "Roofing & Painting, Val D. Little," drawn in the amount of $45.00 to be paid to the order of Steve Laflin and signed "Val D. Little." The check was subsequently dishonored by the bank upon which it was drawn.

Val D. Little testified that he had not signed the check nor authorized defendant to do so. Little's bookkeeper, Lea Meyer, was the only other person authorized to write checks on Little's account. She stated that she had not signed the check.

Harold Moon, the documents examiner for the Nebraska State Patrol, had compared the handwriting on the check with handwriting samples obtained from the defendant, using a low-powered microscope and a hand-held magnifying glass, and testified that it was his opinion defendant had written the check. An independent inspection of the handwriting on the exhibits undoubtedly convinced the jurors that Harold Moon was correct in forming that opinion.

In order to prove the offense with which defendant

was charged, the State was required to show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with the intent to defraud. § 28-601, R. R. S. 1943; State v. Addison, 191 Neb. 792, 217 N. W. 2d 468. "Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud." Owens v. State, 152 Neb. 841, 43 N. W. 2d 168; Bullington v. State, 123 Neb. 432, 243 N. W. 273.

Clearly, the State presented substantial evidence as to each and every element of the crime. Defendant nevertheless asserts there were flaws in Harold Moon's procedures and conflict in the evidence as to intent. Such questions are for the jury. "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence." State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904.

Defendant next alleges that the State is required to show the reason for the bank's dishonor of the check and relies on State v. Addison, *supra*, for that proposition. In State v. Addison, *supra*, there was a possibility the check in question was either signed or authorized by its purported maker. The State failed to prove many of the essential elements of forgery in that case, and the failure to show that the check would have been dishonored if presented to the bank upon which it was drawn only added to the weakness of the State's case. State v. Addison, *supra*, is inapplicable here. It is still the law in this state that where the evidence clearly establishes the forgery of a bank check, it is immaterial whether the check was ever presented to a bank for payment. Owens v. State, *supra*.

Defendant next argues that there was insufficient

proof of the venue of the offense charged. In the information, defendant was accused of making the check but not of uttering it. It is true that at trial there was no direct showing of where the actual affixing of the forged signature to the check took place.

If there was no showing whatsoever of where the forgery took place, then the trial court lacked jurisdiction of the case. Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place. Art. I, § 11, Constitution of Nebraska; § 29-1301, R. R. S. 1943; Gates v. State, 160 Neb. 722, 71 N. W. 2d 460. However, "[t]he 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. Liberator, 197 Neb. 857, 251 N. W. 2d 709, quoting Gates v. State, *supra*, and the cases cited therein.

All the events in this case occurred in Beatrice, which is in Gage County, Nebraska. Val D. Little's place of business, from which the check was presumably taken, was located in Beatrice. Defendant apparently lived in or near Beatrice, as he had been a customer at Vernon Rogge's filling station for about 1 year. The check was passed in Beatrice. Gage County jurors would undoubtedly know that Beatrice is located near the center of Gage County and is several miles from any county line. Even the bank upon which the check was drawn is located in Gage County, although it is in Virginia rather than Beatrice. There was sufficient evidence for the jury to conclude that the check was forged in Gage County and to confer jurisdiction on the District Court for Gage County.

Finally, defendant contends that he should have been granted probation. This court will not overturn an order of the trial court denying probation in the absence of an abuse of discretion. State v. Garland, 199 Neb. 459, 259 N. W. 2d 481. This is defendant's third conviction on similar charges, and defendant was on probation for the offense of uttering a forged instrument when he wrote the check in question here. Under the circumstances, denial of probation was completely appropriate.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN J. GREEN, APPELLANT.

272 N. W. 2d 764

Filed December 13, 1978. No. 42099.

1. **Criminal Law: Searches and Seizures.** An affidavit for a search warrant is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded.
2. **Trial: Evidence: Confessions.** The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, Julianne M. Dunn, and Lyn L. Wallin, for appellant.

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

Heard before SPENCER, C. J., PRO TEM., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

BOSLAUGH, J.

The defendant was convicted of possession of heroin with intent to distribute and sentenced to im-

prisonment for 3 to 10 years. He has appealed and contends the trial court erred in overruling his motions in limine and to suppress. He further contends his motion for a mistrial should have been sustained; the evidence was not sufficient to sustain his conviction; his arrest during the trial resulted in a denial of due process; and the sentence imposed was excessive.

The record shows that the defendant, while under police surveillance, was observed leaving his apartment at 4821 North 66th Street in Omaha, Nebraska, at approximately 10:15 p.m., on December 7, 1977. The defendant and another black man entered a tan Oldsmobile with Illinois license plates and drove away from the parking lot. The officers conducting the surveillance reported that the defendant had left his apartment.

At approximately 11 p.m., the defendant arrived at the residence of Randy Perry at 4013 Charles Street in Omaha, Nebraska, where a search was underway. After the defendant and his companion, Lawrence Hickman, had entered the Perry residence, they were stopped by the officers present and searched. A package of heroin was found in the coat pocket of Hickman. Both the defendant and Hickman were arrested and the officer in charge ordered that a search warrant be obtained to search the defendant's apartment.

A search warrant was obtained upon the basis of an affidavit containing the following allegations: "On Wednesday 7 December 77 Omaha Police Officer Bernard Venditte received information from a person who Officer Bernard Venditte knows to be a reliable informant and who has given Omaha Nebraska Police Officers information in the past that has been checked and found to be true and accurate, regarding to heroin and heroin sales. This reliable informant further stated that Allan James GREEN aka: 'PUNCHY' has in the past made deliveries of

heroin to a Randy PERRY who resides at 4013 Charles Street Omaha Douglas County Nebraska and others not known to this reliable informant . . . Omaha Police Vice/Narcotics Officers have kept a continuing investigation in regards to heroin trafficing by Allan James GREEN aka: 'PUNCHY'. This investigation began at approximately 30 Aug. 77 and has continued through the present 7 December 77. During this investigation Omaha Police Officers have received information from two other separate reliable informants one who has given Officers information that has been checked and found to be true and accurate; and the other who has given information that has also been found to be true and accurate and who has also made a controlled narcotic purchase for Omaha Police Officer Patricia A. Swaney. The above two informants have also stated to officers that Allan James GREEN aka: 'PUNCHY' has been supplying heroin to Randy PERRY and that on several occasions when GREEN delivers heroin drives a blue '75 VW. Both Officer P. Swaney and Lt. Bernard Venditte have received information from the above informants that GREEN has resently (sic) (within the past 72 hours) been in possession of a large quantity of heroin, and is still in possession of a large quantity of heroin.

"Lt. Bernard Venditte has also received information from his reliable informant that Allan James GREEN aka: 'PUNCHY' is making sales of heroin from his residence of 4821 No. 66th Street Apt. #141 Omaha Douglas County Nebraska.

"All of the above reliable informants have knowledge of what heroin and other drugs look like and how these drugs and narcotics are packaged for street sales from their previous street experience.

"During this narcotic investigation of Allan James GREEN aka: 'PUNCHY' Officers of the Vice/Narcotics Unit specifically Lt. Bernard Venditte and Officer Patricia A. Swaney & a Paul Wade kept each

other aware of information supplied by their informants.

"Due to the foregoing, these affiants believe that concealed on the premises of 4821 No. 66th Street apt. #141 located in Omaha Douglas County Nebraska a quantity of heroin and instruments used for the administering of heroin. . .

"*On Wednesday 7 December 77 at 2215 hours Officer R. Swiercek observed Allan James GREEN aka: PUNCHY and another party leave 4821 North 66th Street. These subjects were later stopped and searched and Lt. Bernard Venditte advised these affiants that a quanity (sic) of heroin was found. . ."

The defendant's apartment was searched and a packet containing 1/3 ounce of heroin was found together with instruments, equipment, and supplies suitable for use in preparing heroin for street sale. The equipment included a fruit bowl, plastic bottles, and a coffee blender, all of which contained traces of heroin. Other equipment included a gram scale with a trace of a cutting agent on the tray; 2 playing cards; and a mortar and pestle. The supplies included a plastic bag of Dormin and a plastic bag of lactose, both of which are cutting agents; five small pieces of tinfoil and three boxes of Reynolds Wrap; a box of Baggies; and three boxes of sandwich storage bags. The officers also found $1,770 in cash in the pocket of a leather jacket.

The State's theory of the case was that Hickman was a courier or "mule" used by the defendant to transport or deliver heroin to the Perry residence. The other evidence discovered by the search of the defendant's residence supported the inference that the defendant was engaged in the business of packaging and distributing heroin. The evidence, although in part circumstantial, was substantial and was sufficient to sustain the conviction.

The defendant contends his motion to suppress relating to the search warrant should have been sus-

tained because the State had no direct evidence that Hickman had been at the defendant's apartment and was the man who was with the defendant when the defendant left his apartment.

The affidavit upon which the search warrant was obtained alleged the defendant and another party were observed leaving 4821 North 66th Street and that: "These subjects were later stopped and searched and Lt. Bernard Venditte advised these affiants that a quantity of heroin was found." Although there was no direct evidence that Hickman was the "party" observed leaving 4821 North 66th Street, that was a permissible inference from the facts known to the officer. Without regard to that matter, an affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded. See, State v. Iowa Dist. Ct. In and For Johnson Cty., 247 N. W. 2d 241; United States v. Marihart, 492 F. 2d 897 (1974). Under this rule the affidavit was clearly sufficient to support the issuance of the warrant.

The second motion to suppress related to statements made by the defendant while in custody. The evidence of the State was that the defendant was fully advised of his rights as required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, prior to interrogation. At the suppression hearing the defendant testified that he was not advised of his rights prior to interrogation, but at the trial he testified: "Q. Okay. Now, they advised you of your rights at least three times that there's paperwork on. And every time you admitted that you'd talk to them and so forth, did you not? A. Yes, sir. Q. You answered all the questions. You said you didn't want a lawyer, and you had nothing to hide; isn't that right? A. Yes, sir. I thought I didn't need a lawyer." The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Temple, 192 Neb. 442, 222 N.

W. 2d 356. See, also, State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387; State v. Prim, *ante* p. 279, 267 N. W. 2d 193. Both motions to suppress were properly overruled.

The motion in limine related to the discovery of the heroin in the possession of Hickman when he and the defendant arrived at the Perry residence and the discovery of the items found in the search of the defendant's apartment. This evidence was admissible as a part of the State's case and the motion was properly overruled.

During the recross-examination of Officer Sieh the following occurred: "Q. On Hickman now, you say you had a conversation with — with the defendant, and he said that Hickman was in the apartment? The defendant, I'm talking about. A. Maybe I misunderstood. It's Hickman that said that he had been there. MR. WATTS: Oh, I see. Move to strike that, Your Honor, as not responsive. THE COURT: The motion is sustained. The answer in regard to what Hickman said is stricken. The jury is instructed to disregard it. MR. WATTS: And I'm — I'm going to move for a mistrial. That's the — You know, the whole claim is that Hickman was never there in this trial, and now he — he gets nonresponsive to the question. THE COURT: The motion is denied."

On redirect-examination the witness, Officer Sieh, had testified that the defendant had said "something about Lawrence Hickman being there in the apartment, that he had came up that day." Apparently this was a mistake and the officer wished to correct his testimony during recross-examination. The answer which was objected to was not responsive. The defendant's motion to strike was sustained and the jury instructed to disregard the answer. Under the circumstances this was sufficient to cure the error and the motion for a mistrial was properly overruled.

The defendant was released on bond during the trial which commenced on April 10, 1978. During that evening while the defendant was on his way home, he was stopped and arrested. The record is not entirely clear but, apparently, he was charged with possession of marijuana and held overnight in the jail. He testified the next day, in support of motions to dismiss and for a mistrial, that he had been subjected to some physical abuse and had been questioned about the trial as to who his witnesses would be, and what strategy his lawyer would use. The trial court found that the defendant's rights so far as the trial was concerned had not been jeopardized and overruled both motions.

We think the rulings were correct. While harrassment of the defendant and interference with a trial can not be tolerated, the record here fully supports the rulings of the trial court. Although the defendant may have some right to relief because of the alleged conduct of the police, the trial court was not required to dismiss the prosecution or grant a mistrial because of the incident.

The defendant is 26 years of age. He was placed on probation in 1971 in Chicago, Illinois, for criminal damage to property. Apparently he violated that probation in 1972. In 1975 he was sentenced to a term of 1 to 3 years imprisonment for uttering a forged instrument. In 1976 he was placed on 2 years probation on a federal charge of conspiracy to possess and utter counterfeit bills. In view of the nature of the charge and the defendant's past record, the sentence imposed in this case was not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

JAMES R. WHEELOCK, APPELLEE, V. OPAL HEATH, ET AL., APPELLANTS.

MANNING OO RANCHES, INC., APPELLEE, V. OPAL HEATH ET AL., APPELLANTS.

272 N. W. 2d 768

Filed December 13, 1978. Nos. 42118, 42119.

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. **Property: Mineral Estates: Intent.** For abandonment of mineral interests in realty to occur there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon.
3. **Property: Mineral Estates.** When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct title, and each is a freehold estate of inheritance, subject to the laws of descent, devise, and conveyance.
4. **Property: Mineral Estates: Due Process.** Mineral interests in land are subject to the protection of the due process clause.
5. **Property: Mineral Estates.** The removal of minerals, whether held in solution upon the land or resting in the soil or subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached.
6. _____: _____. When a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created.

Appeals from the District Court for Grant County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Martin, Mattoon & Matzke, for appellants.

Reddish, Curtiss & Moravek, and Thomas A. Danehey, for appellees Wheelock and Manning OO Ranches, Inc.

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

SPENCER, C. J., PRO TEM.

These actions are brought under sections 57-228 through 57-231, R. R. S. 1943, to extinguish the severed mineral interests owned of record by the defendants, and to vest the title to them in the plaintiffs. The trial court canceled the interests and vested title in plaintiffs. The question presented is the constitutionality of the act as retroactively applied against these defendants. We reverse.

The statutory provisions pertinent herein, all of which became effective in 1967, are as follows:

Section 57-228, R. R. S. 1943: "Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record, naming as parties defendant therein all persons having or appearing to have any interest in such severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Chapter 25, article 3."

Section 57-229, R. R. S. 1943: "A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the

surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided*, that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner."

Section 57-230, R. R. S. 1943: "If the court shall find that the severed mineral interest has been abandoned, it shall enter judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the interest in the surface from which it was originally severed in the proportions in which they own such interest in the surface."

Section 57-231, R. R. S. 1943: "In any action filed within two years after October 23, 1967, the owner of a severed mineral interest may enter his appearance and assert his interest therein, and he shall be deemed thereby to have timely and publicly exercised his right of ownership."

The parties stipulated that case No. 42118 and case No. 42119 should be consolidated for the purpose of submitting briefs and for oral argument. The only basic difference between the two cases is the real estate involved.

On May 29, 1950, George S. Manning, for valuable

consideration, executed and delivered a mineral deed to R. W. Slemaker, conveying an undivided one-half interest in and to all oil, gas, and minerals that may be produced from over 3,000 acres of land in Grant County, Nebraska. Said mineral deed warranted the title of said mineral estate forever to the grantee, his heirs, successors, executors, personal representatives, and assigns.

R. W. Slemaker and wife for valuable consideration executed and delivered mineral deeds for fractional interests to the respective defendants herein, conveying undivided interests in and to all oil, gas, and minerals that may be produced from said land. Said mineral deed warranted the title to said mineral estates.

The plaintiffs, appellees herein, James R. Wheelock and Manning OO Ranches, Inc., subsequently acquired title to the surface and one-half of the oil, gas, and minerals in different tracts of real estate through mense conveyances of record from the original grantor, George S. Manning. The appellees, successors in interest to the original grantor, have now brought these actions to terminate and extinguish the mineral interests owned by the defendants-appellants.

There is no factual dispute in the cases. Plaintiffs are the surface owners of the real estate involved and they also own an undivided one-half interest in all the oil, gas, and other minerals underlying their respective tracts of land. Defendants acquired their mineral interests more than 23 years prior to the filing of the actions and had not taken any of the steps required by section 57-229, R. R. S. 1943, to preserve their interests.

We first meet the question as to whether the act was intended to apply retrospectively. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly dis-

closed. Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Sys., 199 Neb. 507, 260 N. W. 2d 472 (1977). It is obvious the Nebraska act was clearly intended to apply retrospectively, because it allows actions to be filed immediately after its effective date. Section 57-231, R. R. S. 1943, provides: "In any action filed within two years after October 23, 1967 * * *." The act became effective October 23, 1967.

In considering the constitutionality of the retrospective application of the act, it is necessary to define the nature of the title to a severed mineral interest. As stated by E. Kuntz in Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest, 22 Oil & Gas Inst. 81, 97 (1971): "The concept (of abandonment in the statutes of Illinois, Michigan, and Nebraska) is necessarily predicated upon an assumption by the legislature that the nature of the title is such that it is capable of being abandoned. Whether or not this assumption is a valid one must be determined by the judicial process. Such determination, in turn, will require an appraisal or reappraisal of the basic theory of ownership adopted in the state and an appraisal or reappraisal of the basic legal principles regarding abandonment of title to real property."

In Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286 (1904), the rule is stated that for abandonment to occur there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon. It is further stated in that opinion that mere absence from and nonuser of the property do not provide an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. The statute, in effect, provides that failure to publicly exercise the right of ownership to a severed mineral interest for a period of 23 years conclusively establishes the

intention to abandon. At common law, legal title to land could not be lost by abandonment. See Tate v. Biggs, 89 Neb. 195, 130 N. W. 1053 (1911).

The general rule is stated in 54 Am. Jur. 2d, Mines and Minerals, § 116, p. 298, as follows: "When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate of inheritance subject to the laws of descent, devise, and conveyance. The owners of the two estates do not become tenants in common, although, of course, the conveyance may be so worded as to constitute the purchasers of either estate such tenants.

"A grantee of the minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. The minerals thus severed become a separate corporeal hereditament. Their ownership is attended with all the attributes and incidents peculiar to ownership of land, and they may be embraced in the terms 'land' or 'real property' in a subsequent conveyance."

There are numerous indications under Nebraska law that mineral interests are vested property rights. In Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568 (1958), and in Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852 (1960), this court held that mineral interests in land are subject to the protection of the due process clause. Section 77-103, R. R. S. 1943, provides, so far as material herein: "The terms real property, real estate and lands shall include * * * minerals * * * mineral springs and wells, oil and gas wells, * * *." In Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75 (1918), this court said: "The removal of minerals, whether held in solution upon the land or resting in the soil and subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until

detached." See, also, Conway v. County of Adams, 172 Neb. 94, 108 N. W. 2d 637 (1961). Under section 25-2170, R. R. S. 1943, mineral interests are subject to partition.

In Elrod v. Heirs, Devisees, etc., 156 Neb. 269, 55 N. W. 2d 673 (1952), Hattie Gifford conveyed a section of land "subject to and reserving to the grantor herein personally an undivided one-half (½) interest in and to all gas, oil or other minerals in on or under said land herein conveyed." The appellants claimed that the reservation of the mineral estate was personal to the grantor and created only a life estate which terminated at grantor's death. This court in that case held "The conclusion is inescapable that Hattie Gifford by the terms of her deed to appellants retained a fee simple estate in one-half of the gas, oil, and other minerals in the land conveyed." It may be argued, however, that this case is not dispositive since the term "fee simple" merely indicated that the grantor retained an estate of inheritance rather than indicating the possessory or corporeal nature of the interest. We incline to the view, however, that when a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created.

In Comment, Abandonment of Mineral Rights, 21 Stanford L. Rev. 1227 (1969), it is stated: "Interests in land, or hereditaments, have long been categorized by the common law for certain purposes as either 'corporeal' or 'incorporeal.' For example, fee-simple ownership of a plot of land is considered ownership of a corporeal hereditament; the owner is deemed to 'own' a corporeal substance — the land. On the other hand, an easement is an example of an incorporeal hereditament. The holder of an easement does not 'own' any tangible substance; rather, he 'owns' the right to use portions of another's land for passage. * * *

"While incorporeal hereditaments, such as easements, licenses, mining claims, and franchises, have uniformly been held subject to abandonment, a firmly established common law rule provides that a corporeal interest in land cannot be abandoned. Underlying this rule is the seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land."

In Fawn Lake Ranch Co. v. Cumbow, *supra*, this court said: "In Williamson v. Jones, 39 W. Va. 231, 257, 25 L. R. A. 222, upon the question whether mineral oil in place is part of the realty, it was held that it was, and that its removal constituted waste, the court saying:

" 'The courts of the state of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. "Oil is a mineral, and, being a mineral, is part of the realty. Funk v. Haldeman, 53 Pa. St. 229. In this it is like coal or any other natural product which *in situ* forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for fire-bote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of the estate." ' "

Appellees direct our attention to Hiddleston v. Nebraska Jewish Education Soc., 186 Neb. 786, 186 N. W. 2d 904 (1971), in which we held: "Constitutionality of a retroactive statute under the contract and

due process clauses of the United States and the Nebraska Constitutions generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by statute." In that case the extinguishment of possibilities of reverter after 30 years was held to be constitutional even though the statute operated retrospectively. The court there stated: "The value of possibilities of reverters as a class has been slight."

There is a vast difference between possibilities of reverter and the outright severance of a mineral interest for a consideration. It cannot be said that the value of mineral interests as a class has been slight. As suggested before, in the quotation from Fawn Lake Ranch Co. v. Cumbow, *supra*, the mineral interest may form the most valuable part of the land.

To date, the exact question involved herein has been considered by only one intermediate appellate court. In Bickel v. Fairchild, 83 Mich. App. 467, 268 N. W. 2d 881 (1978), the Michigan Dormant Mineral Act was declared unconstitutional. The act provided that a severed oil and gas interest would be deemed abandoned unless during any 20-year period the holder of the interest had secured a drilling permit, produced oil or gas, transferred the interest, used the property for underground gas storage, or recorded a notice of interest. A 3-year grace period was provided by the act, which became effective in 1963, for persons to record notice to preserve their interest.

The observations of that court are pertinent herein: "We agree with appellants that in our energy short and energy conscious generation, the legislative act has a real public purpose -- to encourage exploration and drilling of new gas and oil wells. Some oil and gas rights, with the passage of time,

have become fractionalized and distributed among numerous owners, many who are no longer locatable and perhaps even deceased. No oil company will spend the time and expense of tracing all the possible owners down in order to do expensive exploratory drilling with no guarantee of favorable results.

"On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. These rights are subject to being sold, mortgaged, leased, devised or inherited just as the surface rights are. Whose rights are paramount, the state's or the individual's?"

Appellees refer to a Virginia case, Love v. Lynchburg National Bank & Trust Co., 205 Va. 860, 140 S. E. 2d 650 (1965), as supporting their position. It is true, in that case a statute extinguishing mineral interests was held to be constitutional. That case, however, is distinguishable. There, the statute merely created a presumption there were no minerals in the land if the claim was not exercised for 35 years. Further, the interest holder was permitted 6 months after being sued to discover minerals. The Virginia court determined the statute did not operate to divest any property rights. It merely provided a rule of evidence. If there were no minerals, there could be no mineral interest. The court also held the statute did not constitute special legislation, stating: "The legislation is general and impartial in its operation on all persons and land similarly situated."

In the case before us, the statute deprives known property owners of their subsurface rights without notice, hearing, or compensation. The statute was passed in 1967. It declared the mineral rights shall have been abandoned unless the record owner had publicly exercised ownership rights, as defined in the statute, within 23 years immediately prior to the filing of an action to cancel the severed mineral in-

terest of record. No notice of any nature was given to the record owner of a mineral interest.

A limited statute of limitations was provided. In any action filed within 2 years after October 23, 1967, the owner of a severed mineral interest could enter an appearance and assert his interest. He would then be deemed to have timely and publicly exercised his right of ownership. In other words, the record title owners were required within 2 years from October 23, 1967, to take some affirmative action or lose their property. In all actions filed after October 23, 1969, if no affirmative action had been taken within 23 years, the severed interest is to be considered abandoned. The owner does not have any remedy. The statute, insofar as it attempts to operate retroactively, is unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions.

The judgment of the District Court is reversed and the cause remanded with directions to find sections 57-228, 57-229, 57-230, and 57-231, R. R. S. 1943, unconstitutional insofar as those statutes may be interpreted to be retroactive in their operation.

REVERSED AND REMANDED WITH DIRECTIONS.

MONAHAN CATTLE COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. LEO GOODWIN ET AL., APPELLANTS.

272 N. W. 2d 774

Filed December 13, 1978. No. 42096.

Appeal from the District Court for Grant County: ROBERT R. MORAN, Judge. Reversed and remanded.

Stubbs & Metz, for appellants.

Reddish, Curtiss & Moravek, and Thomas A. Danehey, for appellee Monahan Cattle Company.

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

SPENCER, C. J., PRO TEM.

This action is brought under sections 57-228 through 57-231, R. R. S. 1943, to extinguish the severed mineral interests owned of record by the defendants, and to vest the title to them in the plaintiff. The question presented is the constitutionality of these statutes as retroactively applied against these defendants. The trial court canceled the interest and vested title in the plaintiff. We reverse.

The issues involved herein are identical to those in Wheelock and Manning OO Ranches, Inc. v. Heath, Nos. 42118 and 42119, *ante* p. 835, 272 N. W. 2d 768 (1978). This case is therefore controlled by our decision therein that sections 57-228, 57-229, 57-230, and 57-231, R. R. S. 1943, are unconstitutional insofar as those statutes may be interpreted to be retroactive in their operation.

The judgment of the District Court is reversed and the cause is remanded for the reasons stated.

REVERSED AND REMANDED.

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11. Benefit Regulation No. 8 promulgated by the Commissioner of Labor is invalid insofar as it requires that a claimant's notice of appeal when given by mail be actually received within 10 days after mailing of the notice of the deputy's determination. Parson v. Chizek .. 754
12. The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Gretna Public School v. State Board of Education 769
13. Section 84-917, R. R. S. 1943, does not provide a right of appeal from a declaratory ruling of an administrative agency pursuant to section 84-912, R. R. S. 1943. Gretna Public School v. State Board of Education 769

Adoption.

The securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support. Smith v. Smith 21

Adverse Possession.

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Rasmussen Farms v. Gove 432

Affidavits.

1. In an affidavit for a search warrant the judge must

be informed of some of the underlying circumstances from which the informant concluded that controlled substances were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. State v. Payne 665

2. Affidavits for search warrants must be tested in a commonsense realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. State v. Payne 665

Agency.

If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. V.P.O., Inc. v. Money .. 30

Alimony.

1. An award of child support, the fixing of alimony, and the distribution of property rest in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Van Cleave v. Van Cleave 211
2. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Van Cleave v. Van Cleave 211
3. The trial court has the inherent power in adjusting the rights of the parties to provide that a money allowance to be paid in installments shall not draw interest until a certain date. Nickel v. Nickel 267
4. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Nickel v. Nickel 267
5. It is well-established that alimony may be awarded in addition to a property settlement. Baker v. Baker 409
6. When dissolution of a 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. Baker v. Baker 409
7. The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness. Baker v. Baker 409
8. When dissolution of a marriage is decreed, the court

may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Morris v. Morris 479

9. The fixing of the amount of alimony in each case rests within the sound discretion of the trial court. Morris v. Morris 479
10. Alimony awards payable in the form of an annuity for life are not favored. Starr v. Starr 683

Appeal and Error.

1. The District Court is required to review the entire record, weigh the evidence, and determine what is the preponderance of the evidence. Snygg v. City of Scottsbluff Police Dept. 16
2. Upon appeal to the District Court from an order of the Nebraska Equal Opportunity Commission the review is by trial de novo upon the record. Snygg v. City of Scottsbluff Police Dept. 16
3. Upon appeal to this court from a judgment of the District Court in an appeal from the Nebraska Equal Opportunity Commission the judgment of the District Court will be affirmed if it is supported by substantial evidence. Snygg v. City of Scottsbluff Police Dept. 16
4. Where a motion for new trial is not filed within the time prescribed by law, the time for appeal runs from the rendition of the judgment. Corell v. Corell 59
5. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. McConnell 84
6. In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment. Abramson v. Bemis 97
7. A party may not properly assign as error on appeal the admission of evidence where no objection was made

thereto at trial. Scudder v. Haug 107
8. Alleged errors of the trial court in an action at law, not referred to in a motion for new trial, will not be considered in this court on appeal. Scudder v. Haug .. 107
9. In a law action tried to the court without a jury, the findings of the trial court have the effect of a jury verdict, and will not be disturbed on appeal unless clearly wrong. Scudder v. Haug 107
10. On appeal this court considers only alleged errors which are assigned and discussed in the appellant's brief. Scudder v. Haug 107
11. When an alleged error was not raised in a motion for a new trial, the defendant is now precluded from raising the alleged error on appeal to this court. State v. Steed 120
12. A decision of the proper official or board in interpreting and applying a zoning ordinance will not be disturbed on appeal to this court unless it is illegal or from the standpoint of fact is not supported by the evidence, is arbitrary, unreasonable, or clearly wrong. Kitrell v. Board of Adjustment 130
13. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. National Bank of Commerce Trust & Sav. Assn. v. Katleman ... 165
14. Plain error in the record, indicative of a probable miscarriage of justice, may be considered by this court, even if not assigned as error. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165
15. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. National Bank of Commerce Trust & Sav. Assn. v. Katleman ... 165
16. The failure to give a definition of proximate cause herein was prejudicial error. Geiger v. Sweeney 175
17. In an appeal from the Workmen's Compensation Court, the Supreme Court is not free to weigh the facts anew. The standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Kudera v. Minnesota Mining & Manuf. Co. 235
18. If a trial court gives an erroneous instruction, or erroneously gives an instruction, the record must establish such an error did not affect the result of the trial unfavorably to the party affected by such instruction. Oban v. Bossard 243
19. While equity cases are heard de novo in this court, in determining 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. Swearingen v. Swearingen 255
20. While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Swearingen v. Swearingen 255
Long v. Sena 642
21. In cases involving child custody, the determination of the trial court will not ordinarily be disturbed unless there was a clear abuse of discretion on its part or its findings are clearly against the weight of the evidence. Ahlman v. Ahlman 273
22. A finding of a trial court that statements or confessions were intelligently and voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. State v. Prim 279
23. Under the Sexual Sociopath Act, after original commitment, all orders determining the current treatability status of a sexual sociopath, entered after hearing or after summary review shall be considered final orders for purposes of appeal. State v. Blythman 285
24. Under the Sexual Sociopath Act, after original commitment, all orders determining the current status of a defendant as a sexual sociopath, entered after hearing or after summary review, shall be considered final orders for purposes of appeal. State v. Blythman 285
25. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
26. On appeal of an action under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Christensen v. City of Tekamah 344
27. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed on appeal. Stradley v. City of Omaha 378
28. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set

aside on appeal unless clearly wrong. Baker's Supermarkets v. John 387
29. Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction, and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Sibert v. City of Omaha 399
30. This court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
31. In an error proceeding, the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is some competent evidence to sustain its findings. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
32. A party cannot be heard to complain of an error which he was instrumental in bringing about. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
33. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Wasserburger v. Coffee 416
34. 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. Rasmussen Farms v. Gove 432
35. On appeal, a party to a divorce proceeding cannot ordinarily successfully assert error in a property division requested and obtained by him in the trial court. Morris v. Morris 479
36. Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. State v. City of Omaha 491
37. Purported evidence which does not appear in the bill of exceptions cannot be considered by the Supreme Court on appeal. Nicholson v. Braddock 531
38. The determination of custody and fixing of child support rest in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Scarpino v. Scarpino 564
39. The Department of Labor Appeal Tribunal exercises quasi-judicial power as distinguished from legislative

power. Consequently, the statutory provision for a de novo review is valid. Strauss v. Square D Co. 571
40. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Strauss v. Square D Co. 571
41. A party who does not object at trial to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his rights to complain on appeal. State v. Baker 579
42. A party who does not object to a misstatement when made and who does not assign the alleged error in a motion for new trial cannot be heard here on possible prejudice of that misstatement. State v. Brashear 582
43. The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong. Ineba Ranch v. Cockerill 592
44. In an action at law, it is not for the Supreme Court to resolve the conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact. Ineba Ranch v. Cockerill 592
45. A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed on appeal except for a clear abuse of discretion. State v. Kerns 617
46. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kerns 617
47. Appeals in probate matters are governed by article 16 of Chapter 30, R. R. S. 1943. Gunn v. Emerald, Inc. 635
48. An appeal in a probate matter must be taken within 30 days after the decision and a transcript filed within 10 days thereafter. Gunn v. Emerald, Inc. 635
49. Section 24-542, R. R. S. 1943, is not applicable to appeals in probate matters and a notice of appeal is not required in such an appeal. Gunn v. Emerald, Inc. 635
50. Probate matters on appeal to the District Court from the county court are tried de novo. Gunn v. Emerald, Inc. 635
51. 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. Hoback v. Hoback 639
52. The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court. State v. Fowler 647
53. Under section 48-185, R. S. Supp., 1976, the findings of

fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. There is no longer provision in our statutes for de novo review in this court of workmen's compensation cases. Herold v. Constructors, Inc. 697

54. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. Smith v. University of Nebraska Medical Center 730

55. Attorney's fees are not allowable for services on appeal in a compensation case where the appeal is instituted by the employee. Smith v. University of Nebraska Medical Center 730

56. Benefit Regulation No. 8 promulgated by the Commissioner of Labor is invalid insofar as it requires that a claimant's notice of appeal when given by mail be actually received within 10 days after mailing of the notice of the deputy's determination. Parson v. Chizek 754

57. A notice of appeal filed pursuant to section 48-634, R. R. S. 1943, which is properly addressed and to which sufficient postage has been affixed, shall be valid if it is deposited in the United States mail within 10 days after the mailing of the notice of the deputy's determination. Parson v. Chizek 754

58. This court will not disturb an order of the Public Service Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

59. Where the fitness of an applicant is an issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the commission if the order of the commission is supported by competent evidence. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

60. The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Gretna Public School v. State Board of Education 769

61. Section 84-917, R. R. S. 1943, does not provide a right of appeal from a declaratory ruling of an administrative agency pursuant to section 84-912, R. R. S. 1943. Gretna Public School v. State Board of Education 769

62. Where there has been an appeal to the District Court in a misdemeanor case, a motion for new trial must be filed in the District Court if there is to be a review

in this court of errors of law occurring at the trial or the sufficiency of the evidence. State v. Hayen 789
63. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Sommers 809
64. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Newbanks v. Foursome Package & Bar, Inc. .. 818

Appropriation of Public Money.

1. A lease agreement between the state and a municipal corporation with annual rental periods does not violate Article XIII, section 1, of the Constitution, where the liability of the state is conditioned upon a legislative appropriation having been made before each rental period begins. Ruge v. State 391
2. Section 77-2602, R. R. S. 1943, does not appropriate revenue placed in the Downtown Education Center and Office Rental Fund and revenue placed in that fund may not be expended without a specific legislative appropriation from that fund. Ruge v. State 391

Appurtenances.

1. Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. In determining this question, the following tests, while not all inclusive, have received general approval, viz: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is concerned; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Cook v. Beermann 675
2. Ordinarily, the owner of the fee, by his annexation of personal property, renders it an accession to the land. Cook v. Beermann 675

Arrest.

1. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Kretchmar 308
2. When the officer became aware that the car contained marijuana he had probable cause to arrest the defend-

ant and to search the vehicle. State v. Kretchmar 308
3. Ordinarily, the illegality of an arrest is not a defense to the crime for which the arrest was made. State v. Knudsen 584

Assault and Battery.

1. Proof that great bodily injury actually occurred is not an essential element of the crime of assault with intent to inflict great bodily injury. State v. Cruse 533
2. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Cruse 533
3. Previous acts of violence by the defendant against the victim of an assault may be shown for their bearing upon the issue of felonious intent. The trial court has broad discretion in determining the relevance of such testimony and the exercise of such discretion will be upheld in the absence of an abuse thereof. State v. Casados 726
4. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. State v. Ristau 784
5. To constitute the offense of assault with intent to do great bodily injury there must be an unlawful assault, coupled with a present ability and intent to injure, but no actual battery need occur. State v. Ristau 784

Assignments.

Where section 44-371, R. R. S. 1943, is not applicable, an oral assignment or pledge of a life insurance policy by the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. Albracht v. Prudential Ins. Co. 249

Attorney and Client.

1. A client has the power to discharge his or her attorney without cause at any time, but remains liable for the reasonable value of the services rendered. Scudder v. Haug 107
2. A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law.

State ex rel. Nebraska State Bar Assn. v. Gobel 586
3. Effectiveness of counsel in the representation of a defendant in a criminal case is measured by comparison with the standard of performance which should be expected from a lawyer with ordinary training and skill in the criminal law in his area. State v. Hawkman 605
4. Our present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his clients. State v. Fowler 647
5. The decision to object or not to object to evidence is a part of trial strategy, and due deference is given to the discretion of defense counsel to formulate trial tactics. State v. Fowler 647
6. Trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims. State v. Fowler 647
7. The necessity of the trial court instructing the jury with reference to the failure of the defendant to testify (NJI No. 14.63) is a matter of trial strategy on the part of defendant's counsel, and must be requested by him, or the subject of agreement between counsel and the court. State v. Fowler 647
8. Effectiveness of counsel is not to be judged by hindsight. State v. Fowler 647

Attorneys at Law.

1. A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. State ex rel. Nebraska State Bar Assn. v. Gobel 586
2. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. State ex rel. Nebraska State Bar Assn. v. Gobel 586

Attorney's Fees.

1. Attorney's fees and expenses may be recovered only where authorized by statute or a uniform course of procedure. Suhr v. City of Seward 51
2. In a partition action, attorney's fees and reasonable referee's fees shall be taxed as costs in the proceedings. Lienemann v. Lienemann 458
3. Attorneys for the plaintiff in a partition action shall be entitled to all awarded fees where the shares conferred by the judgment, and all encumbrances acted upon by

plaintiff, are accurately pleaded in his original petition. Lienemann v. Lienemann 458
4. Fees shall be divided among the attorneys of record who shall have filed pleadings upon which any of the findings in a judgment of partition are based. Lienemann v. Lienemann 458
5. An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Morris v. Morris 479
6. Whenever an employer refuses payment or when an employer neglects to pay compensation for 30 days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed by the compensation court. Smith v. University of Nebraska Medical Center 730
7. Attorney's fees are not allowable for services on appeal in a compensation case where the appeal is instituted by the employee. Smith v. University of Nebraska Medical Center 730

Aviation.

A person operating an airplane for spraying crops must use due care to perform such operations under such conditions and in such manner as not to cause injury to others. A person who negligently sprays a liquid or powder containing a dangerous proportion of poison in such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom. Mustion v. Ealy 139

Bail.

Where the execution of a sentence has been suspended under section 29-2301, R. R. S. 1943, and the defendant has been at liberty under bail, the bond may be continued without the consent of the surety during the period of suspension. State v. Hurley 569

Blood, Breath, and Urine Tests.

1. The percentage of alcohol content of body fluids is relevant in a civil case when accompanied by expert opinion evidence of the effect thereof. Sandberg v. Hoogensen 190

2. The result of the blood test of the passenger was relevant to prove his intoxication. Intoxication would diminish his appreciation of danger and render him more likely to take greater risks than usual. Sandberg v. Hoogensen 190
3. In order to support a conviction for the offense of drunk driving based solely on a chemical test, the results of the chemical test, when taken together with its tolerance for error, must equal or exceed the statutory percentage. State v. Bjornsen 709
4. Where a technician testifies that a blood alcohol test of a defendant yielded a reading exactly equal to ten-hundredths of one percent, which is the minimum percentage necessary for proof of the offense of drunk driving, but concedes that the test is subject to a tolerance for error of five-thousandths of one percent, the State has not, on that testimony alone, proven the elements of the offense beyond a reasonable doubt. State v. Bjornsen 709
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. Sommers 809

Brokers

Where a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale. Byron Reed Co., Inc. v. Majers Market Research Co., Inc. 67

Burden of Proof.

1. In a post conviction proceeding the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted. State v. Flye 115
2. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Flye 115
3. Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are

wholly insufficient and justify the summary dismissal of a post conviction proceeding. State v. Flye 115
4. A party who relies on circumstantial evidence for proof of causation need not exclude any other possible causes, but the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been proved. Mustion v. Ealy 139
5. A plaintiff in a merchantability lawsuit must prove that the defendant deviated from the standard of merchantability and that this deviation caused the plaintiff's injury both proximately and in fact. Geiger v. Sweeney 175
6. An award of workmen's compensation benefits cannot be based alone on speculation and conjecture and if an inference favorable to the claimaint can only be reached on the basis thereof, then he cannot recover. Camarillo v. Iowa Beef Processors, Inc. 238
7. An award for permanent disability cannot be based on mere possibilities. Camarillo v. Iowa Beef Processors, Inc. 238
8. The State has the burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Johnson 322
9. Where a defendant seeks the vacation of a permanent injunction allowed against him after a trial in a civil action, the burden is on him to show that the threatened injury has been certainly overcome, not that it possibly may be. Wasserburger v. Coffee 416
10. Where a technician testifies that a blood alcohol test of a defendant yielded a reading exactly equal to ten-hundredths of one percent, which is the minimum percentage necessary for proof of the offense of drunk driving, but concedes that the test is subject to a tolerance for error of five-thousandths of one percent, the State has not, on that testimony alone, proven the elements of the offense beyond a reasonable doubt. State v. Bjornsen 709
11. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
12. In an action charging motor vehicle homicide, the bur-

den is upon the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. State v. Sommers 809

13. 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. Sommers 809

14. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment. Newbanks v. Foursome Package & Bar, Inc. 818

15. In a workmen's compensation case involving a myocardial infarction, where the claimant has a preexisting disease or condition which contributes to the injury, he has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The injury is compensable only if the employment contribution involves an exertion greater than that of nonemployment life. Newbanks v. Foursome Package & Bar, Inc. 818

16. In order to prove the offense of forgery of a check, the State must show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with intent to defraud. State v. Laflin 824

Burglary.

Breaking is an essential element of the crime of burglary; any physical force, however slight, in making any entry is sufficient to constitute a breaking. State v. Crispell 759

Canons.

1. A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. State ex rel. Nebraska State Bar Assn. v. Gobel 586

2. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. State ex rel. Nebraska State Bar Assn. v. Gobel 586

Certificate of Title Act.

1. Under section 60-110, R. R. S. 1943, the practice of filing and recording chattel mortgages on motor vehicles has been eliminated, and under that section security interests must be noted on the certificate of title itself. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
2. There is no legal requirement that a lien be noted on a certificate of title purportedly covering property not subject to the Certificate of Title Act, sections 60-101 to 60-117, R. R. S. 1943, even though a certificate of title for such property has been issued. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
3. The statutory provisions for recording chattel mortgages in effect prior to the adoption of the Uniform Commercial Code were specifically repealed by that act. See Laws 1963, c. 544, art. 10, § 10-102, p. 1943. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

Child Support.

1. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Smith v. Smith 21
   Ferry v. Ferry 595
2. This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. Smith v. Smith 21
3. The securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support. Smith v. Smith 21
4. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall

be justified. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1976. Pfeiffer v. Pfeiffer 56

5. The term "when required" is broad and indefinite, but does not contemplate modification at the whim of either a party or the court. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. Pfeiffer v. Pfeiffer 56

6. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Morris v. Morris 479

7. The father has the primary responsibility for child support but the ability of the mother to support the children must also be considered. The trial court has the responsibility of adjusting the equities between the parties. Scarpino v. Scarpino 564

8. In determining the amount of child support to be awarded, the status, character, and situation of the parties, and all attendant circumstances, including the financial position of the husband and wife, must be considered. Scarpino v. Scarpino 564

9. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Scarpino v. Scarpino 564

10. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances. Ferry v. Ferry 595

11. In order to rebut the presumption that an award in an amount for the support of more than one child continues until the last child reaches majority or otherwise becomes ineligible for support, some evidence must exist. The burden of proof is on the moving party to produce such evidence. Ferry v. Ferry 595

12. Section 45-103, R. R. S. 1943, providing for interest on judgments from the date of rendition thereof, is applicable to child support installments accrued prior to August 24, 1975. Ferry v. Ferry 595

13. Section 42-364.06, R. S. Supp., 1978, provides in part that if jurisdiction has been acquired of the employer, "In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable

earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such come due." Ferry v. Ferry 595

Claims.

The showing of good cause that is required is analogous to that required by a court of equity in granting a new trial. Gunn v. Emerald, Inc. 635

Condemnation.

1. The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. This requirement is in the nature of a condition precedent to the right to condemn. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it. Suhr v. City of Seward 51
2. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. Suhr v. City of Seward 51
   Moody's Inc. v. State 271

Confessions.

1. In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made. State v. Prim 279
2. A finding of a trial court that statements or confessions were intelligently and voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. State v. Prim 279
3. The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession. State v. Prim 279
4. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Green 828

Constitutional Law.

1. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. McConnell 84
2. Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17 (2), Constitution of Nebraska. Nebraska League of S. & L. Assns. v. Mathes 122
3. The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession. State v. Prim 279
4. A lease agreement between the state and a municipal corporation with annual rental periods does not violate Article XIII, section 1, of the Constitution, where the liability of the state is conditioned upon a legislative appropriation having been made before each rental period begins. Ruge v. State 391
5. A provision in a lease to which the state is a party which requires the state upon termination of the lease to pay the costs of reletting the property including the costs of alterations incurred by the owner in placing the property in condition for reletting violates Article XIII, section 1, of the Constitution. Ruge v. State 391
6. When several sentences are imposed upon counts based upon the same transaction, the provision that the sentences shall run concurrently produces a single result and the constitutional restriction against multiple punishment is not violated. State v. Hawkman 605
7. An administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Kerns 617
8. Although prisoners do not forfeit all their Fourth Amendment rights upon incarceration, they do not retain the same measure of protection afforded nonincarcerated individuals. State v. Kerns 617
9. The reduced measure of Fourth Amendment protec-

tion afforded prisoners stems from legitimate institutional needs as well as prisoners' diminished expectations of privacy. State v. Kerns 617
10. The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court. State v. Fowler 647
11. Trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims. State v. Fowler 647
12. A resolution of a county board fixing the salaries of elected county officers at an amount plus an annual adjustment for changes in the cost of living as determined by an independent federal agency does not violate Article III, section 19, of the Constitution of Nebraska. Shepoka v. Knopik 780
13. Section 28-729, R. R. S. 1943, punishment for abuse of an officer, held constitutional. State v. Hayen 789

Continuances.

1. If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. State v. Johnson 322
2. A motion for 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. Vlcek v. Sutton 555

Contracts.

1. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. V.P.O., Inc. v. Money .. 30
2. Where a vendee, under, and in reliance upon, an unacknowledged contract to purchase a homestead makes valuable improvements thereon and the vendor fails or refuses to carry out the contract, the vendee may recover for such improvements to the extent they enhance the value of the property. McIntosh v. Borchers 35
3. In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was executed, by failing and refusing to advance part of the funds promised under the agree-

ment, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S. 1943. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 72

4. The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165
5. A guarantor is not liable on his own contract when the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165
6. Equity will decree reformation of a contract for a mistake only if the mistake is mutual. Waite v. Salestrom 224
7. The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed. Waite v. Salestrom 224
8. Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other. Waite v. Salestrom 224
9. To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. A mere preponderance of the evidence is not sufficient. Waite v. Salestrom 224
10. Mere carelessness is not necessarily a defense to an action for reformation. Waite v. Salestrom 224
11. A failure to disclose a change made in a written instrument, which change modifies the prior agreement, may be such inequitable conduct as will, together with mistake on the part of the other party, justify reformation. Waite v. Salestrom 224
12. Generally, the statute of frauds does not apply to a contract which has been fully performed by one party. Albracht v. Prudential Ins. Co. 249
13. Where section 44-371, R. R. S. 1943, is not applicable, an oral assignment or pledge of a life insurance policy

by the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. Albracht v. Prudential Ins. Co. 249

14. The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the general usury law of the state of the otherwise applicable law. Shull v. Dain, Kalman & Quail, Inc. 260

15. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects . A R L Corp. v. Hroch 422

16. Where the defects can not be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. A R L Corp. v. Hroch 422

17. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death. Pflasterer v. Omaha Nat. Bank 427

18. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Pflasterer v. Omaha Nat. Bank 427

19. It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Fisher v. Stuckey 439

20. As a general rule, where a valid binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Reese v. Hatfield 540

21. A contract for the purchase and sale of the stock of a

closely held family corporation, which stock is not procurable on any market, is a proper subject for specific performance. Reese v. Hatfield 540
22. Every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part thereof. State v. Hurley 569
23. A limited liability provision in a policy of insurance is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured. Cochran v. MFA Mut. Ins. Co. 631
24. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. Cook v. Beermann 675
25. 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. Cook v. Beermann 675
26. Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact. Cook v. Beermann 675

Controlled Substances.

1. In an affidavit for a search warrant the judge must be informed of some of the underlying circumstances from which the informant concluded that controlled substances were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. State v. Payne 665
2. An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable. State v. Payne 665

Conversion.

1. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Polley v. Shoemaker 91
2. To constitute conversion there must be an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control

it that it justifies the forced judicial sale to the defendant, which is the distinguishing feature of the action. Polley v. Shoemaker 91

Counties.

1. The liability of all political subdivisions based on the alleged insufficiency or want of repair of any public thoroughfare is to be determined by the provisions of sections 23-2410 and 23-2411, R. R. S. 1943, and judicial interpretations governing the liability of counties under the statute in effect prior to the enactment of the Political Subdivisions Tort Claims Act. Christensen v. City of Tekamah 344
2. A county is not an insurer, but must use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Christensen v. City of Tekamah 344
3. In an action to recover damages from a county by virtue of the Political Subdivisions Tort Claims Act, the burden is on the plaintiff to establish negligence of the county and that its negligent act was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. Christensen v. City of Tekamah 344
4. Where an industrial area is within the zoning jurisdiction of a city of the first class at the time the area is designated as an industrial area by the county board under the provisions of the Industrial Areas Act, the city thereafter retains its zoning jurisdiction of the area, subject to the reservation for use of the area for industrial purposes as provided by the Industrial Areas Act. Hansen v. City of Norfolk 352

Court of Industrial Relations.

1. In determining what is an appropriate employee unit for the purposes of collective bargaining, consideration may be given to the mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
2. The considerations set forth in section 48-838 (2), R. S. Supp., 1976, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors

in determining what bargaining unit of employees is appropriate. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295

3. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295

4. In establishing wage rates, the provisions of section 48-818, R. R. S. 1943, in relevant part, provide that the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. The definition of "comparable" as set forth in section 48-818, R. R. S. 1943, is controlling. Nebraska City Education Assn. v. School Dist. of Nebraska City 303

Courts.

1. Independent of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. Cizek v. Cizek ... 4

2. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Smith v. Smith 21

3. This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. Smith v. Smith 21

4. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion

therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination. Floridia v. Farlee 39
5. The sentencing judge is not bound by the recommendation of the probation officer in determining the sentence to be imposed. State v. Steed 120
6. While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Swearingen v. Swearingen 255
7. A trial court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. Hall v. Hall 590
8. A court will take judicial notice of the pleadings, orders, and judgments in the case before it. Ferry v. Ferry .. 595
9. Probate matters on appeal to the District Court from the county court are tried de novo. Gunn v. Emerald, Inc. 635
10. The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties; the court always has power either to approve or disapprove stipulations or agreements. Lautenschlager v. Lautenschlager 741
11. It is the duty of the trial court, sitting without a jury, to determine the credibility of witnesses and to weigh and to resolve conflicts in the evidence. Its findings, when supported by sufficient, competent evidence, will be upheld. State v. Crispell 759

Criminal Conversation.

1. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. Kremer v. Black 467
2. The jury, in an action for criminal conversation, may consider the actual misconduct of defendant, the social relations of the parties, the existence of or lack of affection between the spouses, the destruction of the plaintiff's home and happiness, and the pecuniary situation of the parties. Kremer v. Black 467
3. In an action for criminal conversation, the courts will seldom interfere with the finding of the jury, for the

reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded. Kremer v. Black 467

Criminal Law.

1. The good time reductions provided in section 83-1,107, R. R. S. 1943, are used to determine eligibility for release on parole or supervision and are subject to forfeiture. Wycoff v. Vitek 62
2. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where a doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. McConnell 84
3. Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. State v. Flye 115
4. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act. State v. Flye 115
5. 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. Flye 115
6. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Flye 115
7. Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding. State v. Flye .. 115
8. When an alleged error was not raised in a motion for a new trial, the defendant is now precluded from raising the alleged error on appeal to this court. State v. Steed 120
9. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Steed 120

10. As a general rule, statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. State v. Eagle Thunder 206
11. There is nothing in the justification for use of force act which appears designed to change the ancient common law rule that in order to justify the defense of self-defense, the belief of the actor that the use of force is necessary must be reasonable and in good faith. State v. Eagle Thunder 206
12. In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made. State v. Prim 279
13. A finding of a trial court that statements or confessions were intelligently and voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. State v. Prim 279
14. The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession. State v. Prim 279
15. Voluntary intoxication is no justification or excuse for crime unless it is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent. State v. Prim 279
16. Under the Sexual Sociopath Act, after original commitment, all orders determining the current treatability status of a sexual sociopath, entered after hearing or after summary review shall be considered final orders for purposes of appeal. State v. Blythman 285
17. Under the Sexual Sociopath Act, after original commitment, all orders determining the current status of a defendant as a sexual sociopath, entered after hearing or after summary review, shall be considered final orders for purposes of appeal. State v. Blythman 285
18. Under the Sexual Sociopath Act, a motion for a hearing to determine whether the defendant is no longer a sexual sociopath must allege facts which, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath. A conclusory allegation that a defendant is no longer a sexual sociopath, unsupported by facts, is insufficient. State v. Blythman 285
19. Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima

facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter. State v. Blythman 285
20. Under the Sexual Sociopath Act, the District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable. State v. Blythman 285
21. Section 29-1207, R. R. S. 1943, requires that every person charged with a criminal offense be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed. State v. Johnson 322
22. The primary burden is upon the State to bring the accused person to trial within the time provided by law. If a defendant is not brought to trial within that time, he is entitled to absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Johnson 322
23. The failure of the defendant to object, at the time the trial court enters an order setting the trial at a date after the 6-month period, does not constitute a waiver of his statutory right to a speedy trial. State v. Johnson 322
24. The State has the burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Johnson 322
25. If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. State v. Johnson 322
26. The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Freeman 382
27. It is the duty of the trial court in homicide cases to instruct the jury only on those degrees of homicide which

find support in the evidence. State v. Freeman 382
28. This court on appeal will not disturb a sentence imposed within the limits prescribed by statute, absent an abuse of discretion on the part of the trial court. State v. Freeman 382
29. Proof that great bodily injury actually occurred is not an essential element of the crime of assault with intent to inflict great bodily injury. State v. Cruse 533
30. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Cruse 533
31. Because the intent with which an act is done exists only in the mind of the actor, its proof may be inferred from the act itself and from the facts surrounding the act. State v. Cruse 533
32. A sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Brown 536
33. 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, if a proper foundation is laid. State v. Brown 536
34. Admission of photographs in evidence 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. Brown 536
35. The trial judge, in imposing sentence is entitled to know to the fullest extent the details of defendant's criminal conduct. State v. Brown 536
36. Where the execution of a sentence has been suspended under section 29-2301, R. R. S. 1943, and the defendant has been at liberty under bail, the bond may be continued without the consent of the surety during the period of suspension. State v. Hurley 569
37. In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Rhodes 576
38. In a prosecution for sexual assault, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Rhodes 576
39. Ordinarily, the illegality of an arrest is not a defense to the crime for which the arrest was made. State v.

Knudsen 584
40. Effectiveness of counsel in the representation of a defendant in a criminal case is measured by comparison with the standard of performance which should be expected from a lawyer with ordinary training and skill in the criminal law in his area. State v. Hawkman 605
41. A claim of double jeopardy cannot be established without a showing of a previous charge and conviction arising out of the same transaction. State v. Hawkman 605
42. When several sentences are imposed upon counts based upon the same transaction, the provision that the sentences shall run concurrently produces a single result and the constitutional restriction against multiple punishment is not violated. State v. Hawkman 605
43. The purpose of the requirement contained in section 29-1602, R. R. S. 1943, that the names of witnesses for the prosecution be listed on the information, is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investigate regarding their background and pertinent knowledge. The failure to endorse on the information the names of witnesses to be called by the State is not ground for reversal of conviction in the absence of a showing of prejudice. State v. Journey 607
44. 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. Journey 607
45. Intent may be determined from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter for the consideration and decision of the trier of facts. State v. Journey 607
46. The existence of specific intent may be inferred from the circumstances under the usual rule that every sane person is presumed to intend the usual and probable consequences of his acts. State v. Journey 607
47. An administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Kerns 617
48. Prison disciplinary proceedings are not a part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. State v. Kerns 617

49. Although prisoners do not forfeit all their Fourth Amendment rights upon incarceration, they do not retain the same measure of protection afforded nonincarcerated individuals. State v. Kerns 617
50. The reduced measure of Fourth Amendment protection afforded prisoners stems from legitimate institutional needs as well as prisoners' diminished expectations of privacy. State v. Kerns 617
51. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Kerns 617
52. A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed on appeal except for a clear abuse of discretion. State v. Kerns 617
53. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kerns 617
54. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), this state adopted the standard for determining the validity of guilty pleas set forth in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), that: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." State v. Fowler 647
55. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty. Those standards do not require a ritualistic litany or item-by-item review of constitutional rights before accepting a plea of guilty from a defendant in a criminal case. State v. Fowler 647
56. The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court. State v. Fowler 647
57. In the absence of a request for a hearing to determine voluntariness, the defendant cannot complain of the failure of the court to hold such a hearing. State v. Fowler 647
58. Our present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his clients. State v. Fowler 647
59. The decision to object or not to object to evidence is a

part of trial strategy, and due deference is given to the discretion of defense counsel to formulate trial tactics. State v. Fowler 647

60. Trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims. State v. Fowler 647

61. The necessity of the trial court instructing the jury with reference to the failure of the defendant to testify (NJI No. 14.63) is a matter of trial strategy on the part of defendant's counsel, and must be requested by him, or the subject of agreement between counsel and the court. State v. Fowler 647

62. Effectiveness of counsel is not to be judged by hindsight. State v. Fowler 647

63. Under section 28-834, R. R. S. 1943, for justification to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. State v. Graham 659

64. Section 28.408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The determination of the admissibility of evidence of the prosecutrix' prior sexual activity must be determined in each case upon its own circumstances. State v. Mason 693

65. In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Mason 693

66. A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and overcomes the victim by force or threat of force, express or implied. § 28-408.03, R. R. S. 1943. State v. Mason 693

67. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Tamburano 703
68. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. State v. Tamburano 703
69. In order to support a conviction for the offense of drunk driving based solely on a chemical test, the results of the chemical test, when taken together with its tolerance for error, must equal or exceed the statutory percentage. State v. Bjornsen 709
70. Where a technician testifies that a blood alcohol test of a defendant yielded a reading exactly equal to ten-hundredths of one percent, which is the minimum percentage necessary for proof of the offense of drunk driving, but concedes that the test is subject to a tolerance for error of five-thousandths of one percent, the State has not, on that testimony alone, proven the elements of the offense beyond a reasonable doubt. State v. Bjornsen 709
71. First degree murder includes the killing of a person "purposely and of deliberate and premeditated malice." § 28-401, R. R. S. 1943. State v. Beers 714
72. Deliberation and premeditation must take place before the killing, but no particular length of time is required for deliberation provided the intent to kill is formed before and not merely simultaneously with the act which caused the death. State v. Beers 714
73. Deliberation and premeditation may be proven circumstantially. State v. Beers 714
74. Motive is not an essential element of the crime of murder, although its absence is a circumstance favorable to the accused and the existence of motive may be shown in support of proof of intention. State v. Beers 714
75. Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943. State v. Beers 714
76. Where murder in the first degree is charged, the court is required, without request, to charge on such lesser

degrees of homicide as to which the evidence is properly applicable. In order for this rule to be applicable to an instruction as to manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Beers 714

77. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Beers 714

78. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing. State v. Beers 714

79. Previous acts of violence by the defendant against the victim of an assault may be shown for their bearing upon the issue of felonious intent. The trial court has broad discretion in determining the relevance of such testimony and the exercise of such discretion will be upheld in the absence of an abuse thereof. State v. Casados 726

80. Photographs purporting to show injuries received in two assaults, with proper foundation including evidence to enable the jury to distinguish the injuries resulting from the assault in issue, may be received in evidence. Unless an abuse of discretion appears, the ruling of the trial court will be affirmed. State v. Casados 726

81. Breaking is an essential element of the crime of burglary; any physical force, however slight, in making any entry is sufficient to constitute a breaking. State v. Crispell 759

82. It is the duty of the trial court, sitting without a jury, to determine the credibility of witnesses and to weigh and resolve conflicts in the evidence. Its findings, when supported by sufficient, competent evidence, will be upheld. State v. Crispell 759

83. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. State v. Ristau .. 784

84. To constitute the offense of assault with intent to do

great bodily injury there must be an unlawful assault, coupled with a present ability and intent to injure, but no actual battery need occur. State v. Ristau 784

85. Where there has been an appeal to the District Court in a misdemeanor case, a motion for new trial must be filed in the District Court if there is to be a review in this court of errors of law occurring at the trial or the sufficiency of the evidence. State v. Hayen 789

86. Evidence of other crimes, wrongs, or acts is admissible to show intent and lack of mistake or accident. State v. Reed..... 800

87. In an action charging motor vehicle homicide, the burden is upon the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. State v. Sommers 809

88. 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. Sommers .. 809

89. By "proximate cause" is meant a moving or effective cause or fault which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred. State v. Sommers 809

90. 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. Sommers ... 809

91. In determining the sufficiency of 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. State v. Sommers 809

92. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Sommers 809

93. In order to prove the offense of forgery of a check, the State must show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with intent to defraud. State v. Laflin 824
94. Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. State v. Laflin 824
95. 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. Laflin 824
96. Where the evidence clearly establishes the forgery of a bank check, it is immaterial whether the check was ever presented to a bank for payment. State v. Laflin 824
97. Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place. State v. Laflin 824
98. 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. Laflin 824
99. An affidavit for a search warrant is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded. State v. Green 828

Crops.

Ordinarily a tenant in possession under an oral year-to-year lease, without an agreement concerning way-going crops, is not entitled to such crops if he had notice of the termination date of the lease before he planted the crops. Fisher v. Stuckey 439

Custody.

1. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Swearingen v. Swearingen 255
2. While the discretion of the trial court on granting or changing custody of minor children is subject to re-

view, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Swearingen v. Swearingen 255
Long v. Sena 642

3. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Ahlman v. Ahlman 273
4. In cases involving child custody, the determination of the trial court will not ordinarily be disturbed unless there was a clear abuse of discretion on its part or its findings are clearly against the weight of the evidence. Ahlman v. Ahlman 273
5. Sexual misconduct is a factor which, although not necessarily determinative, may properly be considered in determining what is in the best interests of the children. Ahlman v. Ahlman 273
6. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Scarpino v. Scarpino 564
7. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage the controlling consideration is the best interests and welfare of the children. Hoback v. Hoback 639
8. 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. Hoback v. Hoback 639
9. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Long v. Sena 642
10. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action. Long v. Sena 642
11. The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties; the court always has power either

to approve or disapprove stipulations or agreements. Lautenschlager v. Lautenschlager 741
12. An award of custody will not be upheld when the evidence is insufficient to show the requirements of the best interests of a minor child in accordance with the provisions of section 42-364, R. S. Supp., 1976. Lautenschlager v. Lautenschlager 741
13. When the trial court disapproves a stipulation for custody or support, the parties shall be given an opportunity to secure and present evidence relevant to a reexamination of such issue, if such evidence has not previously been presented to the court. Lautenschlager v. Lautenschlager 741

Customs and Usages.

It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Fisher v. Stuckey 439

Damages.

1. The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. This requirement is in the nature of a condition precedent to the right to condemn. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it. Suhr v. City of Seward 51
2. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. Suhr v. City of Seward 51
3. The general rule is that damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty. Tyler v. Olson Bros. Mfg. Co., Inc. 79
4. A person operating an airplane for spraying crops must use due care to perform such operations under such conditions and in such manner as not to cause injury to others. A person who negligently sprays a liquid or powder containing a dangerous proportion of poison in

such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom. Mustion v. Ealy 139
5. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Hunter v. Sorensen 153
6. In an action based on breach of warranty, it is necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. Geiger v. Sweeney 175
7. When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. Danish Vennerforning & Old Peoples Home v. State ... 233
8. If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision. Christensen v. City of Tekamah 344
9. In an action to recover damages from a county by virtue of the Political Subdivisions Tort Claims Act, the burden is on the plaintiff to establish negligence of the county and that its negligent act was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. Christensen v. City of Tekamah 344
10. An issue as to the proper measure of damages may be raised by objecting to the instructions and tendering a requested instruction. A R L Corp. v. Hroch 422
11. Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. A R L Corp. v. Hroch 422
12. Where the defects can not be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. A R L Corp. v. Hroch 422
13. In the absence of evidence of some special element of damage for which the law provides a specific means of

measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. Kremer v. Black 467

14. In an action for criminal conversation, the courts will seldom interfere with the finding of the jury, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded. Kremer v. Black 467

15. One who seeks to avoid the legal effect of a release of a cause of action for personal injuries has the burden of pleading and proving the facts which entitle him to such relief. Nicholson v. Braddock 531

16. The essential elements of a cause of action founded upon fraud or deceit are: That a representation be made as a statement of fact, which was untrue and known to be untrue by the party making it or was recklessly made; that it be made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party be induced by reliance on it to act to his injury or damage. English v. Bruin Engineering, Inc. 791

17. In a workmen's compensation case involving a myocardial infarction, where the claimant has a preexisting disease or condition which contributes to the injury, he has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The injury is compensable only if the employment contribution involves an exertion greater than that of nonemployment life. Newbanks v. Foursome Package & Bar, Inc. 818

Deeds.

A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase, and not a mortgage. Cizek v. Cizek 4

Demurrer.

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Cizek v.

Cizek 4

Disciplinary Proceedings.

1. A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. State ex rel. Nebraska State Bar Assn. v. Gobel 586
2. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. State ex rel. Nebraska State Bar Assn. v. Gobel 586

Discrimination.

The Nebraska Equal Opportunity Commission in deciding complaints of discrimination does not exercise legislative power. Snygg v. City of Scottsbluff Police Dept. 16

Divorce.

1. An award of child support, the fixing of alimony, and the distribution of property rest in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Van Cleave v. Van Cleave 211
2. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Van Cleave v. Van Cleave 211
3. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Nickel v. Nickel 267
4. The trial court has the inherent power in adjusting the rights of the parties to provide that a money allowance to be paid in installments shall not draw interest until a certain date. Nickel v. Nickel 267
5. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Nickel v. Nickel 267
6. The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Baker v. Baker 409
7. Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and

where the parties were the parents of all children involved, does not constitute an abuse of discretion. Baker v. Baker 409

8. It is well-established that alimony may be awarded in addition to a property settlement. Baker v. Baker 409
9. When dissolution of a 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. Baker v. Baker 409
10. The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness. Baker v. Baker 409
11. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Morris v. Morris 479
12. The fixing of the amount of alimony in each case rests within the sound discretion of the trial court. Morris v. Morris 479
13. On appeal, a party to a divorce proceeding cannot ordinarily successfully assert error in a property division requested and obtained by him in the trial court. Morris v. Morris 479
14. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Morris v. Morris 479
15. An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Morris v. Morris 479
16. Property settlement agreements are governed by section 42-366, R. R. S. 1943. They are favored in the law and will not be set aside unless the agreement is unconscionable. Paxton v. Paxton 545

17. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable it binds both the parties and the court. Paxton v. Paxton 545
18. A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side. Paxton v. Paxton 545
19. Under section 42-365, R. S. Supp., 1978, the criteria to be used is what appears to be fair and equitable between the parties under the circumstances present in the case. Steele v. Steele 549
20. Although review in marriage dissolution cases is de novo in this court, we also give weight to the fact that the trial court had an opportunity to observe the parties and hear the witnesses. Steele v. Steele 549
21. A decree in a dissolution of a marriage case awarding one party all her "personal effects" does not include bank accounts standing in that party's name alone. Steele v. Steele 549
22. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Smith v. Smith 21
Ferry v. Ferry 595
23. When an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances. Ferry v. Ferry 595
24. In order to rebut the presumption that an award in an amount for the support of more than one child continues until the last child reaches majority or otherwise becomes ineligible for support, some evidence must exist. The burden of proof is on the moving party to produce such evidence. Ferry v. Ferry 595
25. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage the control-

ling consideration is the best interests and welfare of the children. Hoback v. Hoback 639
26. 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. Hoback v. Hoback 639
27. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Long v. Sena 642
28. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action. Long v. Sena 642
29. While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Long v. Sena 642
30. Alimony awards payable in the form of an annuity for life are not favored. Starr v. Starr 683
31. In an appeal from a decree of dissolution of marriage, 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. Blome v. Blome 687
32. The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Blome v. Blome 687
33. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome 687
34. The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties; the court always has power either to approve or disapprove stipulations or agreements. Lautenschlager v. Lautenschlager 741
35. An award of custody will not be upheld when the evidence is insufficient to show the requirements of the best interests of a minor child in accordance with the

provisions of section 42-364, R. S. Supp., 1976. Lautenschlager v. Lautenschlager 741
36. When the trial court disapproves a stipulation for custody or support, the parties shall be given an opportunity to secure and present evidence relevant to a reexamination of such issue, if such evidence has not previously been presented to the court. Lautenschlager v. Lautenschlager 741
37. A decree fixing child support is subject to modification upon a showing of a material change of circumstances. Bruckner v. Bruckner 774
38. Where, subsequent to a decree fixing child support, there is a material reduction in earnings of the husband due to illness, an increase in his debts, and an increase in the earning capacity of the wife, the mere showing of a rise in the cost of living is insufficient as a change in circumstances to warrant an increase in the husband's child-support obligations. Bruckner v. Bruckner 774
39. Nothing in the law of Nebraska limits the common law power of a married woman to bear a different surname from her husband. Simmons v. O'Brien 778
40. Where a petition for dissolution of marriage is filed in the maiden name of a woman who has never adopted the surname of her husband and the parties are otherwise entitled to a decree of dissolution, refusal of the trial court to enter the decree in the maiden name of the wife is error. Simmons v. O'Brien 778

Double Jeopardy.

1. A claim of double jeopardy cannot be established without a showing of a previous charge and conviction arising out of the same transaction. State v. Hawkman 605
2. An administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. The subsequent conviction and sentence in a criminal prosecution for the same offense do not therefore constitute double jeopardy which federal constitutional clauses prohibit. State v. Kerns 617

Due Process.

1. The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession. State v. Prim 279

2. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Morris v. Morris 479
3. Mineral interests in land are subject to the protection of the due process clause. Wheelock & Manning 00 Ranches, Inc. v. Heath 835

Elections.

1. Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least 25 percent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
2. The power granted to electors to remove certain public officers is political in its nature and not the exercise of a judicial function. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
3. A petition to recall school board members which states as a reason for removal one of the grounds listed in section 79-518.04, R. R. S. 1943, is statutorily sufficient to compel a recall election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486

Eminent Domain.

1. The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. This requirement is in the nature of a condition precedent to the right to condemn. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it. Suhr v. City of Seward 51
2. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. Suhr v. City of Seward 51
Moody's Inc. v. State 271

3. When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. Danish Vennerforning & Old Peoples Home v. State ... 233

Equity.

1. A property owner whose land abuts a public road which is the means used for access to his property may enjoin the obstruction of the road by an adjoining property owner. Yerg v. Hunt 1
2. Independent of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. Cizek v. Cizek ... 4
3. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Smith v. Smith 21
4. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. Smith v. Smith 21
5. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Smith v. Smith 21
6. While this court tries equity cases de novo, when evidence on a material question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Waite v. Salestrom 224
7. Equity will decree reformation of a contract for a mistake only if the mistake is mutual. Waite v. Salestrom 224
8. Equity may also grant reformation to conform to the

antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other. Waite v. Salestrom 224

9. A failure to disclose a change made in a written instrument, which change modifies the prior agreement, may be such inequitable conduct as will, together with mistake on the part of the other party, justify reformation. Waite v. Salestrom 224

10. Equity will not allow the statute of frauds to be used as an instrument of fraud. Albracht v. Prudential Ins. Co. 249

11. Where section 44-371, R. R. S. 1943, is not applicable, an oral assignment or pledge of a life insurance policy by the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. Albracht v. Prudential Ins. Co. 249

12. While equity cases are heard de novo in this court, in determining 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. Swearingen v. Swearingen 255

13. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Wasserburger v. Coffee 416

14. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Pflasterer v. Omaha Nat. Bank 427

15. Jurisdiction in the equity court in such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at law. Pflasterer v. Omaha Nat. Bank 427

16. Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Pflasterer v. Omaha Nat. Bank 427

17. 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. Rasmussen Farms v. Gove 432
18. The father has the primary responsibility for child support but the ability of the mother to support the children must also be considered. The trial court has the responsibility of adjusting the equities between the parties. Scarpino v. Scarpino 564
19. The showing of good cause that is required is analogous to that required by a court of equity in granting a new trial. Gunn v. Emerald, Inc. 635

Estates.

1. Appeals in probate matters are governed by article 16 of Chapter 30, R. R. S. 1943. Gunn v. Emerald, Inc. 635
2. An appeal in a probate matter must be taken within 30 days after the decision and a transcript filed within 10 days thereafter. Gunn v. Emerald, Inc. 635
3. Section 24-542, R. R. S. 1943, is not applicable to appeals in probate matters and a notice of appeal is not required in such an appeal. Gunn v. Emerald, Inc. 635
4. Probate matters on appeal to the District Court from the county court are tried de novo. Gunn v. Emerald, Inc. 635
5. The right to file a belated claim depends upon a showing of good cause. Gunn v. Emerald, Inc. 635
6. The showing of good cause that is required is analogous to that required by a court of equity in granting a new trial. Gunn v. Emerald, Inc. 635

Estoppel.

1. This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. Smith v. Smith 21
2. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Smith v. Smith 21

Evidence.

1. In determining the sufficiency of the evidence to sustain a judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. If there is a conflict in the evidence, this court will presume that the controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed on appeal unless clearly wrong. V.P.O., Inc. v. Money 30
2. Nonconsent to enter the premises as an element of trespass may be proved by direct testimony or circumstantial evidence. State v. Korf 64
3. The general rule is that damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty. Tyler v. Olson Bros. Mfg. Co., Inc. 79
4. In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment. Abramson v. Bemis 97
5. A party may not properly assign as error on appeal the admission of evidence where no objection was made thereto at trial. Scudder v. Haug 107
6. A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to section 27-614, R. R. S. 1943. Scudder v. Haug 107
7. It is the duty of the trier of fact to weigh the evidence and the credibility of the witnesses. Scudder v. Haug 107
8. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Mustion v. Ealy 139
9. It is not the province of this court to weigh the evidence or the credibility of witnesses, or resolve conflicts in the evidence; those functions are for the trier of fact. Mustion v. Ealy 139
10. It is the duty of the trial court to decide a question

as a matter of law and direct a verdict only where the facts adduced to sustain a finding are such that but one conclusion can be drawn therefrom when related to the applicable law. Mustion v. Ealy 139

11. A party who relies on circumstantial evidence for proof of causation need not exclude any other possible causes, but the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been proved. Mustion v. Ealy 139

12. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, and apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received, and a judgment will not be reversed because of the admission or rejection of such evidence unless there has been a clear abuse of discretion. Mustion v. Ealy 139

13. When part of an act, declaration, conversation, or writing is given into evidence by one party, the whole on the same subject may be inquired into by the other. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165

14. The percentage of alcohol content of body fluids is relevant in a civil case when accompanied by expert opinion evidence of the effect thereof. Sandberg v. Hoogensen 190

15. The scope of the cross-examination of a witness is largely within the discretion of the trial court. State v. Steinmark 200

16. It is within the discretion of the trial court to admit character evidence to support the credibility of a witness whose credibility has been attacked by opinion or reputation evidence or otherwise. § 27-608 (1), R. R. S. 1943. State v. Steinmark 200

17. The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. Greenberg v. Bishop Clarkson Memorial Hospital 215

18. While this court tries equity cases de novo, when evidence on a material question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and

must have accepted one version of the facts rather than the opposite. Waite v. Salestrom 224

19. To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. A mere preponderance of the evidence is not sufficient. Waite v. Salestrom 224

20. In considering a motion for a directed verdict, all controverted evidence and legitimate inferences therefrom are resolved in favor of the party against whom the motion is directed. Oban v. Bossard 243

21. While equity cases are heard de novo in this court, in determining 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. Swearingen v. Swearingen 255

22. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Nickel v. Nickel 267

23. In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made. State v. Prim 279

24. Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter. State v. Blythman 285

25. Under the Sexual Sociopath Act, the District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable. State v. Blythman 285

26. Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v.

Counties of Douglas & Lancaster 295
27. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. 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 a jury. Stevens v. Kasik 338
28. Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where the trial court may feel the opinion would assist them. The trier of fact is not bound by the testimony of an expert witness. Christensen v. City of Tekamah 344
29. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. Hansen v. City of Norfolk 352
30. A legal presumption exists in favor of validity and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence, that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. Hansen v. City of Norfolk 352
31. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed on appeal. Stradley v. City of Omaha 378
32. The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Freeman 382
33. It is the duty of the trial court in homicide cases to instruct the jury only on those degrees of homicide which find support in the evidence. State v. Freeman 382
34. In an error proceeding, the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is some competent

evidence to sustain its findings. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
35. 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. Rasmussen Farms v. Gove 432
36. A judgment is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, and within this rule the commonly applied test of identity is whether the same evidence would sustain both suits. Midwest Franchise Corp. v. Wakin 450
37. An authenticated record of a prior judgment ordering the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence. State v. Dedmond 455
38. Purported evidence which does not appear in the bill of exceptions cannot be considered by the Supreme Court on appeal. Nicholson v. Braddock 531
39. Because the intent with which an act is done exists only in the mind of the actor, its proof may be inferred from the act itself and from the facts surrounding the act. State v. Cruse 533
40. 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, if a proper foundation is laid. State v. Brown 536
41. Admission of photographs in evidence 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. Brown 536
42. In determining the sufficiency of the evidence to sustain the verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor and he must have the benefit of all inferences reasonably deducible therefrom. Hartman v. Brady 558
43. A party is ordinarily entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case. Hartman v. Brady 558
44. In a prosecution for sexual assault it is not essential

that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Rhodes 576

45. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. The successful party is also entitled to any inference reasonably deducible from the evidence. Ineba Ranch v. Cockerill 592

46. In an action at law, it is not for the Supreme Court to resolve the conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact. Ineba Ranch v. Cockerill 592

47. 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. Journey 607

48. Intent may be determined from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter for the consideration and decision of the trier of fact. State v. Journey 607

49. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Kerns 617

50. A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed on appeal except for a clear abuse of discretion. State v. Kerns 617

51. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Pearson v. Richard 621

52. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may prop-

erly be drawn therefrom, indicate with reasonable certainty the negligent act charged. Pearson v. Richard 621
53. The persuasiveness of direct evidence may be destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Pearson v. Richard 621
54. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury. Pearson v. Richard 621
55. The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Pearson v. Richard 621
56. The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court. State v. Fowler 647
57. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. Cook v. Beermann 675
58. 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. Cook v. Beermann 675
59. Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact. Cook v. Beermann 675
60. A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. Cook v. Beermann 675
61. Where one party desires to avail himself of the other's pleading, it is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. Cook v. Beermann 675

62. Section 28-408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The determination of the admissibility of evidence of the prosecutrix' prior sexual activity must be determined in each case upon its own circumstances. State v. Mason 693

63. In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Mason 693

64. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Tamburano 703

65. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. State v. Tamburano 703

66. Deliberation and premeditation may be proven circumstantially. State v. Beers 714

67. Motive is not an essential element of the crime of murder, although its absence is a circumstance favorable to the accused and the existence of motive may be shown in support of proof of intention. State v. Beers 714

68. Where murder in the first degree is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to be applicable to an instruction as to manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Beers 714

69. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun

at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing. State v. Beers 714

70. It is proper to sustain a motion in limine to prevent reference to or the offer of evidence concerning matters which are entirely extraneous or irrelevant to the issues of the case. State v. Casados 726

71. Previous acts of violence by the defendant against the victim of an assault may be shown for their bearing upon the issue of felonious intent. The trial court has broad discretion in determining the relevance of such testimony and the exercise of such discretion will be upheld in the absence of an abuse thereof. State v. Casados 726

72. Photographs purporting to show injuries received in two assaults, with proper foundation including evidence to enable the jury to distinguish the injuries resulting from the assault in issue, may be received in evidence. Unless an abuse of discretion appears, the ruling of the trial court will be affirmed. State v. Casados 726

73. In the course of ruling upon a motion for summary judgment, the evidence should be viewed in the light most favorable to the party against whom the motion is directed and such party should receive the benefit of all favorable inferences which may be drawn from the evidence. Bringewatt v. Mueller 736

74. An award of custody will not be upheld when the evidence is insufficient to show the requirements of the best interests of a minor child in accordance with the provisions of section 42-364, R. S. Supp., 1976. Lautenschlager v. Lautenschlager 741

75. When the trial court disapproves a stipulation for custody or support, the parties shall be given an opportunity to secure and present evidence relevant to a reexamination of such issue, if such evidence has not previously been presented to the court. Lautenschlager v. Lautenschlager 741

76. It is the duty of the trial court, sitting without a jury, to determine the credibility of witnesses and to weigh and to resolve conflicts in the evidence. Its findings, when supported by sufficient, competent evidence, will be upheld. State v. Crispell 759

77. Where the fitness of an applicant is an issue and

evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the commission if the order of the commission is supported by competent evidence. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

78. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from words or acts and the facts or circumstances surrounding the act. State v. Ristau 784

79. Subsections (a) through (f) of section 25-1267.04 (3), R. R. S. 1943, describe alternative conditions under which a deposition of a witness may be used at trial whether or not the witness is a party. Thus, where the plaintiff resided out of the county where trial was had and was shown to be elderly and infirm, the trial court was correct in admitting his deposition into evidence without requiring a further showing that unusual circumstances existed. English v. Bruin Engineering, Inc. 791

80. For a hearsay statement to qualify for admission as an excited utterance, the following conditions must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Reed .. 800

81. A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement is admissible under section 27-803 (22), R. R. S. 1943, if the statutory conditions precedent to admission are met. State v. Reed 800

82. Evidence of other crimes, wrongs, or acts is admissible to show intent and lack of mistake or accident. State v. Reed 800

83. 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. Sommers 809

84. In determining the sufficiency of 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. State v. Sommers 809

85. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that

it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Sommers 809
86. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment. Newbanks v. Foursome Package & Bar, Inc. 818
87. In a workmen's compensation case involving a myocardial infarction, where the claimant has a preexisting disease or condition which contributes to the injury, he has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The injury is compensable only if the employment contribution involves an exertion greater than that of nonemployment life. Newbanks v. Foursome Package & Bar, Inc. 818
88. In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case. Newbanks v. Foursome Package & Bar, Inc. 818
89. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Newbanks v. Foursome Package & Bar, Inc. 818
90. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Newbanks v. Foursome Package & Bar, Inc. .. 818
91. 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. Laflin 824
92. Where the evidence clearly establishes the forgery of a bank check, it is immaterial whether the check was ever presented to a bank for payment. State v. Laflin 824
93. 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. Laflin 824
94. The resolution of conflicting testimony as to the volun-

tariness of a confession is for the trial court and jury. State v. Green 828

Fees.

Where a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale. Byron Reed Co., Inc. v. Majers Market Research Co., Inc. 67

Foreclosure.

Section 77-1917.01, R. R. S. 1943, provides the subdivisions of government named therein an independent and complete remedy for the foreclosure of special assessment liens and is in addition to any other remedies provided by law for the collection of special assessments. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10

Forgery.

1. In order to prove the offense of forgery of a check, the State must show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with intent to defraud. State v. Laflin 824
2. Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. State v. Laflin 824
3. Where the evidence clearly establishes the forgery of a bank check, it is immaterial whether the check was ever presented to a bank for payment. State v. Laflin 824

Fraud.

1. Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other. Waite v. Salestrom 224
2. The essential elements of a cause of action founded upon fraud or deceit are: That a representation be made as a statement of fact, which was untrue and known to be untrue by the party making it or was recklessly made; that it be made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party be induced by reliance on it to act to his injury or damage. English v. Bruin

Engineering, Inc. 791
3. A person is justified in relying upon a representation made to him in all cases where the presentation is a positive statement of material fact, and where an investigation would be required to discover the truth. English v. Bruin Engineering, Inc. 791
4. Where one deliberately gives another a false statement in writing, knowing the purpose for which it is to be used, which the other uses to deceive a third party, he is a joint wrongdoer and must be held responsible for the consequences which follow. English v. Bruin Engineering, Inc. 791
5. It is not essential to actionable fraud that the guilty party receive any benefit. The gravamen of the action is injury to the plaintiff, not benefit to the defendant. English v. Bruin Engineering, Inc. 791
6. The right of joint tort-feasors to contribution as among themselves does not affect their liability to the injured party. It is still the law in this state that an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them jointly and severally liable. English v. Bruin Engineering, Inc. 791

Frauds, Statute of.

1. Generally, the statute of frauds does not apply to a contract which has been fully performed by one party. Albracht v. Prudential Ins. Co. 249
2. Equity will not allow the statute of frauds to be used as an instrument of fraud. Albracht v. Prudential Ins. Co. 249

Garnishment.

1. Section 1673 (b) and (c) of Title 15, U.S.C., preempts state garnishment statutes to the extent that state statutes are less restrictive. Ferry v. Ferry 595
2. Section 42-364.06, R. S. Supp. 1978, provides in part that if jurisdiction has been acquired of the employer, "In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such come due." Ferry v. Ferry 595

Gifts.

A court cannot adjudicate the rights of a transferee of a gift without having the transferee in court since his rights may be adversely affected thereby. Baker v. Baker 409

Guaranty.

1. The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165
2. A guarantor is not liable on his own contract when the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165

Guardian and Ward.

1. Where a ward is receiving public assistance, the Department of Public Welfare, if its practice permits, may enter a conditional order to require the guardians to exhaust their remedies so long as it does not deny assistance to the ward pending such determination. Jansen v. Department of Public Welfare 185
2. In determining the eligibility of a potential trust beneficiary for public assistance, the interest of a beneiciary in a discretionary trust is not an available resource pending exhaustion of judicial remedies to determine whether such trustee is in fact abusing his discretion. Jansen v. Department of Public Welfare 185

Guilty Pleas.

1. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), this state adopted the standard for determining the validity of guilty pleas set forth in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), that: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." State v. Fowler 647
2. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty. Those standards do not require a ritualistic

litany or item-by-item review of constitutional rights before accepting a plea of guilty from a defendant in a criminal case. State v. Fowler 647

Hearings.

1. When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. State v. Steinmark 200
2. If misconduct occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed. State v. Steinmark 200
3. The determination as to whether misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case. State v. Steinmark 200
4. Under the Sexual Sociopath Act, after original commitment, all orders determining the current treatability status of a sexual sociopath, entered after hearing or after summary review shall be considered final orders for purposes of appeal. State v. Blythman 285
5. Under the Sexual Sociopath Act, after original commitment, all orders determining the current status of a defendant as a sexual sociopath, entered after hearing or after summary review, shall be considered final orders for purposes of appeal. State v. Blythman 285
6. Under the Sexual Sociopath Act, a motion for a hearing to determine whether the defendant is no longer a sexual sociopath must allege facts which, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath. A conclusory allegation that a defendant is no longer a sexual sociopath, unsupported by facts, is insufficient. State v. Blythman 285
7. Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to

the State and remains on the State thereafter. State v. Blythman 285
8. Under the Sexual Sociopath Act, the District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable. State v. Blythman 285
9. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. Pflasterer v. Omaha Nat. Bank 427
10. In the absence of a request for a hearing to determine voluntariness, the defendant cannot complain of the failure of the court to hold such a hearing. State v. Fowler 647

Hearsay.

1. For a hearsay statement to qualify for admission as an excited utterance, the following conditions must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Reed 800
2. A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement is admissible under section 27-803 (22), R. R. S. 1943, if the statutory conditions precedent to admission are met. State v. Reed 800

Highways.

1. A property owner whose land abuts a public road which is the means used for access to his property may enjoin the obstruction of the road by an adjoining property owner. Yerg v. Hunt 1
2. If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision. Christensen v. City of Tekamah 344
3. The liability of all political subdivisions based on the alleged insufficiency or want of repair of any public

thoroughfare is to be determined by the provisions of sections 23-2410 and 23-2411, R. R. S. 1943, and judicial interpretations governing the liability of counties under the statute in effect prior to the enactment of the Political Subdivisions Tort Claims Act. Christensen v. City of Tekamah 344

4. A county is not an insurer, but must use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Christensen v. City of Tekamah ... 344

5. The character and extent of unevenness or other inequalities in the surface of a highway, or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway. Christensen v. City of Tekamah 344

6. Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. Slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie. Christensen v. City of Tekamah 344

7. A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets. Hartman v. Brady 558

8. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-

way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident. Hartman v. Brady 558

9. A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether or not the violation is negligent. Hartman v. Brady 558

10. When a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Pearson v. Richard 621

11. The right-of-way which the driver of a vehicle is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. The fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left. Pearson v. Richard 621

Homicide.

1. It is the duty of the trial court in homicide cases to instruct the jury only on those degrees of homicide which find support in the evidence. State v. Freeman 382

2. First degree murder includes the killing of a person "purposely and of deliberate and premeditated malice." § 28-401, R. R. S. 1943. State v. Beers 714

3. Deliberation and premeditation must take place before the killing, but no particular length of time is required for deliberation provided the intent to kill is formed before and not merely simultaneously with the act which caused the death. State v. Beers 714

4. Deliberation and premeditation may be proven circumstantially. State v. Beers 714

5. Motive is not an essential element of the crime of murder, although its absence is a circumstance favorable

to the accused and the existence of motive may be shown in support of proof of intention. State v. Beers . 714

6. Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943. State v. Beers 714
7. Where murder in the first degree is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to be applicable to an instruction as to manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Beers 714
8. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Beers 714
9. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing. State v. Beers 714
10. By "proximate cause" is meant a moving or effective cause or fault which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred. State v. Sommers 809

Indictments and Informations.

The purpose of the requirement contained in section 29-1602, R. R. S. 1943, that the names of witnesses for the prosecution be listed on the information, is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investigate regarding their background and pertinent knowledge. The failure to endorse on the information the names of witnesses to be called by the State is not ground for reversal of conviction in the absence of a showing of prejudice. State v. Journey 607

Infants.

1. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Smith v. Smith 21
2. The primary consideration in matters involving child custody, whether arising as a part of the proceedings for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Eravi v. Bohnert 99
3. Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent. Eravi v. Bohnert 99
4. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. Eravi v. Bohnert 99
5. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Swearingen v. Swearingen 255
6. While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Swearingen v. Swearingen 255
7. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Ahlman v. Ahlman 273
8. In cases involving child custody, the determination of the trial court will not ordinarily be disturbed unless there was a clear abuse of discretion on its part or its findings are clearly against the weight of the evidence. Ahlman v. Ahlman 273
9. Sexual misconduct is a factor which, although not necessarily determinative, may properly be considered

in determining what is in the best interests of the children. Ahlman v. Ahlman 273
10. In a proceeding to determine paternity of a child under the provisions of sections 13-101 to 13-112, R. R. S. 1943, the mother is a competent witness on the issue of the child's paternity. Roebuck v. Fraedrich 413

Initiative and Referendum.
1. By the initiative process municipal voters may amend or repeal an ordinance enacted by the legislative body of a municipality where the object of the initiative is to accomplish no more than that which the city council and mayor could do if they so chose. State ex rel. Boyer v. Grady 360
2. Section 77-27,142, R. R. S. 1943, does not limit the power to propose or reject ordinances concerning a municipal sales tax to the legislative body of a municipality, and does not except sales tax ordinances from the usual powers of initiative and referendum. State ex rel. Boyer v. Grady 360

Injunction.
1. A property owner whose land abuts a public road which is the means used for access to his property may enjoin the obstruction of the road by an adjoining property owner. Yerg v. Hunt 1
2. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. Wasserburger v. Coffee 416
3. Where a defendant seeks the vacation of a permanent injunction allowed against him after a trial in a civil action, the burden is on him to show that the threatened injury has been certainly overcome, not that it possibly may be. Wasserburger v. Coffee 416

Instructions.
1. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. National Bank of Commerce Trust & Sav. Assn. v. Katleman ... 165
2. It is the duty of the trial court to instruct the jury upon the law of the case made applicable by the pleadings and the evidence. Geiger v. Sweeney 175
3. It is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power. Geiger v.

Sweeney 175
4. It is ordinarily not appropriate that the trial court submit to the jury the allegations of plaintiff's petition in haec verba. The trial court has the duty to properly analyze, summarize, and submit to the jury the substance of the allegations of negligence in tort petitions. Greenberg v. Bishop Clarkson Memorial Hospital 215
5. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. Greenberg v. Bishop Clarkson Memorial Hospital 215
6. Abstract statements of law applicable in cases in which the evidence fails to establish a prima facie case for submission to a jury are ordinarily inappropriate as instructions to a jury in a case in which a prima facie case has been established. Greenberg v. Bishop Clarkson Memorial Hospital 215
7. If a trial court gives an erroneous instruction, or erroneously gives an instruction, the record must establish such an error did not affect the result of the trial unfavorably to the party affected by such instruction. Oban v. Bossard 243
8. It is the duty of the trial court in homicide cases to instruct the jury only on those degrees of homicide which find support in the evidence. State v. Freeman 382
9. An issue as to the proper measure of damages may be raised by objecting to the instructions and tendering a requested instruction. A R L Corp. v. Hroch 422
10. The necessity of the trial court instructing the jury with reference to the failure of the defendant to testify (NJI No. 14.63) is a matter of trial strategy on the part of defendant's counsel, and must be requested by him, or the subject of agreement between counsel and the court. State v. Fowler 647
11. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Tamburano 703
12. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. State v. Tamburano 703
13. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at

another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter simply because there is some evidence to support an instruction on legal justification or excuse for the killing. State v. Beers 714

Insurance.

1. In a policy indemnifying insured for loss by burglary for "property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry on the exterior of such vehicle," such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability. Cochran v. MFA Mut. Ins. Co. 631
2. A limited liability provision in a policy of insurance is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured. Cochran v. MFA Mut. Ins. Co. 631

Intent.

1. The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed. Waite v. Salestrom 224
2. Voluntary intoxication is no justification or excuse for crime unless it is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent. State v. Prim 279
3. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Cruse 533
4. Because the intent with which an act is done exists only in the mind of the actor, its proof may be inferred from the act itself and from the facts surrounding the act. State v. Cruse 533
5. Intent may be determined from all the evidence, facts,

and circumstances of the case, inclusive of the act, and is a matter for the consideration and decision of the trier of facts. State v. Journey 607

6. The existence of specific intent may be inferred from the circumstances under the usual rule that every sane person is presumed to intend the usual and probable consequences of his acts. State v. Journey 607

7. Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. In determining this question, the following tests, while not all inclusive, have received general approval, viz: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is concerned; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Cook v. Beermann 675

8. Where the owner of property puts in improvements, the law at once raises a presumption of intention to make them a part of the land. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser. Cook v. Beermann 675

9. Deliberation and premeditation must take place before the killing, but no particular length of time is required for deliberation provided the intent to kill is formed before and not merely simultaneously with the act which caused the death. State v. Beers 714

10. Motive is not an essential element of the crime of murder, although its absence is a circumstance favorable to the accused and the existence of motive may be shown in support of proof of intention. State v. Beers 714

11. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Beers 714

12. Previous acts of violence by the defendant against the victim of an assault may be shown for their bearing upon the issue of felonious intent. The trial court has broad discretion in determining the relevance of such testimony and the exercise of such discretion will be upheld in the absence of an abuse thereof. State v. Casados 726

13. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from words or acts and the facts or circumstances surrounding the act. State v. Ristau 784

14. It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the

result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. State v. Ristau 784
15. The essential elements of a cause of action founded upon fraud or deceit are: That a representation be made as a statement of fact, which was untrue and known to be untrue by the party making it or was recklessly made; that it be made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party be induced by reliance on it to act to his injury or damage. English v. Bruin Engineering, Inc. 791
16. Evidence of other crimes, wrongs, or acts is admissible to show intent and lack of mistake or accident. State v. Reed 800
17. In order to prove the offense of forgery of a check, the State must show beyond a reasonable doubt that the check was signed by the defendant without the authorization of the party whose name was used and that it was forged with intent to defraud. State v. Laflin 824
18. Knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. State v. Laflin 824
19. A legislative act will operate only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. Wheelock & Manning 00 Ranches, Inc. v. Heath 835
20. For abandonment of mineral interests in realty to occur there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon. Wheelock & Manning 00 Ranches, Inc. v. Heath 835

Interest.

1. The trial court has the inherent power in adjusting the rights of the parties to provide that a money allowance to be paid in installments shall not draw interest until a certain date. Nickel v. Nickel 267
2. Section 45-103, R. R. S. 1943, providing for interest on judgments from the date of rendition thereof, is applicable to child support installments accrued prior to August 24, 1975. Ferry v. Ferry 595
3. When the judgment is payable in installments, interest begins to accrue on the individual installments when they are due. Ferry v. Ferry 595
4. When the statutory interest rate changes, the new rate applies to all delinquent installments from the effective date of the new rate. Ferry v. Ferry 595

Intoxication.

1. The result of the blood test of the passenger was relevant to prove his intoxication. Intoxication would diminish his appreciation of danger and render him more likely to take greater risks than usual. Sandberg v. Hoogensen 190
2. A guest may be guilty of contributory negligence or assumption of risk by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence, should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Sandberg v. Hoogensen 190
3. Voluntary intoxication is no justification or excuse for crime unless it is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent. State v. Prim 279

Judgments.

1. Upon appeal to this court from a judgment of the District Court in an appeal from the Nebraska Equal Opportunity Commission the judgment of the District Court will be affirmed if it is supported by substantial evidence. Snygg v. City of Scottsbluff Police Dept. 16
2. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. V.P.O., Inc. v. Money 30
3. In determining the sufficiency of the evidence to sustain a judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. If there is a conflict in the evidence, this court will presume that the controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed on appeal unless clearly wrong. V.P.O., Inc. v. Money 30
4. When the evidence is conflicting, the verdict of a jury will not be set aside on appeal unless it is clearly wrong. McIntosh v. Borchers 35
5. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination. Floridia v. Farlee 39
6. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. National Bank of Commerce Trust & Sav. Assn. v. Katleman ... 165
7. A juror may not testify as to the effect of any matter or

statement upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith. State v. Steinmark 200

8. The setting aside of a default judgment of one co-obligor does not ipso facto set aside the judgment against the other where the obligations are joint and several. Waite v. Salestrom 224

9. When a question in controversy has been once finally decided it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation. Wasserburger v. Coffee 416

10. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Wasserburger v. Coffee 416

11. A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. Midwest Franchise Corp. v. Wakin 450

12. A judgment is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, and within this rule the commonly applied test of identity is whether the same evidence would sustain both suits. Midwest Franchise Corp. v. Wakin 450

13. Privity depends upon the relation of the parties to the subject matter. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. Midwest Franchise Corp. v. Wakin 450

14. As a general rule, a stockholder is so in privity with, and represented by, the corporation that he is bound by a judgment for or against the corporation insofar as it deals in corporate rights and liabilities and affects the stockholders as a body, where it was not obtained by fraud or collusion, but he is not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all the stockholders. Midwest Franchise Corp. v. Wakin 450

15. An authenticated record of a prior judgment ordering

the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence. State v. Dedmond 455

16. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Vlcek v. Sutton 555
17. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Strauss v. Square D Co. 571
18. A trial court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. Hall v. Hall 590
19. The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong. Ineba Ranch v. Cockerill 592
20. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. The successful party is also entitled to any inference reasonably deducible from the evidence. Ineba Ranch v. Cockerill 592
21. When the judgment is payable in installments, interest begins to accrue on the individual installments when they are due. Ferry v. Ferry 595
22. In determining the sufficiency of 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. State v. Sommers 809
23. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Newbanks v. Foursome Package & Bar, Inc. 818
24. 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. Laflin 824

Judicial Notice.

1. Generally, this court will not take judicial notice of a municipal ordinance which does not appear in the rec-

ord on appeal. State v. Korf 64
2. A court will take judicial notice of the pleadings, orders, and judgments in the case before it. Ferry v. Ferry 595

Juries.

1. Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds. Geiger v. Sweeney 175
2. It is the duty of the trial court to instruct the jury upon the law of the case made applicable by the pleadings and the evidence. Geiger v. Sweeney 175
3. It is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power. Geiger v. Sweeney 175
4. A juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention during deliberations. State v. Steinmark 200
5. A juror may not testify as to the effect of any matter or statement upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith. State v. Steinmark 200
6. When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. State v. Steinmark 200
7. If misconduct occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed. State v. Steinmark 200
8. The determination as to whether misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case. State v. Steinmark 200
9. It is ordinarily not appropriate that the trial court submit to the jury the allegations of plaintiff's petition in

haec verba. The trial court has the duty to properly analyze, summarize, and submit to the jury the substance of the allegations of negligence in tort petitions. Greenberg v. Bishop Clarkson Memorial Hospital 215

10. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. Greenberg v. Bishop Clarkson Memorial Hospital 215

11. Abstract statements of law applicable in cases in which the evidence fails to establish a prima facie case for submission to a jury are ordinarily inappropriate as instructions to a jury in a case in which a prima facie case has been established. Greenberg v. Bishop Clarkson Memorial Hospital 215

12. The jury, in an action for criminal conversation, may consider the actual misconduct of defendant, the social relations of the parties, the existence of or lack of affection between the spouses, the destruction of the plaintiff's home and happiness, and the pecuniary situation of the parties. Kremer v. Black 467

13. In an action for criminal conversation, the courts will seldom interfere with the finding of the jury, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded. Kremer v. Black 467

14. Photographs purporting to show injuries received in two assaults, with proper foundation including evidence to enable the jury to distinguish the injuries resulting from the assault in issue, may be received in evidence. Unless an abuse of discretion appears, the ruling of the trial court will be affirmed. State v. Casados 726

15. Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place. State v. Laflin 824

Jurisdiction.

Jurisdiction in the equity court in such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at law. Pflasterer v. Omaha Nat. Bank ... 427

Labor and Labor Relations.

1. In determining what is an appropriate employee unit for the purposes of collective bargaining, consideration may be given to the mutuality of interest in wages, hours, and working conditions; the duties and skills of

the employees; the extent of union organization among the employees; and the desires of the employees. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
2. It is the intent of the Legislature, and the policy of this court, that undue fragmentation of bargaining units within the public sector is to be avoided. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
3. The considerations set forth in section 48-838 (2), R. S. Supp., 1976, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
4. The state is vested with the power to, and has, entered the field of labor, and has not delegated to the City of Omaha any power to legislate, by its city council, ordinances relating to labor relations and practices, and civil rights. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

Laches.

1. Independent of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. Cizek v. Cizek ... 4
2. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. Smith v. Smith 21

Landlord & Tenant.

1. Landlords are not entitled to recover leased premises by resort to self-help, but must use the legal means provided for that purpose. Polley v. Shoemaker 91
2. Where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year-to-year. Fisher v. Stuckey 439

3. A tenancy can be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced. Fisher v. Stuckey 439
4. Ordinarily a tenant in possession under an oral year-to-year lease, without an agreement concerning way-going crops, is not entitled to such crops if he had notice of the termination date of the lease before he planted the crops. Fisher v. Stuckey 439
5. The fault, if any, of a landlord whose fences are out of repair is not the proximate cause of injury or loss caused by his tenant's animals straying from the premises. Bringewatt v. Mueller 736

Leasehold Improvements.

Improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to him. The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise. Lienemann v. Lienemann 458

Leases.

1. Landlords are not entitled to recover leased premises by resort to self-help, but must use the legal means provided for that purpose. Polley v. Shoemaker 91
2. A lease agreement between the state and a municipal corporation with annual rental periods does not violate Article XIII, section 1, of the Constitution, where the liability of the state is conditioned upon a legislative appropriation having been made before each rental period begins. Ruge v. State 391
3. A provision in a lease to which the state is a party which requires the state upon termination of the lease to pay the costs of reletting the property including the costs of alterations incurred by the owner in placing the property in condition for reletting violates Article XIII, section 1, of the Constitution. Ruge v. State 391
4. Where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year-to-year. Fisher v. Stuckey 439
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Legislature.

1. It is presumed that the Legislature has full knowledge and information of the subject matter of a statute, as well as the relevant facts relating to prior law and existing pertinent legislation, and has acted with respect thereto. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10
2. It is the intent of the Legislature, and the policy of this court, that undue fragmentation of bargaining units within the public sector is to be avoided. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
3. When the Legislature has enacted a law affecting municipal affairs, which are also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
4. Where general and special acts of the Legislature come in conflict, the special law is not repealed by the general provisions unless by express words or necessary implication. Roebuck v. Fraedrich 413

Lesser-Included Offenses.

1. Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943. State v. Beers 714
2. Where murder in the first degree is charged, the court

is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to be applicable to an instruction as to manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Beers 714

Libel and Slander.

1. The publication complained of in an action for libel must be libelous. In the first instance it is a question of law for the court as to whether a particular publication was libelous. Silence v. Journal Star Printing Co. 159
2. In determining whether the language of a publication was libelous, the statement is to be interpreted in its ordinary and popular sense. Silence v. Journal Star Printing Co. 159

Licenses and Permits.

1. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Kretchmar 308
2. The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. State v. Kretchmar .. 308
3. An authenticated record of a prior judgment ordering the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence. State v. Dedmond 455

Liens.

1. Section 77-1917.01, R. R. S. 1943, provides the subdivisions of government named therein an independent and complete remedy for the foreclosure of special assessment liens and is in addition to any other remedies provided by law for the collection of special assessments. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10
2. Where section 44-371, R. R. S. 1943, is not applicable, an oral assignment or pledge of a life insurance policy by

the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. Albracht v. Prudential Ins. Co. 249

3. There is no legal requirement that a lien be noted on a certificate of title purportedly covering property not subject to the Certificate of Title Act, sections 60-101 to 60-117, R. R. S. 1943, even though a certificate of title for such property has been issued. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

Mandamus.

1. A writ of mandamus will not ordinarily be awarded to compel the performance of an act unless it is one which is actually due from the respondent at the time of the application. A writ in anticipation of default, however, may be granted where the respondent clearly manifests an intention not to perform the act in question and refuses to act because he claims that he is under no duty to act. State ex rel. Boyer v. Grady 360
2. Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. State v. City of Omaha 491

Mineral Estates.

1. For abandonment of mineral interests in realty to occur there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon. Wheelock & Manning OO Ranches, Inc. v. Heath 835
2. When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct title, and each is a freehold estate of inheritance, subject to the laws of descent, devise, and conveyance. Wheelock & Manning OO Ranches, Inc. v. Heath 835
3. Mineral interests in land are subject to the protection of the due process clause. Wheelock & Manning OO Ranches, Inc. v. Heath 835
4. The removal of minerals, whether held in solution upon the land or resting in the soil or subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached. Wheelock &

Manning OO Ranches, Inc. v. Heath 835
5. When a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created. Wheelock & Manning OO Ranches, Inc. v. Heath 835

Minors.

1. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1976. Pfeiffer v. Pfeiffer 56
2. The term "when required" is broad and indefinite, but does not contemplate modification at the whim of either a party or the court. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. Pfeiffer v. Pfeiffer 56
3. The primary consideration in matters involving child custody, whether arising as a part of the proceedings for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Eravi v. Bohnert 99
4. Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent. Eravi v. Bohnert 99
5. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. Eravi v. Bohnert 99
6. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. Ferry v. Ferry 595
7. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is

to seek a modification of the decree in the court which entered it on the basis of the changed circumstances. Ferry v. Ferry 595

8. In order to rebut the presumption that an award in an amount for the support of more than one child continues until the last child reaches majority or otherwise becomes ineligible for support, some evidence must exist. The burden of proof is on the moving party to produce such evidence. Ferry v. Ferry 595

9. Section 45-103, R. R. S. 1943, providing for interest on judgments from the date of rendition thereof, is applicable to child support installments accrued prior to August 24, 1975. Ferry v. Ferry 595

10. Section 42-364.06, R. S. Supp., 1978, provides in part that if jurisdiction has been acquired of the employer, "In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such come due." Ferry v. Ferry 595

Mortgages.

1. A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase, and not a mortgage. Cizek v. Cizek 4

2. A safe, and perhaps the most satisfactory, test in all cases, where it is contended that an absolute conveyance of real estate is in actuality a mortgage, is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not. Cizek v. Cizek 4

3. In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was executed, by failing and refusing to advance part of the funds promised under the agreement, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S. 1943. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 72

4. Under section 60-110, R. R. S. 1943, the practice of filing and recording chattel mortgages on motor vehicles has been eliminated, and under that section security interests must be noted on the certificate of title itself. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
5. The statutory provisions for recording chattel mortgages in effect prior to the adoption of the Uniform Commercial Code were specifically repealed by that act. See Laws 1963, c. 544, art. 10, § 10-102, p. 1943. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
6. A chattel mortgage may constitute a "financing statement" entitled to be filed under sections 9-105, 9-302, 9-401, 9-402, and 9-403, U. C. C., only if it complies with the formal requisites of a financing statement by showing (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

Motions, Rules, and Orders.

1. Dissolution of a restraining order is not a final order within the meaning of section 25-1902, R. R. S. 1943. Abramson v. Bemis 97
2. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. Wasserburger v. Coffee 416
3. A party who does not object to a misstatement when made and who does not assign the alleged error in a motion for new trial cannot be heard here on possible prejudice of that misstatement. State v. Brashear 582
4. A trial court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. Hall v. Hall 590
5. It is proper to sustain a motion in limine to prevent reference to or the offer of evidence concerning matters which are entirely extraneous or irrelevant to the issues of the case. State v. Casados 726
6. The purpose of a motion for summary judgment is to pierce the allegations of a pleading and show conclusively that the controlling facts are otherwise than as alleged. Ames Bank v. Pacenco, Inc. 776

Motor Carriers.

1. Under section 75-311, R. R. S. 1943, a certificate shall be

issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the requirements, rules, and regulations of the Nebraska Public Service Commission thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

2. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
3. This court will not disturb an order of the Public Service Commission unless its order is illegal, arbitrary, capricious, or unreasonable. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
4. Where the fitness of an applicant is an issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the commission if the order of the commission is supported by competent evidence. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
5. Illegality of past operations does not necessarily bar a carrier from seeking and obtaining an additional certificate for operating authority. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

Motor Vehicles.

1. It is the pedestrian's duty as an ordinarily cautious and prudent person, to look to the right and to the left in crossing an intersection to observe cars coming from either direction. However, he has a right to assume that vehicles approaching from the rear will exercise ordinary care in keeping a lookout for him and there is no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence. Dunlap v. Coleman 148
2. The result of the blood test of the passenger was relevant to prove his intoxication. Intoxication would diminish his appreciation of danger and render him more likely to take greater risks than usual. Sandberg v. Hoogensen 190
3. A guest may be guilty of contributory negligence or as-

sumption of risk by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence, should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Sandberg v. Hoogensen 190

4. The term "gross negligence" has different meanings under the automobile guest statute and the comparative negligence statute. Sandberg v. Hoogensen 190
5. The doctrine of sudden emergency applies only when an individual, first becoming aware of the emergency, is faced with a rapid choice of courses and selects one which deliberate judgment shows as negligent. Oban v. Bossard 243
6. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Kretchmar 308
7. The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. State v. Kretchmar .. 308
8. When the officer became aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle. State v. Kretchmar 308
9. An authenticated record of a prior judgment ordering the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence. State v. Dedmond 455
10. Under section 60-110, R. R. S. 1943, the practice of filing and recording chattel mortgages on motor vehicles has been eliminated, and under that section security interests must be noted on the certificate of title itself. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
11. There is no legal requirement that a lien be noted on a certificate of title purportedly covering property not subject to the Certificate of Title Act, sections 60-101 to 60-117, R. R. S. 1943, even though a certificate of title for such property has been issued. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
12. A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to

a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets. Hartman v. Brady 558

13. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident. Hartman v. Brady 558

14. A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether or not the violation is negligent. Hartman v. Brady 558

15. When a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Pearson v. Richard 621

16. The right-of-way which the driver of a vehicle is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. The fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left. Pearson v. Richard 621

17. In a policy indemnifying insured for loss by burglary for "property while unattended in or on any motor ve-

hicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry on the exterior of such vehicle," such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability. Cochran v. MFA Mut. Ins. Co. 631

18. In order to support a conviction for the offense of drunk driving based solely on a chemical test, the results of the chemical test, when taken together with its tolerance for error, must equal or exceed the statutory percentage. State v. Bjornsen 709

19. Where a technician testifies that a blood alcohol test of a defendant yielded a reading exactly equal to ten-hundredths of one percent, which is the minimum percentage necessary for proof of the offense of drunk driving, but concedes that the test is subject to a tolerance for error of five-thousandths of one percent, the State has not, on that testimony alone, proven the elements of the offense beyond a reasonable doubt. State v. Bjornsen 709

20. In an action charging motor vehicle homicide, the burden is upon the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. State v. Sommers 809

Municipal Corporations.

1. The character and extent of unevenness or other inequalities in the surface of a highway, or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway. Christensen v. City of Tekamah 344

2. Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. Slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be antici-

pated, are not defects for which an action will lie. Christensen v. City of Tekamah 344
3. Where an industrial area is within the zoning jurisdiction of a city of the first class at the time the area is designated as an industrial area by the county board under the provisions of the Industrial Areas Act, the city thereafter retains its zoning jurisdiction of the area, subject to the reservation for use of the area for industrial purposes as provided by the Industrial Areas Act. Hansen v. City of Norfolk 352
4. Participation in a hearing before the city council on a proposed amendment to a zoning ordinance constitutes a waiver of any defect in the notice of the hearing. Hansen v. City of Norfolk 352
5. Where a metes and bounds description of an area proposed to be rezoned, taken as a whole, is sufficiently clear to indicate the intended bounds of the area to be zoned, with the courses and distances set out clearly therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error. Hansen v. City of Norfolk 352
6. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. Hansen v. City of Norfolk 352
7. A legal presumption exists in favor of validity and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence, that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. Hansen v. City of Norfolk 352
8. By the initiative process municipal voters may amend or repeal an ordinance enacted by the legislative body of a municipality where the object of the initiative is to accomplish no more than that which the city council and mayor could do if they so chose. State ex rel. Boyer v. Grady 360
9. A municipal ordinance establishing a new scheme of taxation is not an appropriation ordinance. State ex rel. Boyer v. Grady 360
10. Section 77-27,142, R. R. S. 1943, does not limit the power

to propose or reject ordinances concerning a municipal sales tax to the legislative body of a municipality, and does not except sales tax ordinances from the usual powers of initiative and referendum. State ex rel. Boyer v. Grady 360

11. The state is vested with the power to, and has, entered the field of labor, and has not delegated to the City of Omaha any power to legislate, by its city council, ordinances relating to labor relations and practices, and civil rights. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
12. A public improvement ordinance need not recite the necessity for its enactment unless the statute expressly requires that it do so. Rozanek v. City of Fremont 748
13. The passage of an ordinance requiring construction of a public improvement is in itself a finding of necessity because necessity is a legislative question rather than a judicial question. Rozanek v. City of Fremont 748

Names.

1. Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. State v. Journey 607
2. Nothing in the law of Nebraska limits the common law power of a married woman to bear a different surname from her husband. Simmons v. O'Brien 778
3. Where a petition for dissolution of marriage is filed in the maiden name of a woman who has never adopted the surname of her husband and the parties are otherwise entitled to a decree of dissolution, refusal of the trial court to enter the decree in the maiden name of the wife is error. Simmons v. O'Brien 778

Negligence.

1. A person operating an airplane for spraying crops must use due care to perform such operations under such conditions and in such manner as not to cause injury to others. A person who negligently sprays a liquid or powder containing a dangerous proportion of poison in such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom. Mustion v. Ealy 139
2. It is the pedestrian's duty as an ordinarily cautious and prudent person, to look to the right and to the left in crossing an intersection to observe cars coming from either direction. However, he has a right to assume that vehicles approaching from the rear will exercise ordi-

nary care in keeping a lookout for him and there is no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence. Dunlap v. Coleman 148

3. A guest may be guilty of contributory negligence or assumption of risk by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence, should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Sandberg v. Hoogensen 190
4. The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to the injury, although it plays no part in causing the injury. Sandberg v. Hoogensen 190
5. The term "gross negligence" has different meanings under the automobile guest statute and the comparative negligence statute. Sandberg v. Hoogensen 190
6. A motion for a directed verdict of liability encompasses not only the negligence of the defendant as a matter of law, but also the causal connection between such negligence and the accident in question. Oban v. Bossard .. 243
7. The character and extent of unevenness or other inequalities in the surface of a highway, or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway. Christensen v. City of Tekamah 344
8. Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. Slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie. Christensen v. City of Tekamah 344
9. In an action to recover damages from a county by virtue of the Political Subdivisions Tort Claims Act, the burden is on the plaintiff to establish negligence of the county and that its negligent act was the proximate

cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. Christensen v. City of Tekamah 344

10. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Pearson v. Richard 621

11. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. Pearson v. Richard 621

12. When a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Pearson v. Richard 621

13. Actionable fault exists only when the injury or loss is the proximate result thereof; if the alleged fault produces only the condition or occasion amounting to an opportunity for a subsequent independent cause to produce such result, the causes are not concurrent and the subsequent independent cause is the proximate cause. Bringewatt v. Mueller 736

14. The fault, if any, of a landlord whose fences are out of repair is not the proximate cause of injury or loss caused by his tenant's animals straying from the premises. Bringewatt v. Mueller 736

15. By "proximate cause" is meant a moving or effective cause or fault which, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred. State v. Sommers 809

New Trial.

1. Where a motion for new trial is not filed within the time prescribed by law, the time for appeal runs from the rendition of the judgment. Corell v. Corell 59
2. Alleged errors of the trial court in an action at law, not referred to in a motion for new trial, will not be considered in this court on appeal. Scudder v. Haug 107
3. When an alleged error was not raised in a motion for a new trial, the defendant is now precluded from raising the alleged error on appeal to this court. State v. Steed 120
4. Ordinarily, a verdict may and should be set aside and a new trial granted where it is self-contradictory, inconsistent, or incongruous and such relief should, as a rule, be granted where more than one verdict is returned in the same action and they are inconsistent and irreconcilable. Hunter v. Sorensen 153
5. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Hunter v. Sorensen 153
6. Where there has been an appeal to the District Court in a misdemeanor case, a motion for new trial must be filed in the District Court if there is to be a review in this court of errors of law occurring at the trial or the sufficiency of the evidence. State v. Hayen 789

Notice.

1. In a workmen's compensation case, 50 percent shall be added for waiting time for all delinquent payments after 30 days notice has been given of disability. Smith v. University of Nebraska Medical Center 730
2. Benefit Regulation No. 8 promulgated by the Commissioner of Labor is invalid insofar as it requires that a claimant's notice of appeal when given by mail be actually received within 10 days after mailing of the notice of the deputy's determination. Parson v. Chizek .. 754
3. A notice of appeal filed pursuant to section 48-634, R. R. S. 1943, which is properly addressed and to which sufficient postage has been affixed, shall be valid if it is deposited in the United States mail within 10 days after the mailing of the notice of the deputy's determination. Parson v. Chizek 754

Nursing Care.

An injured workman may recover the reasonable value of necessary nursing care furnished to him by his wife while he was cared for at home. Spiker v. John Day Co. 503

Ordinances.

1. Generally, this court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. State v. Korf 64
2. A private tennis court is an eligible accessory use in a one-family residential district under the provisions of the zoning ordinance of the City of Hastings. Kitrell v. Board of Adjustment 130
3. A tennis court and appurtenances as an accessory use is a "structure" within the meaning of the zoning ordinance of the City of Hastings and is an exception to the "backyard" provisions of the ordinance, but is subject to the pertinent height restrictions of the ordinance. Kitrell v. Board of Adjustment 130
4. In the law of zoning, although a use may in a nontechnical sense not be an accessory use where not customary, it is nevertheless an accessory use where defined by the ordinance to be such. Kitrell v. Board of Adjustment 130
5. A decision of the proper official or board in interpreting and applying a zoning ordinance will not be disturbed on appeal to this court unless it is illegal or from the standpoint of fact is not supported by the evidence, is arbitrary, unreasonable, or clearly wrong. Kitrell v. Board of Adjustment 130
6. Where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention. Nebraska City Education Assn. v. School Dist. of Nebraska City 303
7. Where an industrial area is within the zoning jurisdiction of a city of the first class at the time the area is designated as an industrial area by the county board under the provisions of the Industrial Areas Act, the city thereafter retains its zoning jurisdiction of the area, subject to the reservation for use of the area for industrial purposes as provided by the Industrial Areas Act. Hansen v. City of Norfolk 352
8. Participation in a hearing before the city council on a proposed amendment to a zoning ordinance constitutes a waiver of any defect in the notice of the hearing. Hansen v. City of Norfolk 352
9. Where a metes and bounds description of an area proposed to be rezoned, taken as a whole, is sufficiently clear to indicate the intended bounds of the area to be zoned, with the courses and distances set out clearly

therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error. Hansen v. City of Norfolk 352

10. Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. Hansen v. City of Norfolk 352

11. A legal presumption exists in favor of validity and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence, that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. Hansen v. City of Norfolk 352

12. By the initiative process municipal voters may amend or repeal an ordinance enacted by the legislative body of a municipality where the object of the initiative is to accomplish no more than that which the city council and mayor could do if they so chose. State ex rel. Boyer v. Grady 360

13. A municipal ordinance establishing a new scheme of taxation is not an appropriation ordinance. State ex rel. Boyer v. Grady 360

14. Section 77-27,142, R. R. S. 1943, does not limit the power to propose or reject ordinances concerning a municipal sales tax to the legislative body of a municipality, and does not except sales tax ordinances from the usual powers of initiative and referendum. State ex rel. Boyer v. Grady 360

15. This court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

16. The state is vested with the power to, and has, entered the field of labor, and has not delegated to the City of Omaha any power to legislate, by its city council, ordinances relating to labor relations and practices, and civil rights. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

17. When the Legislature has enacted a law affecting municipal affairs, which are also of statewide concern, such law takes precedence over any provisions in a

home rule charter and the provisions of the charter must yield. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405
18. A public improvement ordinance need not recite the necessity for its enactment unless the statute expressly requires that it do so. Rozanek v. City of Fremont 748
19. The passage of an ordinance requiring construction of a public improvement is in itself a finding of necessity because necessity is a legislative question rather than a judicial question. Rozanek v. City of Fremont 748

Parent and Child.

1. The primary consideration in matters involving child custody, whether arising as a part of the proceedings for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Eravi v. Bohnert 99
2. Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent. Eravi v. Bohnert 99
3. Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. Eravi v. Bohnert 99
4. An award of child support, the fixing of alimony, and the distribution of property rest in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Van Cleave v. Van Cleave 211
5. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Van Cleave v. Van Cleave 211
6. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Swearingen v. Swearingen 255
7. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Ahlman v. Ahlman 273
8. When dissolution of a marriage is decreed, the court

may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Morris v. Morris 479

9. The father has the primary responsibility for child support but the ability of the mother to support the children must also be considered. The trial court has the responsibility of adjusting the equities between the parties. Scarpino v. Scarpino 564

10. In determining the amount of child support to be awarded, the status, character, and situation of the parties, and all attendant circumstances, including the financial position of the husband and wife, must be considered. Scarpino v. Scarpino 564

11. The determination of custody and fixing of child support rest in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Scarpino v. Scarpino 564

12. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage the controlling consideration is the best interests and welfare of the children. Hoback v. Hoback 639

13. 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. Hoback v. Hoback 639

14. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Long v. Sena 642

15. A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action. Long v. Sena 642

16. While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily

be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Long v. Sena 642

17. A decree fixing child support is subject to modification upon a showing of a material change of circumstances. Bruckner v. Bruckner 774

18. Where, subsequent to a decree fixing child support, there is a material reduction in earnings of the husband due to illness, an increase in his debts, and an increase in the earning capacity of the wife, the mere showing of a rise in the cost of living is insufficient as a change in circumstances to warrant an increase in the husband's child-support obligations. Bruckner v. Bruckner 774

Parties.

1. Parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

2. A court cannot adjudicate the rights of a transferee of a gift without having the transferee in court since his rights may be adversely affected thereby. Baker v. Baker 409

3. The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Baker v. Baker 409

4. In order for a previous action to act as res judicata to a present action, the parties to the present action must be identical to or in privity with the parties in the previous action. Midwest Franchise Corp. v. Wakin 450

5. Privity depends upon the relation of the parties to the subject matter. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. Midwest Franchise Corp. v. Wakin 450

6. Ordinarily, the Workmen's Compensation Court has no right to adjudicate a claim of a third party against an employer for services furnished to an injured employee unless the third party is a party to the action. Spiker v. John Day Co. 503

Partition.

1. In a partition action, attorney's fees and reasonable referee's fees shall be taxed as costs in the proceed-

ings. Lienemann v. Lienemann 458
2. Attorneys for the plaintiff in a partition action shall be entitled to all awarded fees where the shares conferred by the judgment, and all encumbrances acted upon by plaintiff, are accurately pleaded in his original petition. Lienemann v. Lienemann 458
3. Fees shall be divided among the attorneys of record who shall have filed pleadings upon which any of the findings in a judgment of partition are based. Lienemann v. Lienemann 458

Paternity.

In a proceeding to determine paternity of a child under the provisions of sections 13-101 to 13-112, R. R. S. 1943, the mother is a competent witness on the issue of the child's paternity. Roebuck v. Fraedrich 413

Pedestrians.

It is the pedestrian's duty as an ordinarily cautious and prudent person, to look to the right and to the left in crossing an intersection to observe cars coming from either direction. However, he has a right to assume that vehicles approaching from the rear will exercise ordinary care in keeping a lookout for him and there is no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence. Dunlap v. Coleman 148

Penalties.

Where there is a reasonable controversy between the parties, an injured workman is not entitled to the statutory penalties for waiting time. Spiker v. John Day Co. 503

Pleadings.

1. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Cizek v. Cizek 4
2. The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. Greenberg v. Bishop Clarkson Memorial Hospital 215
3. It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to al-

lege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Fisher v. Stuckey 439
4. A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. Cook v. Beermann 675
5. Where one party desires to avail himself of the other's pleading, it is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. Cook v. Beermann 675

Police Officers and Sheriffs.

1. The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. State v. Kretchmar .. 308
2. When the officer became aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle. State v. Kretchmar 308
3. Section 28-729, R. R. S. 1943, punishment for abuse of an officer, held constitutional. State v. Hayen 789

Political Subdivisions.

1. Section 77-1917.01, R. R. S. 1943, provides the subdivisions of government named therein an independent and complete remedy for the foreclosure of special assessment liens and is in addition to any other remedies provided by law for the collection of special assessments. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10
2. Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17 (2), Constitution of Nebraska. Nebraska League of S. & L. Assns. v. Mathes 122
3. If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to

keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision. Christensen v. City of Tekamah 344

4. The liability of all political subdivisions based on the alleged insufficiency or want of repair of any public thoroughfare is to be determined by the provisions of sections 23-2410 and 23-2411, R. R. S. 1943, and judicial interpretations governing the liability of counties under the statute in effect prior to the enactment of the Political Subdivisions Tort Claims Act. Christensen v. City of Tekamah 344

5. A county is not an insurer, but must use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Christensen v. City of Tekamah 344

6. The character and extent of unevenness or other inequalities in the surface of a highway, or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway. Christensen v. City of Tekamah 344

7. Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. Slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie. Christensen v. City of Tekamah 344

8. In an action to recover damages from a county by virtue of the Political Subdivisions Tort Claims Act, the burden is on the plaintiff to establish negligence of the county and that its negligent act was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. Christensen v. City of Tekamah 344

9. On appeal of an action under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Christensen v. City of Tekamah 344

Post Conviction.

1. Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. State v. Flye 115
2. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act. State v. Flye 115
3. 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. Flye 115
4. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Flye 115
5. Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding. State v. Flye .. 115

Privity.

1. In order for a previous action to act as res judicata to a present action, the parties to the present action must be identical to or in privity with the parties in the previous action. Midwest Franchise Corp. v. Wakin 450
2. Privity depends upon the relation of the parties to the subject matter. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. Midwest Franchise Corp. v. Wakin 450
3. As a general rule, a stockholder is so in privity with, and represented by, the corporation that he is bound by a judgment for or against the corporation insofar as it deals in corporate rights and liabilities and affects the stockholders as a body, where it was not obtained by fraud or collusion, but he is not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all the stockholders. Midwest Franchise Corp. v. Wakin 450

Probable Cause.

When the officer became aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle. State v. Kretchmar 308

Probation and Parole.

1. The good time reductions provided in section 83-1,107, R. R. S. 1943, are used to determine eligibility for release on parole or supervision and are subject to forfeiture. Wycoff v. Vitek 62
2. This court will not overturn an order of the trial court denying probation in the absence of an abuse of discretion. State v. Laflin 824

Process.

1. The requirements of section 25-530, R. R. S. 1943, with respect to service of process are to be strictly construed, and strict compliance with those requirements is mandatory and jurisdictional. Lydick v. Smith 45
2. The mailing of a copy of the summons and petition to the defendant, before the summons is served on the Secretary of State, does not satisfy the requirements of section 25-530, R. R. S. 1943. Lydick v. Smith 45
3. When service of process is made outside this state by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to addressee satisfactory to the court. § 25-540, R. R. S. 1943. Lydick v. Smith 45

Proof.

1. Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter. State v. Blythman 285
2. One who seeks to avoid the legal effect of a release of a cause of action for personal injuries has the burden of pleading and proving the facts which entitle him to such relief. Nicholson v. Braddock 531
3. Proof that great bodily injury actually occurred is not an essential element of the crime of assault with intent to inflict great bodily injury. State v. Cruse 533
4. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and

proof thereof is indispensable to sustain a conviction. State v. Cruse 533
5. Because the intent with which an act is done exists only in the mind of the actor, its proof may be inferred from the act itself and from the facts surrounding the act. State v. Cruse 533
6. In a prosecution for sexual assault, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Rhodes 576
7. In order to rebut the presumption that an award in an amount for the support of more than one child continues until the last child reaches majority or otherwise becomes ineligible for support, some evidence must exist. The burden of proof is on the moving party to produce such evidence. Ferry v. Ferry 595
8. A claim of double jeopardy cannot be established without a showing of a previous charge and conviction arising out of the same transaction. State v. Hawkman ... 605
9. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. Pearson v. Richard 621

Property.

1. A safe, and perhaps the most satisfactory, test in all cases, where it is contended that an absolute conveyance of real estate is in actuality a mortgage, is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not. Cizek v. Cizek 4
2. Where a vendee, under, and in reliance upon, an unacknowledged contract to purchase a homestead makes valuable improvements thereon and the vendor fails or refuses to carry out the contract, the vendee may recover for such improvements to the extent they enhance the value of the property. McIntosh v. Borchers 35
3. Where a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale. Byron Reed Co., Inc. v. Majers Market Re-

search Co., Inc. 67
4. In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was executed by failing and refusing to advance part of the funds promised under the agreement, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S. 1943. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 72
5. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Polley v. Shoemaker 91
6. To constitute conversion there must be an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that it justifies the forced judicial sale to the defendant, which is the distinguishing feature of the action. Polley v. Shoemaker 91
7. A private tennis court is an eligible accessory use in a one-family residential district under the provisions of the zoning ordinance of the City of Hastings. Kitrell v. Board of Adjustment 130
8. A tennis court and appurtenances as an accessory use is a "structure" within the meaning of the zoning ordinance of the City of Hastings and is an exception to the "backyard" provisions of the ordinance, but is subject to the pertinent height restrictions of the ordinance. Kitrell v. Board of Adjustment 130
9. In the law of zoning, although a use may in a nontechnical sense not be an accessory use where not customary, it is nevertheless an accessory use where defined by the ordinance to be such. Kitrell v. Board of Adjustment 130
10. An award of child support, the fixing of alimony, and the distribution of property rest in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Van Cleave v. Van Cleave 211
11. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Van Cleave v. Van Cleave 211
12. When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion

of the improvement from which the injury results. Danish Vennerforning & Old Peoples Home v. State ... 233
13. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Nickel v. Nickel 267
14. The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Baker v. Baker 409
15. Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion. Baker v. Baker 409
16. It is well-established that alimony may be awarded in addition to a property settlement. Baker v. Baker 409
17. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Rasmussen Farms v. Gove 432
18. Improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to him. The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise. Lienemann v. Lienemann 458
19. A decree in a dissolution of a marriage case awarding one party all her "personal effects" does not include bank accounts standing in that party's name alone. Steele v. Steele 549
20. Ordinarily, the owner of the fee, by his annexation of personal property, renders it an accession to the land. Cook v. Beermann 675
21. The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Blome v. Blome 687
22. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome 687
23. For abandonment of mineral interests in realty to occur there must be both a relinquishment of possession or nonuser of the right granted together with the

intention to abandon. Wheelock & Manning OO Ranches, Inc. v. Heath 835
24. When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct title, and each is a freehold estate of inheritance, subject to the laws of descent, devise, and conveyance. Wheelock & Manning OO Ranches, Inc. v. Heath 835
25. Mineral interests in land are subject to the protection of the due process clause. Wheelock & Manning OO Ranches, Inc. v. Heath 835
26. The removal of minerals, whether held in solution upon the land or resting in the soil or subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached. Wheelock & Manning OO Ranches, Inc. v. Heath 835
27. When a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created. Wheelock & Manning OO Ranches, Inc. v. Heath 835

Property Settlement Agreements.

1. On appeal, a party to a divorce proceeding cannot ordinarily successfully assert error in a property division requested and obtained by him in the trial court. Morris v. Morris 479
2. Property settlement agreements are governed by section 42-366, R. R. S. 1943. They are favored in the law and will not be set aside unless the agreement is unconscionable. Paxton v. Paxton 545
3. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable it binds both the parties and the court. Paxton v. Paxton 545
4. A property settlement agreement is not unconscionable unless it is shown to be unjust as to one of the parties or obviously excessive in respect to the benefits or burdens on either side. Paxton v. Paxton 545

Prosecuting Attorneys.

A party who does not object at trial to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his rights to complain on

appeal. State v. Baker 579

Proximate Cause.

1. In an action based on breach of warranty, it is necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. Geiger v. Sweeney 175
2. The failure to give a definition of proximate cause herein was prejudicial error. Geiger v. Sweeney 175
3. Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds. Geiger v. Sweeney 175
4. The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to the injury, although it plays no part in causing the injury. Sandberg v. Hoogensen 190
5. The doctrine of sudden emergency applies only when an individual, first becoming aware of the emergency, is faced with a rapid choice of courses and selects one which deliberate judgment shows as negligent. Oban v. Bossard 243

Public Officers and Employees.

1. Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least 25 percent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
2. The power granted to electors to remove certain public officers is political in its nature and not the exercise of a judicial function. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486

3. A petition to recall school board members which states as a reason for removal one of the grounds listed in section 79-518.04, R. R. S. 1943, is statutorily sufficient to compel a recall election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
4. A resolution of a county board fixing the salaries of elected county officers at an amount plus an annual adjustment for changes in the cost of living as determined by an independent federal agency does not violate Article III, section 19, of the Constitution of Nebraska. Shepoka v. Knopik 780

Public Policy.

1. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Smith v. Smith 21
2. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. McConnell 84

Public Service Commission.

1. Under section 75-311, R. R. S. 1943, a certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the requirements, rules, and regulations of the Nebraska Public Service Commission thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
2. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
3. This court will not disturb an order of the Public Service Commission unless its order is illegal, arbitrary, ca-

pricious, or unreasonable. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
4. Where the fitness of an applicant is an issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the commission if the order of the commission is supported by competent evidence. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
5. Illegality of past operations does not necessarily bar a carrier from seeking and obtaining an additional certificate for operating authority. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761

Public Welfare.

1. In determining the eligibility of a party to receive Assistance to the Aged, Blind or Disabled benefits, it is the present availability of another source of funds which is determinative. Jansen v. Department of Public Welfare 185
2. Where a ward is receiving public assistance, the Department of Public Welfare, if its practice permits, may enter a conditional order to require the guardians to exhaust their remedies so long as it does not deny assistance to the ward pending such determination. Jansen v. Department of Public Welfare 185
3. In determining the eligibility of a potential trust beneficiary for public assistance, the interest of a beneficiary in a discretionary trust is not an available resource pending exhaustion of judicial remedies to determine whether such trustee is in fact abusing his discretion. Jansen v. Department of Public Welfare 185

Real Property.

1. Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact. In determining this question, the following tests, while not all inclusive, have received general approval, viz: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is concerned; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Cook v. Beermann 675
2. Ordinarily, the owner of the fee, by his annexation of personal property, renders it an accession to the land. Cook v. Beermann 675
3. Where the owner of property puts in improvements, the law at once raises a presumption of intention to make

them a part of the land. Rules for determining what is a fixture are construed strongly against the vendor and in favor of the purchaser. Cook v. Beermann 675

Recall.

1. Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least 25 percent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
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Records.

1. Generally, this court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. State v. Korf 64
2. Purported evidence which does not appear in the bill of exceptions cannot be considered by the Supreme Court on appeal. Nicholson v. Braddock 531

Referee's Fees.

In a partition action, attorney's fees and reasonable referee's fees shall be taxed as costs in the proceedings. Lienemann v. Lienemann 458

Reformation.

1. Equity will decree reformation of a contract for a mistake only if the mistake is mutual. Waite v. Salestrom 224
2. The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties

have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed. Waite v. Salestrom 224

3. Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other. Waite v. Salestrom 224
4. To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. A mere preponderance of the evidence is not sufficient. Waite v. Salestrom 224
5. Mere carelessness is not necessarily a defense to an action for reformation. Waite v. Salestrom 224
6. A failure to disclose a change made in a written instrument, which change modifies the prior agreement, may be such inequitable conduct as will, together with mistake on the part of the other party, justify reformation. Waite v. Salestrom 224

Res Judicata.

1. A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. Midwest Franchise Corp. v. Wakin 450
2. A judgment is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, and within this rule the commonly applied test of identity is whether the same evidence would sustain both suits. Midwest Franchise Corp. v. Wakin 450
3. In order for a previous action to act as res judicata to a present action, the parties to the present action must be identical to or in privity with the parties in the previous action. Midwest Franchise Corp. v. Wakin 450

Right to Counsel.

The defendant by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him must be held responsible for his ineptness of counsel even though that counsel was himself. State v. Brashear 582

Rules of Court.

It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. Pflasterer v. Omaha Nat. Bank 427

Rules of Supreme Court.

On appeal this court considers only alleged errors which are assigned and discussed in the appellant's brief. Scudder v. Haug 107

Savings and Loan Associations.

Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17 (2), Constitution of Nebraska. Nebraska League of S. & L. Assns. v. Mathes 122

Schools and School Districts.

1. Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least 25 percent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486
2. A petition to recall school board members which states as a reason for removal one of the grounds listed in section 79-518.04, R. R. S. 1943, is statutorily sufficient to compel a recall election. State ex rel. Lottman v. Board of Education of School Dist. No. 103 486

Searches and Seizures.

1. In an affidavit for a search warrant the judge must be informed of some of the underlying circumstances from which the informant concluded that controlled substances were where he claimed they were, and some of the underlying circumstances from which the

officer concluded that the informant was credible or his information reliable. State v. Payne 665
2. Affidavits for search warrants must be tested in a commonsense realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. State v. Payne 665
3. An informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer, and informs the officer of what the informant saw and heard at the time of the purchase, is presumptively reliable. State v. Payne 665
4. An affidavit for a search warrant is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded. State v. Green 828

Self-Defense.

1. There is nothing in the justification for use of force act which appears designed to change the ancient common law rule that in order to justify the defense of self-defense, the belief of the actor that the use of force is necessary must be reasonable and in good faith. State v. Eagle Thunder 206
2. Under section 28-834, R. R. S. 1943, for justification to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. State v. Graham 659

Sentences.

1. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Steed 120
2. The sentencing judge is not bound by the recommendation of the probation officer in determining the sentence to be imposed. State v. Steed 120
3. This court on appeal will not disturb a sentence imposed within the limits prescribed by statute, absent an

abuse of discretion on the part of the trial court. State v. Freeman 382
4. A sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Brown 536
5. The trial judge, in imposing sentence is entitled to know to the fullest extent the details of defendant's criminal conduct. State v. Brown 536
6. Where the execution of a sentence has been suspended under section 29-2301, R. R. S. 1943, and the defendant has been at liberty under bail, the bond may be continued without the consent of the surety during the period of suspension. State v. Hurley 569
7. When several sentences are imposed upon counts based upon the same transaction, the provision that the sentences shall run concurrently produces a single result and the constitutional restriction against multiple punishment is not violated. State v. Hawkman 605
8. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kerns 617

Service.

Process to secure the attendance of witnesses from another state may not be issued unless the testimony proposed to be elicited from such witness is relevant to the issues to be tried. State v. Casados 726

Sexual Assault.

1. In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Rhodes 576
2. In a prosecution for sexual assault, proof of reasonable resistance in good faith under all the circumstances is sufficient to negative a claim of consent. State v. Rhodes 576
3. Section 28-408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The determination of the admissibility of evidence of the prosecutrix' prior sexual activity must be determined in each case upon its own circumstances. State v. Mason 693

4. In a prosecution for sexual assault it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue. State v. Mason 693
5. A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and overcomes the victim by force or threat of force, express or implied. § 28-408.03, R. R. S. 1943. State v. Mason 693

Sexual Misconduct.

Sexual misconduct is a factor which, although not necessarily determinative, may properly be considered in determining what is in the best interests of the children. Ahlman v. Ahlman 273

Sexual Sociopaths.

1. Under the Sexual Sociopath Act, after original commitment, all orders determining the current treatability status of a sexual sociopath, entered after hearing or after summary review shall be considered final orders for purposes of appeal. State v. Blythman 285
2. Under the Sexual Sociopath Act, after original commitment, all orders determining the current status of a defendant as a sexual sociopath, entered after hearing or after summary review, shall be considered final orders for purposes of appeal. State v. Blythman 285
3. Under the Sexual Sociopath Act, a motion for a hearing to determine whether the defendant is no longer a sexual sociopath must allege facts which, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath. A conclusory allegation that a defendant is no longer a sexual sociopath, unsupported by facts, is insufficient. State v. Blythman 285
4. Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt

that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter. State v. Blythman 285

5. Under the Sexual Sociopath Act, the District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable. State v. Blythman 285

Specific Performance.

1. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death. Pflasterer v. Omaha Nat. Bank 427
2. Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Pflasterer v. Omaha Nat. Bank 427
3. As a general rule, where a valid binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Reese v. Hatfield 540
4. A contract for the purchase and sale of the stock of a closely held family corporation, which stock is not procurable on any market, is a proper subject for specific performance. Reese v. Hatfield 540

States.

1. When service of process is made outside this state by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to addressee satisfactory to the court. § 25-540, R. R. S. 1943. Lydick v. Smith 45
2. The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the general usury law of the state of the otherwise applicable law. Shull v. Dain, Kalman & Quail, Inc. 260

Statutes.

1. The rule of in pari materia construction of statutes does not permit the use of a previous statute to control by way of former policy, plain language of a subsequent statute, or to add a restriction not included in or expressly excluded from the later statute. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. .. 10
2. Where a statute is unambiguous, there is no need for construction. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10
3. Section 77-1917.01, R. R. S. 1943, provides the subdivisions of government named therein an independent and complete remedy for the foreclosure of special assessment liens and is in addition to any other remedies provided by law for the collection of special assessments. Sanitary & Improvement Dist. #222 v. Metropolitan Life Ins. Co. 10
4. The requirements of section 25-530, R. R. S. 1943, with respect to service of process are to be strictly construed, and strict compliance with those requirements is mandatory and jurisdictional. Lydick v. Smith 45
5. The mailing of a copy of the summons and petition to the defendant, before the summons is served on the Secretary of State, does not satisfy the requirements of section 25-530, R. R. S. 1943. Lydick v. Smith 45
6. When service of process is made outside this state by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to addressee satisfactory to the court. § 25-540, R. R. S. 1943. Lydick v. Smith 45
7. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1976. Pfeiffer v. Pfeiffer 56
8. The good time reductions provided in section 83-1,107, R. R. S. 1943, are used to determine eligibility for release on parole or supervision and are subject to forfeiture. Wycoff v. Vitek 62
9. In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was excecuted, by failing and refusing to advance part of the funds promised under the agreement, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S.

1943. O'Neill Production Credit Assn. v. Putnam Ranches, Inc. 72
10. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. McConnell 84
11. In section 52-123, R. R. S. 1943, the words "with the intent thereby to deprive or defraud," should read as though it read "with the fraudulent intent thereby to deprive." State v. McConnell 84
12. Dissolution of a restraining order is not a final order within the meaning of section 25-1902, R. R. S. 1943. Abramson v. Bemis 97
13. A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to section 27-614, R. R. S. 1943. Scudder v. Haug 107
14. Under section 2-314, U. C. C., a plaintiff must prove (1) that a merchant sold goods, (2) which were "not merchantable" at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury. Geiger v. Sweeney 175
15. It is within the discretion of the trial court to admit character evidence to support the credibility of a witness whose credibility has been attacked by opinion or reputation evidence or otherwise. § 27-608 (1), R. R. S. 1943. State v. Steinmark 200
16. As a general rule, statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. State v. Eagle Thunder 206
17. There is nothing in the justification for use of force act which appears designed to change the ancient common law rule that in order to justify the defense of self-defense, the belief of the actor that the use of force is necessary must be reasonable and in good faith. State v. Eagle Thunder 206
18. The considerations set forth in section 48-838 (2), R. S. Supp., 1976, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. American Fed. of S., C. & M. Emp. v. Counties of Douglas & Lancaster 295
19. In establishing wage rates, the provisions of section 48-818, R. R. S. 1943, in relevant part, provide that the

Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. The definition of "comparable" as set forth in section 48-818, R. R. S. 1943, is controlling. Nebraska City Education Assn. v. School Dist. of Nebraska City 303

20. Where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention. Nebraska City Education Assn. v. School Dist. of Nebraska City 303
21. The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. State v. Kretchmar .. 308
22. Section 29-1207, R. R. S. 1943, requires that every person charged with a criminal offense be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed. State v. Johnson 322
23. If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. State v. Johnson 322
24. Section 77-2602, R. R. S. 1943, does not appropriate revenue placed in the Downtown Education Center and Office Rental Fund and revenue placed in that fund may not be expended without a specific legislative appropriation from that fund. Ruge v. State 391
25. In a proceeding to determine paternity of a child under the provisions of sections 13-101 to 13-112, R. R. S. 1943, the mother is a competent witness on the issue of the child's paternity. Roebuck v. Fraedrich 413
26. Property settlement agreements are governed by section 42-366, R. R. S. 1943. They are favored in the law and will not be set aside unless the agreement is unconscionable. Paxton v. Paxton 545

27. The term "unconscionable" as used in statutes like in section 42-366, R. R. S. 1943, has been interpreted as meaning "manifestly unfair or inequitable." Paxton v. Paxton 545
28. Under section 42-365, R. S. Supp., 1978, the criteria to be used is what appears to be fair and equitable between the parties under the circumstances present in the case. Steele v. Steele 549
29. A violation of a statute regulating the use and operation of motor vehicles upon the highways, including a speed regulation, does not in and of itself constitute negligence, but any such violation is evidence which may be considered with all other facts and circumstances of the case in determining whether or not the violation is negligent. Hartman v. Brady 558
30. Section 45-103, R. R. S. 1943, providing for interest on judgments from the date of rendition thereof, is applicable to child support installments accrued prior to August 24, 1975. Ferry v. Ferry 595
31. Section 1673 (b) and (c) of Title 15, U.S.C., preempts state garnishment statutes to the extent that state statutes are less restrictive. Ferry v. Ferry 595
32. Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to or repealed by the latter, the earlier statute is repealed or modified by the implication of the later act, but only to the extent of repugnancy or conflict. Ferry v. Ferry 595
33. L. B. 1015, Laws 1974, sections 6 to 17, now sections 42-364.01 to 42-364.12, R. S. Supp., 1978, amends section 25-1558, R. R. S. 1943, to the extent that the two statutes are inconsistent. Ferry v. Ferry 595
34. Section 42-364.06, R. S. Supp., 1978, provides in part that if jurisdiction has been acquired of the employer, "In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such come due." Ferry v. Ferry 595
35. The purpose of the requirement contained in section 29-1602, R. R. S. 1943, that the names of witnesses for the prosecution be listed on the information, is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investigate regarding their background and pertinent

knowledge. The failure to endorse on the information the names of witnesses to be called by the State is not ground for reversal of conviction in the absence of a showing of prejudice. State v. Journey 607

36. Under sections 27-702 to 27-705, R. R. S. 1943, an expert witness, qualified to be such, may testify in terms of opinion or inference without prior disclosure of underlying facts or data, the weight of such evidence being for the trier of facts. State v. Journey 607

37. Appeals in probate matters are governed by article 16 of Chapter 30, R. R. S. 1943. Gunn v. Emerald, Inc. 635

38. Section 24-542, R. R. S. 1943, is not applicable to appeals in probate matters and a notice of appeal is not required in such an appeal. Gunn v. Emerald, Inc. 635

39. Under section 28-834, R. R. S. 1943, for justification to be available as a defense, it must first be shown that the defendant's conduct was necessitated by specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative other than the violation of the law for which he stands charged. State v. Graham 659

40. Section 28-408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929 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." The determination of the admissibility of evidence of the prosecutrix' prior sexual activity must be determined in each case upon its own circumstances. State v. Mason 693

41. A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration and overcomes the victim by force or threat of force, express or implied. § 28-408.03, R. R. S. 1943. State v. Mason 693

42. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. There is no longer provision in our statutes for de novo review in this court of workmen's compensation cases. Herold v. Constructors, Inc. 697

43. First degree murder includes the killing of a person "purposely and of deliberate and premeditated malice." § 28-401, R. R. S. 1943. State v. Beers 714
44. Manslaughter is a lesser-included offense in the greater crime of murder and is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." § 28-403, R. R. S. 1943. State v. Beers 714
45. An award of custody will not be upheld when the evidence is insufficient to show the requirements of the best interests of a minor child in accordance with the provisions of section 42-364, R. S. Supp., 1976. Lautenschlager v. Lautenschlager 741
46. A public improvement ordinance need not recite the necessity for its enactment unless the statute expressly requires that it do so. Rozanek v. City of Fremont 748
47. Even though there is no present prospect of improvement of a condition of total and permanent disability or of further rehabilitation, the employer continues to be responsible for further nursing care and therapy under the terms of section 48-120, R. R. S. 1943. S & S LP Gas Co. v. Ramsey 751
48. The Nebraska Workmen's Compensation Court has continuing authority to determine the necessity, character, and sufficiency of medical services furnished or to be furnished and to order a change therein when it deems such change is desirable or necessary. § 48-120, R. R. S. 1943. S & S LP Gas Co. v. Ramsey 751
49. A notice of appeal filed pursuant to section 48-634, R. R. S. 1943, which is properly addressed and to which sufficient postage has been affixed, shall be valid if it is deposited in the United States mail within 10 days after the mailing of the notice of the deputy's determination. Parson v. Chizek 754
50. Under section 75-311, R. R. S. 1943, a certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the requirements, rules, and regulations of the Nebraska Public Service Commission thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity. Gentry Real Estate Co. v. King's Limousine Service, Inc. 761
51. The right of appeal in this state is clearly statutory

and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Gretna Public School v. State Board of Education 769

52. Section 84-917, R. R. S. 1943, does not provide a right of appeal from a declaratory ruling of an administrative agency pursuant to section 84-912, R. R. S. 1943. Gretna Public School v. State Board of Education 769

53. Section 28-729, R. R. S. 1943, punishment for abuse of an officer, held constitutional. State v. Hayen 789

54. Subsections (a) through (f) of section 25-1267.04 (3), R. R. S. 1943, describe alternative conditions under which a deposition of a witness may be used at trial whether or not the witness is a party. Thus, where the plaintiff resided out of the county where trial was had and was shown to be elderly and infirm, the trial court was correct in admitting his deposition into evidence without requiring a further showing that unusual circumstances existed. English v. Bruin Engineering, Inc. 791

55. A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement is admissible under section 27-803 (22), R. R. S. 1943, if the statutory conditions precedent to admission are met. State v. Reed 800

56. 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. Sommers .. 809

57. A legislative act will operate only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. Wheelock & Manning 00 Ranches, Inc. v. Heath 835

Stipulations.

Parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

Stockholders.

As a general rule, a stockholder is so in privity with, and represented by, the corporation that he is bound by a

judgment for or against the corporation insofar as it deals in corporate rights and liabilities and affects the stockholders as a body, where it was not obtained by fraud or collusion, but he is not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all the stockholders. Midwest Franchise Corp. v. Wakin 450

Stop and Check.

1. A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present. State v. Kretchmar 308
2. The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. State v. Kretchmar .. 308

Summary Judgments.

1. 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. Fisher v. Stuckey 439
2. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Fisher v. Stuckey 439
3. The trial court, in its discretion, may permit the renewal and resubmission of a motion for summary judgment which has previously been overruled. Bringewatt v. Mueller 736
4. In the course of ruling upon a motion for summary judgment, the evidence should be viewed in the light most favorable to the party against whom the motion is directed and such party should receive the benefit of all favorable inferences which may be drawn from the evidence. Bringewatt v. Mueller 736
5. A motion for summary judgment may be granted only when the moving party is entitled to judgment as a matter of law, where it is clear what the truth is and no genuine issue remains for trial. Bringewatt v. Mueller 736
6. The purpose of a motion for summary judgment is to pierce the allegations of a pleading and show conclu-

sively that the controlling facts are otherwise than as alleged. Ames Bank v. Pacenco, Inc. 776

Sureties.

Where the execution of a sentence has been suspended under section 29-2301, R. R. S. 1943, and the defendant has been at liberty under bail, the bond may be continued without the consent of the surety during the period of suspension. State v. Hurley 569

Taxation.

1. A municipal ordinance establishing a new scheme of taxation is not an appropriation ordinance. State ex rel. Boyer v. Grady 360
2. Section 77-27,142, R. R. S. 1943, does not limit the power to propose or reject ordinances concerning a municipal sales tax to the legislative body of a municipality, and does not except sales tax ordinances from the usual powers of initiative and referendum. State ex rel. Boyer v. Grady 360

Time.

1. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Smith v. Smith 21
2. Where a motion for new trial is not filed within the time prescribed by law, the time for appeal runs from the rendition of the judgment. Corell v. Corell 59
3. When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. Danish Vennerforning & Old Peoples Home v. State ... 233
4. Section 29-1207, R. R. S. 1943, requires that every person charged with a criminal offense be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed. State v. Johnson 322
5. The primary burden is upon the State to bring the accused person to trial within the time provided by law. If a defendant is not brought to trial within that time, he is entitled to absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Johnson 322
6. The failure of the defendant to object, at the time the

trial court enters an order setting the trial at a date after the 6-month period, does not constitute a waiver of his statutory right to a speedy trial. State v. Johnson 322
7. The State has the burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Johnson 322
8. If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. State v. Johnson 322
9. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. Pflasterer v. Omaha Nat. Bank 427
10. Where there is a reasonable controversy between the parties, an injured workman is not entitled to the statutory penalties for waiting time. Spiker v. John Day Co. 503
11. When the statutory interest rate changes, the new rate applies to all delinquent installments from the effective date of the new rate. Ferry v. Ferry 595
12. An appeal in a probate matter must be taken within 30 days after the decision and a transcript filed within 10 days thereafter. Gunn v. Emerald, Inc. 635
13. The right to file a belated claim depends upon a showing of good cause. Gunn v. Emerald, Inc. 635
14. Deliberation and premeditation must take place before the killing, but no particular length of time is required for deliberation provided the intent to kill is formed before and not merely simultaneously with the act which caused the death. State v. Beers 714
15. In a workmen's compensation case, 50 percent shall be added for waiting time for all delinquent payments after 30 days notice has been given of disability. Smith v. University of Nebraska Medical Center 730
16. Whenever an employer refuses payment or when an employer neglects to pay compensation for 30 days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed by the compensation court. Smith v.

University of Nebraska Medical Center 730
17. Benefit Regulation No. 8 promulgated by the Commissioner of Labor is invalid insofar as it requires that a claimant's notice of appeal when given by mail be actually received within 10 days after mailing of the notice of the deputy's determination. Parson v. Chizek 754
18. A notice of appeal filed pursuant to section 48-634, R. R. S. 1943, which is properly addressed and to which sufficient postage has been affixed, shall be valid if it is deposited in the United States mail within 10 days after the mailing of the notice of the deputy's determination. Parson v. Chizek 754
19. A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement is admissible under section 27-803 (22), R. R. S. 1943, if the statutory conditions precedent to admission are met. State v. Reed 800

Torts.

1. If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision. Christensen v. City of Tekamah 344
2. The liability of all political subdivisions based on the alleged insufficiency or want of repair of any public thoroughfare is to be determined by the provisions of sections 23-2410 and 23-2411, R. R. S. 1943, and judicial interpretations governing the liability of counties under the statute in effect prior to the enactment of the Political Subdivisions Tort Claims Act. Christensen v. City of Tekamah 344
3. On appeal of an action under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Christensen v. City of Tekamah 344

Trade Names.

One trade name is not an infringement of another if ordinary attention of persons or customers would disclose the differences. Dahms v. Jacobs 745

Trespass.

Nonconsent to enter the premises as an element of trespass may be proved by direct testimony or circum-

stantial evidence. State v. Korf 64

Trial.

1. The District Court is required to review the entire record, weigh the evidence, and determine what is the preponderance of the evidence. Snygg v. City of Scottsbluff Police Dept. 16
2. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. V.P.O., Inc. v. Money 30
3. In determining the sufficiency of the evidence to sustain a judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. If there is a conflict in the evidence, this court will presume that the controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed on appeal unless clearly wrong. V.P.O., Inc. v. Money 30
4. When the evidence is conflicting, the verdict of a jury will not be set aside on appeal unless it is clearly wrong. McIntosh v. Borchers 35
5. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination. Floridia v. Farlee 39
6. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. Suhr v. City of Seward 51
7. The general rule is that damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty. Tyler v. Olson Bros. Mfg. Co., Inc. 79
8. In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment. Abramson v. Bemis 97
9. A party may not properly assign as error on appeal the

admission of evidence where no objection was made thereto at trial. Scudder v. Haug 107
10. Alleged errors of the trial court in an action at law, not referred to in a motion for new trial, will not be considered in this court on appeal. Scudder v. Haug 107
11. A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to section 27-614, R. R. S. 1943. Scudder v. Haug 107
12. In a law action tried to the court without a jury, the findings of the trial court have the effect of a jury verdict, and will not be disturbed on appeal unless clearly wrong. Scudder v. Haug 107
13. It is the duty of the trier of fact to weigh the evidence and the credibility of the witnesses. Scudder v. Haug 107
14. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Mustion v. Ealy 139
15. It is not the province of this court to weigh the evidence or the credibility of witnesses, or resolve conflicts in the evidence; those functions are for the trier of fact. Mustion v. Ealy 139
16. It is the duty of the trial court to decide a question as a matter of law and direct a verdict only where the facts adduced to sustain a finding are such that but one conclusion can be drawn therefrom when related to the applicable law. Mustion v. Ealy 139
17. A party who relies on circumstantial evidence for proof of causation need not exclude any other possible causes, but the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been proved. Mustion v. Ealy 139
18. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, and apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received, and a judgment will not be reversed because of the admission or rejection of such evidence unless there has been a clear abuse of discretion. Mustion v. Ealy 139
19. Admissibility of expert testimony depends on whether

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165

20. When part of an act, declaration, conversation, or writing is given into evidence by one party, the whole on the same subject may be inquired into by the other. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165

21. It is the duty of the trial court to instruct the jury upon the law of the case made applicable by the pleadings and the evidence. Geiger v. Sweeney 175

22. It is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power. Geiger v. Sweeney 175

23. When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. State v. Steinmark 200

24. If misconduct occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed. State v. Steinmark 200

25. The determination as to whether misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case. State v. Steinmark 200

26. The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. Greenberg v. Bishop Clarkson Memorial Hospital 215

27. It is ordinarily not appropriate that the trial court sub-

mit to the jury the allegations of plaintiff's petition in haec verba. The trial court has the duty to properly analyze, summarize, and submit to the jury the substance of the allegations of negligence in tort petitions. Greenberg v. Bishop Clarkson Memorial Hospital 215

28. If a trial court gives an erroneous instruction, or erroneously gives an instruction, the record must establish such an error did not affect the result of the trial unfavorably to the party affected by such instruction. Oban v. Bossard 243

29. Section 29-1207, R. R. S. 1943, requires that every person charged with a criminal offense be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed. State v. Johnson 322

30. The primary burden is upon the State to bring the accused person to trial within the time provided by law. If a defendant is not brought to trial within that time, he is entitled to absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Johnson 322

31. The failure of the defendant to object, at the time the trial court enters an order setting the trial at a date after the 6-month period, does not constitute a waiver of his statutory right to a speedy trial. State v. Johnson 322

32. The State has the burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Johnson 322

33. If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. State v. Johnson 322

34. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. 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 a jury. Stevens v. Kasik 338

35. Expert testimony is permitted even in areas where lay-

men have competence to determine the facts testified to by the expert where the trial court may feel the opinion would assist them. The trier of fact is not bound by the testimony of an expert witness. Christensen v. City of Tekamah 344

36. A party cannot be heard to complain of an error which he was instrumental in bringing about. City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co. 405

37. A court cannot adjudicate the rights of a transferee of a gift without having the transferee in court since his rights may be adversely affected thereby. Baker v. Baker 409

38. An issue as to the proper measure of damages may be raised by objecting to the instructions and tendering a requested instruction. A R L Corp. v. Hroch 422

39. 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, if a proper foundation is laid. State v. Brown 536

40. Admission of photographs in evidence 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. Brown 536

41. Although review in marriage dissolution cases is de novo in this court, we also give weight to the fact that the trial court had an opportunity to observe the parties and hear the witnesses. Steele v. Steele 549

42. The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Vlcek v. Sutton 555

43. A motion for 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. Vlcek v. Sutton 555

44. In determining the sufficiency of the evidence to sustain the verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor and he must have the benefit of all inferences reasonably deducible therefrom. Hartman v. Brady 558

45. A party is ordinarily entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case. Hartman v. Brady 558

46. A party who does not object at trial to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his rights to complain on appeal. State v. Baker 579
47. The defendant by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him must be held responsible for his ineptness of counsel even though that counsel was himself. State v. Brashear 582
48. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. The successful party is also entitled to any inference reasonably deducible from the evidence. Ineba Ranch v. Cockerill 592
49. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. State v. Kerns ... 617
50. A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed on appeal except for a clear abuse of discretion. State v. Kerns 617
51. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Pearson v. Richard 621
52. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. Pearson v. Richard 621
53. The persuasiveness of direct evidence may be destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Pearson v. Richard 621
54. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely

for the consideration of the jury. Pearson v. Richard 621
55. The failure of a defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court. State v. Fowler 647
56. The decision to object or not to object to evidence is a part of trial strategy, and due deference is given to the discretion of defense counsel to formulate trial tactics. State v. Fowler 647
57. Trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims. State v. Fowler 647
58. The necessity of the trial court instructing the jury with reference to the failure of the defendant to testify (NJI No. 14.63) is a matter of trial strategy on the part of defendant's counsel, and must be requested by him, or the subject of agreement between counsel and the court. State v. Fowler 647
59. In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. Cook v. Beermann 675
60. Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact. Cook v. Beermann 675
61. A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable and in doing so he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. Cook v. Beermann 675
62. Where one party desires to avail himself of the other's pleading, it is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. Cook v. Beermann 675
63. In an appeal from a decree of dissolution of marriage, 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. Blome v. Blome 687
64. If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful

to a clear understanding of his testimony or the determination of a fact in issue. State v. Beers 714
65. Whether the qualifications of a witness with respect to special experience are sufficiently established is a matter resting largely in the discretion of the trial court whose determination is final unless that discretion is clearly abused. State v. Beers 714
66. Process to secure the attendance of witnesses from another state may not be issued unless the testimony proposed to be elicited from such witness is relevant to the issues to be tried. State v. Casados 726
67. It is proper to sustain a motion in limine to prevent reference to or the offer of evidence concerning matters which are entirely extraneous or irrelevant to the issues of the case. State v. Casados 726
68. Photographs purporting to show injuries received in two assaults, with proper foundation including evidence to enable the jury to distinguish the injuries resulting from the assault in issue, may be received in evidence. Unless an abuse of discretion appears, the ruling of the trial court will be affirmed. State v. Casados 726
69. The trial court, in its discretion, may permit the renewal and resubmission of a motion for summary judgment which has previously been overruled. Bringewatt v. Mueller 736
70. In the course of ruling upon a motion for summary judgment, the evidence should be viewed in the light most favorable to the party against whom the motion is directed and such party should receive the benefit of all favorable inferences which may be drawn from the evidence. Bringewatt v. Mueller 736
71. The intent with which an act is done is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from words or acts and the facts or circumstances surrounding the act. State v. Ristau 784
72. Subsections (a) through (f) of section 25-1267.04 (3), R. R. S. 1943, describe alternative conditions under which a deposition of a witness may be used at trial whether or not the witness is a party. Thus, where the plaintiff resided out of the county where trial was had and was shown to be elderly and infirm, the trial court was correct in admitting his deposition into evidence without requiring a further showing that unusual circumstances existed. English v. Bruin Engineering Inc. 791
73. For a hearsay statement to qualify for admission as an excited utterance, the following conditions must exist:

(1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Reed 800
74. Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place. State v. Laflin 824
75. The resolution of conflicting testimony as to the voluntariness of a confession is for the trial court and jury. State v. Green 828

Trusts.

1. In determining the eligibility of a potential trust beneficiary for public assistance, the interest of a beneficiary in a discretionary trust is not an available resource pending exhaustion of judicial remedies to determine whether such trustee is in fact abusing his discretion. Jansen v. Department of Public Welfare 185
2. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Pflasterer v. Omaha Nat. Bank 427

Uniform Commercial Code.

1. A plaintiff in a merchantability lawsuit must prove that the defendant deviated from the standard of merchantability and that this deviation caused the plaintiff's injury both proximately and in fact. Geiger v. Sweeney 175
2. Under section 2-314, U. C. C., a plaintiff must prove (1) that a merchant sold goods, (2) which were "not merchantable" at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury. Geiger v. Sweeney 175
3. Under section 60-110, R. R. S. 1943, the practice of filing and recording chattel mortgages on motor vehicles has been eliminated, and under that section security interests must be noted on the certificate of title itself. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495
4. There is no legal requirement that a lien be noted on a certificate of title purportedly covering property not

subject to the Certificate of Title Act, sections 60-101 to 60-117, R. R. S. 1943, even though a certificate of title for such property has been issued. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

5. The statutory provisions for recording chattel mortgages in effect prior to the adoption of the Uniform Commercial Code were specifically repealed by that act. See Laws 1963, c. 544, art. 10, § 10-102, p. 1943. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

6. A chattel mortgage may constitute a "financing statement" entitled to be filed under sections 9-105, 9-302, 9-401, 9-402, and 9-403, U. C. C., only if it complies with the formal requisites of a financing statement by showing (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item. Cushman Sales & Service of Nebraska, Inc. v. Muirhead 495

Usury.

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the general usury law of the state of the otherwise applicable law. Shull v. Dain, Kalman & Quail, Inc. .. 260

Vendor and Purchaser.

Where a vendee, under, and in reliance upon, an unacknowledged contract to purchase a homestead makes valuable improvements thereon and the vendor fails or refuses to carry out the contract, the vendee may recover for such improvements to the extent they enhance the value of the property. McIntosh v. Borchers 35

Venue.

1. Venue is a jurisdictional fact, and the defendant in a criminal case has the right to be tried by an impartial jury in the county where the alleged offense took place. State v. Laflin 824

2. 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. Laflin 824

Verdicts.

1. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Mustion v. Ealy 139
2. It is the duty of the trial court to decide a question as a matter of law and direct a verdict only where the facts adduced to sustain a finding are such that but one conclusion can be drawn therefrom when related to the applicable law. Mustion v. Ealy 139
3. Ordinarily, a verdict may and should be set aside and a new trial granted where it is self-contradictory, inconsistent, or incongruous and such relief should, as a rule, be granted where more than one verdict is returned in the same action and they are inconsistent and irreconcilable. Hunter v. Sorensen 153
4. When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Hunter v. Sorensen 153
5. A verdict will not be vacated on appeal on the ground of irregularity if a construction is possible which will make it effective rather than void. Hunter v. Sorensen 153
6. A motion for a directed verdict of liability encompasses not only the negligence of the defendant as a matter of law, but also the causal connection between such negligence and the accident in question. Oban v. Bossard 243
7. In considering a motion for a directed verdict, all controverted evidence and legitimate inferences therefrom are resolved in favor of the party against whom the motion is directed. Oban v. Bossard 243
8. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. 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 a jury. Stevens v. Kasik 338
9. In an action for criminal conversation, the courts will seldom interfere with the finding of the jury, for the reason that there is no method of determining exactly

the proper pecuniary compensation which should be awarded. Kremer v. Black 467
10. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Sommers 809

Waiver.

1. The failure of the defendant to object, at the time the trial court enters an order setting the trial at a date after the 6-month period, does not constitute a waiver of his statutory right to a speedy trial. State v. Johnson 322
2. A waiver is a voluntary and intentional relinquishment of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred. State v. City of Omaha 491
3. A party who does not object at trial to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his rights to complain on appeal. State v. Baker 579
4. 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. Sommers .. 809

Warranty.

In an action based on breach of warranty, it is necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. Geiger v. Sweeney 175

Wills.

1. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death. Pflasterer v. Omaha Nat. Bank 427
2. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by

devise or descent. Pflasterer v. Omaha Nat. Bank 427

Witnesses.

1. A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to section 27-614, R. R. S. 1943. Scudder v. Haug 107
2. It is the duty of the trier of fact to weigh the evidence and the credibility of the witnesses. Scudder v. Haug 107
3. It is not the province of this court to weigh the evidence or the credibility of witnesses, or resolve conflicts in the evidence; those functions are for the trier of fact. Mustion v. Ealy 139
4. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, and apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received, and a judgment will not be reversed because of the admission or rejection of such evidence unless there has been a clear abuse of discretion. Mustion v. Ealy 139
5. Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. National Bank of Commerce Trust & Sav. Assn. v. Katleman 165
6. The scope of the cross-examination of a witness is largely within the discretion of the trial court. State v. Steinmark 200
7. It is within the discretion of the trial court to admit character evidence to support the credibility of a witness whose credibility has been attacked by opinion or reputation evidence or otherwise. § 27-608 (1), R. R. S. 1943. State v. Steinmark 200
8. A juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention during deliberations. State v. Steinmark 200
9. A juror may not testify as to the effect of any matter or statement upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in con-

nection therewith. State v. Steinmark 200
10. While this court tries equity cases de novo, when evidence on a material question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Waite v. Salestrom 224
11. While equity cases are heard de novo in this court, in determining 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. Swearingen v. Swearingen 255
12. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Nickel v. Nickel 267
13. Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where the trial court may feel the opinion would assist them. The trier of fact is not bound by the testimony of an expert witness. Christensen v. City of Tekamah 344
14. In a proceeding to determine paternity of a child under the provisions of sections 13-101 to 13-112, R. R. S. 1943, the mother is a competent witness on the issue of the child's paternity. Roebuck v. Fraedrich 413
15. 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. Rasmussen Farms v. Gove 432
16. A party is ordinarily entitled to the benefit of the testimony of other witnesses in contradiction of his own, whenever his own is not of the character of a judicial admission and concerns only some evidential or constituent circumstance of his case. Hartman v. Brady 558
17. In an action at law, it is not for the Supreme Court to resolve the conflict in the evidence. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact. Ineba Ranch v. Cockerill 592
18. The purpose of the requirement contained in section 29-1602, R. R. S. 1943, that the names of witnesses for the prosecution be listed on the information, is to inform the defendant of the names of persons who will testify

against him and give him an opportunity to investigate regarding their background and pertinent knowledge. The failure to endorse on the information the names of witnesses to be called by the State is not ground for reversal of conviction in the absence of a showing of prejudice. State v. Journey 607

19. Under sections 27-702 to 27-705, R. R. S. 1943, an expert witness, qualified to be such, may testify in terms of opinion or inference without prior disclosure of underlying facts or data, the weight of such evidence being for the trier of facts. State v. Journey 607

20. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury. Pearson v. Richard 621

21. In an appeal from a decree of dissolution of marriage, 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. Blome v. Blome 687

22. If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. State v. Beers 714

23. Whether the qualifications of a witness with respect to special experience are sufficiently established is a matter resting largely in the discretion of the trial court whose determination is final unless that discretion is clearly abused. State v. Beers 714

24. Process to secure the attendance of witnesses from another state may not be issued unless the testimony proposed to be elicited from such witness is relevant to the issues to be tried. State v. Casados 726

25. It is the duty of the trial court, sitting without a jury, to determine the credibility of witnesses and to weigh and to resolve conflicts in the evidence. Its findings, when supported by sufficient, competent evidence, will be upheld. State v. Crispell 759

26. Subsections (a) through (f) of section 25-1267.04 (3), R. R. S. 1943, describe alternative conditions under which a deposition of a witness may be used at trial whether or not the witness is a party. Thus, where the plaintiff resided out of the county where trial was had and was shown to be elderly and infirm, the trial court was correct in admitting his deposition into

evidence without requiring a further showing that unusual circumstances existed. English v. Bruin Engineering, Inc. 791

Words and Phrases.

1. The term "when required" is broad and indefinite, but does not contemplate modification at the whim of either a party or the court. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. Pfeiffer v. Pfeiffer 56
2. In section 52-123, R. R. S. 1943, the words "with the intent thereby to deprive or defraud," should read as though it read "with the fraudulent intent thereby to deprive." State v. McConnell 84
3. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Polley v. Shoemaker 91
4. To constitute conversion there must be an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that it justifies the forced judicial sale to the defendant, which is the distinguishing feature of the action. Polley v. Shoemaker 91
5. A tennis court and appurtenances as an accessory use is a "structure" within the meaning of the zoning ordinance of the City of Hastings and is an exception to the "backyard" provisions of the ordinance, but is subject to the pertinent height restrictions of the ordinance. Kitrell v. Board of Adjustment 130
6. Under section 2-314, U. C. C., a plaintiff must prove (1) that a merchant sold goods, (2) which were "not merchantable" at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury. Geiger v. Sweeney 175
7. Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds. Geiger v. Sweeney 175
8. The term "gross negligence" has different meanings under the automobile guest statute and the comparative negligence statute. Sandberg v. Hoogensen 190
9. A waiver is a voluntary and intentional relinquishment

of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred. State v. City of Omaha 491

10. The term "unconscionable" as used in statutes like in section 42-366, R. R. S. 1943, has been interpreted as meaning "manifestly unfair or inequitable." Paxton v. Paxton 545

11. In a policy indemnifying insured for loss by burglary for "property while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry on the exterior of such vehicle," such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability. Cochran v. MFA Mut. Ins. Co. 631

12. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), this state adopted the standard for determining the validity of guilty pleas set forth in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), that: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." State v. Fowler 647

13. Breaking is an essential element of the crime of burglary; any physical force, however slight, in making any entry is sufficient to constitute a breaking. State v. Crispell 759

14. Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of any preexisting condition. Newbanks v. Foursome Package & Bar, Inc. 818

Workmen's Compensation.

1. In an appeal from the Workmen's Compensation Court, the Supreme Court is not free to weigh the facts anew. The standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. Kudera v. Minnesota Mining & Manuf. Co. 235

2. An award of workmen's compensation benefits cannot be based alone on speculation and conjecture and if an inference favorable to the claimant can only be reached

on the basis thereof, then he cannot recover. Camarillo v. Iowa Beef Processors, Inc. 238
3. An award for permanent disability cannot be based on mere possibilities. Camarillo v. Iowa Beef Processors, Inc. 238
4. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Baker's Supermarkets v. John 387
5. The Workmen's Compensation Act should be liberally construed so as to accomplish the beneficent purposes of the act. The policy of the act should not be thwarted by technical refinements of interpretation. Spiker v. John Day Co. 503
6. An employer is liable to an injured workman for reasonable medical and hospital services and medicines which are necessary to relieve or cure the injuries suffered by the workman. Spiker v. John Day Co. 503
7. The liability of an employer to an injured workman for reasonable medical and hospital services and medicines which are necessary as a result of an injury is not limited to only those situations in which the employee may be cured or his disability reduced by further treatment. Spiker v. John Day Co. 503
8. Ordinarily, a workman's right to recover the cost of medical and hospital services and medicines depends upon his having paid for the services or incurred a liability to pay for them. Spiker v. John Day Co. 503
9. Ordinarily, the Workmen's Compensation Court has no right to adjudicate a claim of a third party against an employer for services furnished to an injured employee unless the third party is a party to the action. Spiker v. John Day Co. 503
10. An injured workman may recover the reasonable value of necessary nursing care furnished to him by his wife while he was cared for at home. Spiker v. John Day Co. 503
11. A finding of the Workmen's Compensation Court that is clearly wrong will be reversed. Spiker v. John Day Co. 503
12. Where there is a reasonable controversy between the parties, an injured workman is not entitled to the statutory penalties for waiting time. Spiker v. John Day Co. 503
13. Where the effect of an injury to a finger only is the usual and natural one, compensation cannot be allowed for the loss of use of the hand. Herold v. Constructors, Inc. 697

14. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. There is no longer provision in our statutes for de novo review in this court of workmen's compensation cases. Herold v. Constructors, Inc. 697
15. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. Smith v. University of Nebraska Medical Center 730
16. In a workmen's compensation case, 50 percent shall be added for waiting time for all delinquent payments after 30 days notice has been given of disability. Smith v. University of Nebraska Medical Center 730
17. Whenever an employer refuses payment or when an employer neglects to pay compensation for 30 days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed by the compensation court. Smith v. University of Nebraska Medical Center 730
18. Attorney's fees are not allowable for services on appeal in a compensation case where the appeal is instituted by the employee. Smith v. University of Nebraska Medical Center 730
19. Even though there is no present prospect of improvement of a condition of total and permanent disability or of further rehabilitation, the employer continues to be responsible for further nursing care and therapy under the terms of section 48-120, R. R. S. 1943. S & S LP Gas Co. v. Ramsey 751
20. The Nebraska Workmen's Compensation Court has continuing authority to determine the necessity, character, and sufficiency of medical services furnished or to be furnished and to order a change therein when it deems such change is desirable or necessary. § 48-120, R. R. S. 1943. S & S LP Gas Co. v. Ramsey 751
21. Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment. Newbanks v. Foursome Package & Bar, Inc. 818
22. Under the Nebraska Workmen's Compensation Act, the terms "injury" and "personal injuries" do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of any preexisting condition.

Newbanks v. Foursome Package & Bar, Inc. 818
23. In a workmen's compensation case involving a myocardial infarction, where the claimant has a preexisting disease or condition which contributes to the injury, he has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The injury is compensable only if the employment contribution involves an exertion greater than that of nonemployment life. Newbanks v. Foursome Package & Bar, Inc. 818
24. In myocardial infarction cases the issue is whether the injury arises out of and in the course of employment, and that issue must be determined by the facts of each case. Newbanks v. Foursome Package & Bar, Inc. ... 818
25. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Newbanks v. Foursome Package & Bar, Inc. 818
26. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Newbanks v. Foursome Package & Bar, Inc. .. 818

Wrongful Death.

The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Pearson v. Richard 621

Zoning.

1. A private tennis court is an eligible accessory use in a one-family residential district under the provisions of the zoning ordinance of the City of Hastings. Kitrell v. Board of Adjustment 130
2. A tennis court and appurtenances as an accessory use is a "structure" within the meaning of the zoning ordinance of the City of Hastings and is an exception to the "backyard" provisions of the ordinance, but is subject to the pertinent height restrictions of the ordinance. Kitrell v. Board of Adjustment 130
3. In the law of zoning, although a use may in a nontechnical sense not be an accessory use where not customary, it is nevertheless an accessory use where defined by the ordinance to be such. Kitrell v. Board of Adjust-

ment 130
4. A decision of the proper official or board in interpreting and applying a zoning ordinance will not be disturbed on appeal to this court unless it is illegal or from the standpoint of fact is not supported by the evidence, is arbitrary, unreasonable, or clearly wrong. Kitrell v. Board of Adjustment 130
5. Where an industrial area is within the zoning jurisdiction of a city of the first class at the time the area is designated as an industrial area by the county board under the provisions of the Industrial Areas Act, the city thereafter retains its zoning jurisdiction of the area, subject to the reservation for use of the area for industrial purposes as provided by the Industrial Areas Act. Hansen v. City of Norfolk 352
6. Participation in a hearing before the city council on a proposed amendment to a zoning ordinance constitutes a waiver of any defect in the notice of the hearing. Hansen v. City of Norfolk 352
7. Where a metes and bounds description of an area proposed to be rezoned, taken as a whole, is sufficiently clear to indicate the intended bounds of the area to be zoned, with the courses and distances set out clearly therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error. Hansen v. City of Norfolk 352