

# THE APPEAL PROCEDURE IN NEBRASKA; PITFALLS, PERSPECTIVE AND A PROGNOSIS\*

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## INTRODUCTION

In the recent Nebraska Supreme Court case of *Spanheimer Roofing & Supply Co. v. Thompson*, the majority of the Nebraska Supreme Court held that the appellant had not properly perfected his appeal to the Nebraska Supreme Court.<sup>1</sup> The appeal was dismissed and the merits of the case were not reached.<sup>2</sup> The fate that befell the appellant in *Spanheimer* was, sad to say, not atypical. A perusal of the Nebraska reports would indicate that a fair number of appellants have suffered a similar fate. Failure to comply with the statutory scheme for perfecting appeals has resulted in the cause winding up in the Supreme Court with the notation at the conclusion of the case that the appeal is dismissed. While, no doubt, many of these failures may be blamed upon counsel, it is at least possible that some of the failures have resulted from a statutory scheme that is inadequate, confusing, and outmoded.

The purpose of this article is to identify certain recurring problems in the area of appeal procedures in Nebraska. The analysis will be that of identifying the principal areas of concern in the light of current statutory procedures and judicial interpretations. The bulk of the discussion will center upon the appeal of civil cases from the district court to the Supreme Court of Nebraska. In reviewing this process, particular emphasis will be given to the following subjects: (1) the timing of the filing of the motion for new trial; (2) the timing of the filing of the notice of appeal; and (3) an examination of all relevant statutes pertaining to the appellate process. As will be seen, a recurring problem is the determination as to when a judgment was "rendered."

The balance of this article will concern the appellate process in areas other than appeal of civil decisions from the district court to the supreme court. In these other areas, emphasis will be given to

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\* This article is dedicated to the master of civil procedure, my friend Michael J. O'Reilly. All errors and faults are solely attributable to the author.

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1. 198 Neb. 710, 712, 255 N.W.2d 265, 266 (1977) [hereinafter cited as *Spanheimer*].

2. *Id.* at 712, 255 N.W.2d at 266.

the most recent developments in Nebraska law. The other appellate problems that will be explored are: (1) error proceedings; (2) appeal of inferior court decisions to the district court; and (3) appeal of criminal cases from the district court to the supreme court.

Throughout, the emphasis will be upon an explanation of where we are in regard to appeal procedures, with some consideration of how we got there. Finally, consideration will be given to where we should be going in terms of improving the appellate process in Nebraska.

### APPEAL OF CIVIL CASES FROM DISTRICT COURTS TO THE NEBRASKA SUPREME COURT

Under Section 25-1912 of the Nebraska statutes, the procedure for obtaining review of a decision or judgment of the district court involves two jurisdictional steps: (1) the filing of a notice of appeal in the office of the District Court Clerk within one month from the rendition of such judgment or decree or one month from the overruling of a motion for a new trial and (2) the payment of the docket fee to the Clerk of the District Court.<sup>3</sup> Under Section 25-1912, the appeal of a civil case shall be deemed perfected and the supreme court will have acquired jurisdiction when the notice of appeal has been timely filed and the docket fee paid within the statutory periods.<sup>4</sup> Of the two jurisdictional steps, the filing of the notice of appeal within the statutory period has created the most problems; the payment of the docket fee within the prescribed time period has not been nearly as troublesome.<sup>5</sup> Although the filing of a motion for a new trial is not a jurisdictional act, the fact is that, in most cases, a new trial motion should be filed as part of the appellate process, since the filing of the motion for a new trial affects the scope of review by the supreme court. Because a motion for new trial should be filed after the rendition of a final judgment in a civil case, and since the filing of a motion for a new trial also affects the time of filing of a notice of appeal under section 25-1912, it is advisable to investigate first the function and role of the motion for a new trial.

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3. NEB. REV. STAT. § 25-1912 (Reissue 1975). See *Ruan Transp. Corp. v. Peake, Inc.*, 163 Neb. 319, 322, 79 N.W.2d 575, 577 (1956).

4. *Fick v. Herman*, 161 Neb. 110, 117, 72 N.W.2d 598, 602 (1955).

5. Cases involving dismissals of appeals for failure to deposit the required docket fee are scarce. An early case is *Barney v. Platte Valley Pub. Power & Irrigation Dist.*, 144 Neb. 230, 234-35, 13 N.W.2d 120, 123 (1944); the most recent is *American Legion Post No. 90 v. Nebraska Liquor Control Comm'n*, 199 Neb. 429, 431, 259 N.W.2d 36, 37 (1977).

FUNCTION OF MOTION FOR NEW TRIAL—SCOPE OF REVIEW  
AFFORDED

The statutory provisions in Nebraska detailing the procedure for granting motions for new trial are contained in sections 25-1142 through 1145 of the statutes. Section 25-1142 states the grounds upon which a motion for new trial may be predicated, the majority of which are alleged errors occurring during the trial.<sup>6</sup> One of the grounds for a motion for a new trial is that the "verdict, report or decision was not sustained by sufficient evidence, or is contrary to law."<sup>7</sup> The Nebraska Supreme Court has often stated the purposes of the motion for new trial: (1) the motion calls trial errors to the trial court's attention so that the court may remedy serious and prejudicial errors by granting a new trial without the necessity of an appeal,<sup>8</sup> and, (2) the motion is a part of the procedure enabling the appellate court to note that claimed errors have been called to the attention of the trial court and that it has had an opportunity to pass thereon.<sup>9</sup> In the supreme court's review of a law action where no new trial motion has been timely filed, the court will examine the record of the case before it "only for the purpose of determining whether or not the judgment is supported by the pleadings."<sup>10</sup> In the light of the recent case of *McClintock v.*

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6. NEB. REV. STAT. § 25-1142 (Reissue 1975). The statutory grounds are as follows:

(1) Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of this court or referee, or abuse of discretion, by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise, which ordinary prudence could not have guarded against; (4) excessive damages, appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property; (6) that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law; (7) newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; and (8) error of law occurring at the trial and excepted to by the party making the application.

*Id.*

7. *Id.* § 25-1142(6).

8. *Brandt v. Mayer*, 196 Neb. 751, 754, 246 N.W.2d 203, 204 (1976).

9. *State v. Kelley*, 198 Neb. 805, 809, 255 N.W.2d 840, 843 (1977).

10. *Nebraska Children's Home Soc'y v. Collins*, 195 Neb. 531, 536, 239 N.W.2d 258, 261 (1976). This rule has been followed by the court at least since 1911. See *Summers v. Chisholm*, 89 Neb. 324, 326, 131 N.W. 610, 611 (1911). The motion for new trial and the scope of review interplay in equity cases presents a more complex and troublesome problem. See note 12 *infra*. As indicated above, the effect of failure to file a new trial motion in a law action and its relationship to the scope of appellate review has been clear for over 50 years. It is then most surprising to find the Nebraska Supreme Court, in the recent case of *Christensen v. Eastern Neb. Equip. Co.*, stating that "some confusion" existed as to the necessity for filing a new trial motion. 199 Neb. 741, 745, 261 N.W.2d 367, 370 (1978). In *Christensen* the district court, in an appeal from a county court judgment under NEB. REV. STAT. § 24-541 (Reissue 1975), affirmed the county court's action, and the action of the district

*Nemaha Valley Schools* it would appear that the safer course of conduct is to file a motion for a new trial in equity cases,<sup>11</sup> even though it is debatable whether or not the failure to file a motion for a new trial in an equity case should affect the scope of review.<sup>12</sup>

#### FILING OF MOTION FOR NEW TRIAL AS IT AFFECTS NOTICE OF APPEAL

The filing of a motion for a new trial is important not only for determining the scope of review afforded but also for computing the time within which the notice of appeal must be filed. Timely filing of such motion extends the time for filing a notice of appeal because section 25-1912 provides that if such timely motion is filed, the time for filing the notice of appeal begins to run from the overruling of the motion for new trial.<sup>13</sup> It should be noted at this juncture that a timely filed motion for a new trial prevents any appeal until the motion is ruled upon, and when the record shows that no action has been taken by the trial court in regard to the motion, an appeal will be dismissed as prematurely taken.<sup>14</sup> Once the trial

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court was appealed to the supreme court but no new trial motion was filed. *Id.* at 745, 261 N.W.2d at 370. The failure to file the new trial motion would have, under traditional law, limited the supreme court's scope of review. The supreme court in *Christensen* noted that the issue of proper scope of review was not raised by the parties and issued a clarifying statement to the effect that, although the district court was acting in an appellate capacity, a motion for new trial was required in order for the supreme court to reach the record. *Id.* at 745-46, 261 N.W.2d at 370. The "new" rule was made prospective— *i.e.*, applicable to all cases tried after February 1, 1978. *Id.* For the sake of consistency, compare the fate of the appellant in *Christensen* who completely failed to file a new trial motion but whose appeal was upheld and the appellant in *Spanheimer* who filed a new trial motion "too promptly" and had his appeal dismissed. *See* text to note 2 *supra*.

11. 198 Neb. 477, 253 N.W.2d 304 (1977). The court stated:

We cannot accept the contention of the Commissioner. This is a civil action, equitable in nature. He contends that no motion for a new trial is necessary in equity cases. This court has held that a motion for a new trial is necessary in such cases if it is desired to review alleged errors of law occurring at the trial.

*Id.* at 480, 253 N.W.2d at 306.

12. An extended discussion of the problem raised herein is beyond the scope of the present article. The *McClintock* holding should be compared with the following quotation from *Lindgren v. School Dist.*, 170 Neb. 279, 284, 102 N.W.2d 599, 605 (1960): "[I]n an equity action a motion for a new trial is required to secure a review of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence. It is required for no other purpose." *See also* Judge Boslaugh's dissent in *McClintock*, 198 Neb. at 480-81, 253 N.W.2d at 306. In discussing this problem, it should be recalled that the supreme court reviews equity cases *de nova*. NEB. REV. STAT. § 25-1925 (Reissue 1975).

13. Section 25-1912 provides that the notice of appeal must be filed and the docket fee deposited "within one month after the rendition of such judgment or decree, or the making of such final order, or *within one month from the overruling of a motion for a new trial* in said cause. . . ." (Emphasis added). NEB. REV. STAT. § 25-1912 (Reissue 1975).

14. *Mueller v. Keeley*, 163 Neb. 613, 618, 80 N.W.2d 707, 711 (1957). This rule

court has overruled the motion for new trial, the one-month period for filing the notice of appeal under section 25-1912 commences.<sup>15</sup> A motion for new trial not timely filed will be treated as a "nullity,"<sup>16</sup> and thus the time within which the notice of appeal must be filed under section 25-1912 commences from the date of the rendition of the judgment or decree.<sup>17</sup> It is this "nullity" principle that was central to the *Spanheimer* case and which presents a peculiar problem for the litigant.<sup>18</sup> Since a motion for new trial not timely filed does not extend the period within which the notice of appeal must be filed, let us first consider that statute which specifies the time within which a new trial motion must be filed.

### *Timely Filing of New Trial Motion*

Subject to certain exceptions not relevant here, the application for the new trial must be made, according to section 25-1143, "within ten days, either within or without the term, after the verdict, report or decision was rendered. . . ." <sup>19</sup> The language of this statute with respect to the time period and the term have been changed over the years, but the language "report, verdict or decision was rendered" has been in the statutes for over 100 years.<sup>20</sup> During that time period, there have been many occasions for the Nebraska Supreme Court to interpret this language and indicate under what circumstances a "verdict, report or decision was rendered."

In an 1899 case,<sup>21</sup> the record showed that the district court judge rendered a decision on February 13, 1899, and the motion for new trial was not filed until February 17. At that time, the applicable statutory provision provided that the motion for new trial had to be filed within three days "after the verdict or decision was rendered." It was contended that as the judgment was not entered on the journal of the trial court until February 14, the motion was timely filed. The court rejected this contention, quoting the statutory language and stating that the statute required the filing of a

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applies in equity cases also. *Skag-Way Dep't Stores, Inc. v. City of Grand Island*, 176 Neb. 169, 175, 125 N.W.2d 529, 534 (1964).

15. See note 13 *supra*. The order overruling or granting the motion for a new trial "must be made with the same solemnity as a judgment." 163 Neb. at 617, 80 N.W.2d at 710. It may not be made when the court is not "in actual session for the transaction of business." *Id.* at 615, 80 N.W.2d at 709 (quoting *Hodgin v. Whitcomb*, 51 Neb. 615, 619-20, 71 N.W. 314, 315 (1897)).

16. The "nullity" principle was formulated in *Heeter v. Nisi*, 134 Neb. 209, 211, 278 N.W. 271, 272 (1938) and has been repeatedly followed.

17. *Ehlers v. Neal*, 148 Neb. 697, 698, 700, 28 N.W.2d 558, 559, 560 (1947).

18. 198 Neb. at 712, 255 N.W.2d at 266.

19. NEB. REV. STAT. § 25-1143 (Reissue 1975).

20. 1867 Neb. Stat., Code of Civil Procedure § 316, at 447.

21. *Nebraska Nat'l Bank v. Pennock*, 59 Neb. 61, 80 N.W. 255 (1899).

motion for new trial within three days after the verdict or decision was rendered and "not three days after the clerk has spread the decision upon the court records."<sup>22</sup>

Two years later, in an opinion by Dean Roscoe Pound, the Nebraska court discussed a similar problem. In *Ames v. Parrott*,<sup>23</sup> a civil case tried to the court, the findings of the court were dated April 3, 1897, but the judgment appeared on the journal as of April 10, 1897. The motion for new trial was filed April 6 and was called upon and ruled upon subsequent to April 10th.<sup>24</sup>

Pound did "not feel bound to decide as to the effect of premature filing of such a motion."<sup>25</sup> He observed that the findings of the trial court were dated April 3rd and the order overruling the motion for new trial was rendered April 10th and thus, according to Pound, "it is pretty clear that the clerk withheld the entry of the findings and judgment until the motion for new trial had been passed on."<sup>26</sup> Pound then turned to the statutory language which required the motion for new trial to be filed within three days after the verdict or decision was "rendered."

There is a clear and well established distinction between rendition and entry of a judgment. 1 Black, Judgments, sec. 106. The findings of the court were its "verdict or decision" within the meaning of the Code, and the motion should have been and was made within three days from the rendition thereof. The date of the entry upon the journal would be presumed to be the date of rendition, but where the record shows these dates to be different, the latter alone is to be considered.<sup>27</sup>

Pound's clear exposition of when a decision or judgment is rendered seemed to settle this issue for some time and was influential in later opinions.

In a 1942 case, a jury verdict was directed for the defendant on May 16th and the entry on the journal was made May 20th. The motion for new trial filed May 23rd was held to be untimely on the basis of the distinction articulated by Pound that a judgment is rendered when it is announced and not when it is entered upon the journal of the court.<sup>28</sup> In a case decided in June of 1958, the Nebraska Supreme Court further elaborated on the language of section 25-1143 in deciding that a letter written by a trial court judge to

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22. *Id.* at 63, 80 N.W. at 256.

23. 61 Neb. 847, 86 N.W. 503 (1901).

24. *Id.* at 856-57, 86 N.W. at 506. The factual similarity between *Ames* and *Spanheimer* is striking. See 198 Neb. at 710-11, 255 N.W.2d at 265.

25. 61 Neb. at 857, 86 N.W. at 506.

26. *Id.*

27. *Id.* at 857, 86 N.W. at 506-07.

28. *Power v. Federal Land Bank*, 141 Neb. 139, 142-43, 2 N.W.2d 924, 926 (1942).

counsel of the respective parties as to the court's opinion with reference to the findings and judgments to be entered and requesting the preparation of a decree did not constitute the rendition of a judgment or a decision within the meaning of section 25-1143.<sup>29</sup> In the course of this opinion, reference was made to section 25-1301 of the Nebraska Revised Statutes which defines judgment as "the final determination of the rights of the parties in an action."<sup>30</sup> In another case decided the same month, the court held that a memorandum opinion issued by the trial court was "of no more force and effect than a letter written to counsel" and did not constitute a judgment.<sup>31</sup> These 1958 cases are significant in light of a 1976 case, *Valentine Production Credit Association v. Spencer Foods, Inc.*<sup>32</sup> (*Valentine*) which again concerned a letter written by a district court judge and the definition of "judgment". In 1960, the Nebraska Supreme Court, in one of its headnotes, stated that "[t]he time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court."<sup>33</sup> Similar language appeared in other cases, all in accord with Pound's interpretation.<sup>34</sup>

In sum, through 1962, the Nebraska Supreme Court generally followed Pound's interpretation of section 25-1143 and accepted the view that a verdict, report or decision was rendered when the court announced its decision and that journalizing the decision was not part of the rendition. The two 1958 cases going to the question of the existence of a "judgment" did not constitute a departure from this uniform course of interpretation. Then, in the course of its decision in a 1974 opinion, the Nebraska Supreme Court reviewed a *replevin* action tried to a jury.<sup>35</sup> According to the facts given, the jury returned its verdict on November 30, 1972, and the trial court entered its judgment thereon on January 26, 1973. The supreme court indicated that the defendant had until February 5, 1973 in which to file his motion for a new trial.<sup>36</sup> The court did not discuss its reasoning as to why this verdict was not considered to have been returned on November 30, 1972. This interpretation is argua-

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29. *Rumbel v. Ress*, 166 Neb. 839, 843, 91 N.W.2d 36, 40 (1958).

30. *Id.* (quoting NEB. REV. STAT. § 25-1301 (Reissue 1975)).

31. *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 823, 91 N.W.2d 19, 24 (1958).

32. 196 Neb. 119, 241 N.W.2d 541 (1976).

33. *Ricketts v. Continental Nat'l Bank*, 169 Neb. 809, 810, 101 N.W.2d 153, 153-54 (1960).

34. *E.g.*, *Bebee v. Kriewald*, 173 Neb. 179, 181, 112 N.W.2d 764, 766 (1962); *In re Neudeck*, 166 Neb. 649, 651, 90 N.W.2d 254, 257 (1958).

35. *Community Credit Co. v. Gillham*, 191 Neb. 198, 199, 214 N.W.2d 384, 386 (1974).

36. *Id.* at 206, 214 N.W.2d at 390.

bly opposed to interpretation which had consistently been placed upon section 25-1143 for many years.<sup>37</sup>

In the *Valentine* case,<sup>38</sup> the trial court judge, after motions for summary judgment were filed, issued a memorandum finding that the plaintiff's motion for summary judgment should be granted without stating the relief granted and directed the plaintiff to prepare a journal entry. The record was silent as to whether or not a notation was made on the trial docket. A formal judgment was signed by the trial judge and filed October 1, 1975, and the defendant filed his motion for new trial on October 9, 1975.<sup>39</sup> Plaintiff contended that defendant's motion for new trial was not timely filed since it was not filed within ten days from the time the trial court judge issued a memorandum finding that the plaintiff's motion for summary judgment should be granted.<sup>40</sup> In his brief, the counsel for the appellee cited the second 1958 case, holding the memorandum opinion of the trial judge as not constituting a judgment, as applicable to the case at bar.<sup>41</sup>

The supreme court quoted the language of section 25-1143 with special emphasis upon the term "rendered."<sup>42</sup> The court then quoted the language of section 25-1301—the statute defining a "judgment."<sup>43</sup> Section 25-1301 had been amended in 1961 and provided as follows:

- (1) A judgment is the final determination of the rights of the parties in an action.
- (2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
- (3) Entry of judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.<sup>44</sup>

The court then quoted the following rule from the 1973 case of *Fritch v. Fritch*: "[n]o judgment is rendered until the pronounce-

37. Although this case did not rely on § 25-1143, it relied on similar language. See *City of Lincoln v. Beckman*, 23 Neb. 677, 37 N.W. 593 (1888).

38. 196 Neb. 119, 241 N.W.2d 541 (1976).

39. *Id.* at 121-22, 241 N.W.2d at 542.

40. *Id.* at 121, 241 N.W.2d at 542. See note 19 and accompanying text *supra*.

41. Brief for Appellee at 5 (citing *Curtis v. Securities Acceptance Corp.*, 166 Neb. at 815, 91 N.W.2d at 19).

42. 196 Neb. at 121, 241 N.W.2d at 542.

43. *Id.*

44. NEB. REV. STAT. § 25-1301 (Reissue 1975).

ment thereof is noted on the trial docket."<sup>45</sup> Upon the facts before it, the court found that the trial court had not placed any notation on the trial court docket prior to October 1, 1975, and thus the motion was timely filed.<sup>46</sup>

At this juncture, it is extremely interesting to note how the court has utilized section 25-1301 as the basis for its opinion and how section 25-1301 affects the interpretation given section 25-1143. The statutory language of section 25-1143, dealing with motions for new trial and providing that the motion must be filed within ten days "after the verdict, report or decision was rendered" is translated into the single issue of "when was the judgment rendered?" Amended section 25-1301 defines the "rendition of a judgment" and it is viewed as controlling. The long-standing interpretation of section 25-1143 going back to the time of Dean Pound is thus rendered obsolete in view of the emphasis upon "rendition of judgment" and the definition of that term in section 25-1301.

In the most recent case involving this problem, *Spanheimer Roofing & Supply Company v. Thompson*,<sup>47</sup> the rationale of *Valentine* reaches full bloom. In *Spanheimer*, a letter was written by the trial court to counsel stating that plaintiff was entitled to the relief sought and requesting that counsel for the plaintiff submit a decree consistent with findings made by the court. Shortly thereafter, defendant filed a motion for new trial. Subsequent thereto, the court signed a decree submitted by the plaintiff, and the decree was entered on the trial docket on the same day.<sup>48</sup> The question again arose as to the timeliness of the defendant's motion. The majority of the Nebraska Supreme Court stated that the effect of *Valentine* was clearly "that until the judgment is pronounced, accompanied by an appropriate docket entry, a motion for a new trial is premature. A memorandum or letter as in this case is not a report or decision within the meaning of section 25-1143 . . . ."<sup>49</sup> Thus the motion for new trial, which was of record at the time the judgment was in fact rendered and entered, was held to be a "nullity" and the time period for filing the notice of appeal was not extended.<sup>50</sup> In his concurring opinion, Judge Clinton compared the language of the three statutes which he felt were applicable: section 25-1143, dealing with motions for new trial; section 25-1301, de-

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45. 196 Neb. at 121, 241 N.W.2d at 542 (quoting 191 Neb. 29, 30, 213 N.W.2d 445, 445 (1973)). See note 81 and accompanying text *infra*.

46. 196 Neb. at 122, 241 N.W.2d at 542.

47. 198 Neb. 710, 255 N.W.2d 265 (1977).

48. *Id.* at 711, 255 N.W.2d at 265-66.

49. *Id.* at 712, 255 N.W. 2d at 266.

50. *Id.*

fining judgment; and section 25-1912, the notice of appeal statute.<sup>51</sup> After detailing the ambiguities of the statutes, Judge Clinton proposed that the result of the majority was "hypertechnical," but he concurred in the result for the sake of laying down an absolutely certain rule.<sup>52</sup> Judges McCown and Boslaugh dissented.<sup>53</sup> Further discussion of the *Spanheimer* rationale will be made in the concluding section of this portion of the article.

#### TIMELY FILING OF NOTICE OF APPEAL

Under section 25-1192 of the Nebraska Revised Statutes, the notice of appeal shall be filed within "one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause . . . ."<sup>54</sup> If the motion for new trial was timely filed, the trial court must rule upon this motion for new trial before an appeal may be taken.<sup>55</sup> Furthermore, the trial court's action in overruling the motion for a new trial "must be made with the same solemnity as a judgment."<sup>56</sup>

If a motion for new trial is not filed or if the untimely motion for new trial is treated as a nullity, then the critical language of section 25-1912 is the following: "within one month after the rendition of such judgment or decree." The statute under discussion, section 25-1912, goes back to 1907, the date of its enactment.<sup>57</sup> Prior to that date, the Nebraska Supreme Court had occasions to construe a predecessor statute, section 675 of the Civil Code, which provided for an appeal in equity from the judgment or decree rendered or final order made by the district court to the supreme court. Under this procedure the appellant "within six months after the date of the rendition of the judgment or the decree, or the making of the final order" was required to file a transcript of the district court case in the supreme court.<sup>58</sup>

In the 1892 case of *Bickel v. Dutcher*,<sup>59</sup> the Nebraska Supreme Court reviewed a prior decision, *Horn v. Miller*,<sup>60</sup> and the old chancery rules and concluded that "the rule has prevailed both in courts of common law and of equity of this country, where the distinction has been maintained, that there must be an entry of the

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51. *Id.* at 713-15, 255 N.W.2d at 267-68.

52. *Id.* at 717, 255 N.W.2d at 268.

53. *Id.* at 717, 255 N.W.2d at 268-69.

54. NEB. REV. STAT. § 25-1912 (Reissue 1975).

55. *Mueller v. Keeley*, 163 Neb. at 618, 80 N.W.2d at 711.

56. *Id.* at 617, 80 N.W.2d at 708.

57. 1907 Neb. Laws ch. 162, § 1.

58. 1881 Neb. Stat., Code of Civil Procedure § 675, at 619-20.

59. 35 Neb. 761, 53 N.W. 663 (1892).

60. 20 Neb. 98, 29 N.W. 260 (1886).

judgment or decree before an appeal will lie."<sup>61</sup> The court concluded that "the time for appeal begins to run against the appellant from the time it is within his power to comply with the provisions of the statute regulating appeals by filing in the court a transcript of the proceedings of the district court, and not before."<sup>62</sup>

When the "new" appeal statute was enacted in 1907, the filing of the transcript was continued as a jurisdictional requirement.<sup>63</sup> The interpretation placed upon "rendition of judgment" under the new appeal statute was the same as under former law, namely that the judgment was not rendered until it was spread upon the records of the court.<sup>64</sup> The judicial interpretation given to "rendition of judgment" in the appeal statute for the period 1907 to 1941 is examined in the 1953 case of *Sloan v. Gibson*.<sup>65</sup> The *Sloan* opinion cited a number of cases going back to *Bickel v. Dutcher* stating that the uniform interpretation of the appeal statute was that the review of the judgment or final order of the district court was not final until it was formally entered in or spread upon the journal of the court.<sup>66</sup> Thus, the time for taking an appeal from the district court to the supreme court commenced to run when the judgment or final order was entered on the record "so that it is within the power of the appellant to comply with the statute regarding appeals by filing" a certified transcript of the district court proceedings in the supreme court.<sup>67</sup>

In 1941, an amendment to section 25-1912 substituted the filing of the notice of appeal and the payment of the docket fee within the stated period for filing of the transcript as jurisdictional acts.<sup>68</sup> *Sloan v. Gibson* discussed the effect of the 1941 amendment to section 25-1912 and concluded:

The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial as contemplated and intended by this statute means the announcement by the court of the judgment, the final order, or the denial of the motion for a new trial, and not the notation thereof in any record or the entry thereof in the journal of the court.<sup>69</sup>

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61. 35 Neb. at 765, 53 N.W. at 664.

62. *Id.* at 766, 53 N.W. at 664.

63. 1907 Neb. Laws ch. 162, § 1.

64. *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385, 389, 213 N.W. 342, 343 (1927); *In re Getchell's Estate*, 98 Neb. 788, 789, 154 N.W. 537, 537 (1915).

65. 156 Neb. 625, 57 N.W.2d 167 (1953).

66. *Id.* at 627, 57 N.W.2d at 168.

67. *Id.* (quoting *Bickel v. Dutcher*, 35 Neb. at 761, 53 N.W. at 663).

68. 1941 Neb. Laws ch. 32, § 1 (formerly § 20-1912).

69. 156 Neb. at 628, 57 N.W.2d at 169.

The *Sloan* court cited the case of *Luikart v. Bredthauer*<sup>70</sup> for the propositions that: (1) a distinction exists between rendition and entry of judgment and (2) a judgment is rendered when the court announces its decision and (3) that the entry of a judgment upon the records is not an essential part of the judicial act of rendering a judgment.<sup>71</sup> *Luikart* does point out the distinction between rendition and entry of judgment but its applicability to appeal procedures is questionable.<sup>72</sup>

The *Sloan* case was clarified in 1960 by *Ricketts v. Continental National Bank*<sup>73</sup> wherein the Nebraska Supreme Court modified the language above quoted from *Sloan* and indicated that the rendition of a judgment, the making of a final order, or the denial of a motion for a new trial "does not necessarily require the notation thereof in any record. . . ."<sup>74</sup>

The ruling in the *Sloan* case, interpreting rendition of judgment to mean announcement of decision presented problems for attorneys as a glance through volume 169 of the Nebraska Reports indicates. In volume 169, there are three instances in which an appeal was dismissed for failure to timely file a notice of appeal.<sup>75</sup> Apparently the situation dictated legislative relief.<sup>76</sup>

The legislature's response in 1961 was not an amendment to section 25-1912, the notice of appeal statute, but an amendment to

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70. 132 Neb. 62, 271 N.W. 165 (1937).

71. 156 Neb. at 628, 57 N.W.2d at 169.

72. 132 Neb. at 65, 271 N.W. at 167. *Luikart*, a creditor's rights case, in no way intimates why the elimination of the filing of the transcript as a jurisdictional act should affect the interpretation of when a judgment is "rendered." *Luikart* should be remembered for its observation that "[i]n the nature of things, a judgment must be rendered before it can be entered." *Id.* The *Sloan* holding may be viewed as: (1) explainable under the theory "cessante ratione, cessat lex" and (2) acknowledging a "false" but necessary (see *Bickel v. Dutcher*, 35 Neb. at 761, 53 N.W. at 663) interpretation as to when a judgment is rendered for purposes of the appeal statute. It is anomalous that the *Sloan* court turned to *Luikart* for its distinction between entry and rendition of judgment at a time when the Roscoe Pound interpretation of rendition of judgment under the new trial statute was still in vogue. See note 27 and accompanying text *supra*.

73. 169 Neb. 809, 101 N.W.2d 153 (1960).

74. *Id.* at 812, 101 N.W.2d at 156 (emphasis in original). The lack of necessity for any notation is hard to square with the requirement that "[a]ll judgments and orders must be entered on the journal of the court . . .," a fact implicitly acknowledged in *Ricketts* NEB. REV. STAT. § 25-1318 (Reissue 1975).

75. *Lockard v. Lockard*, 169 Neb. 226, 233, 99 N.W.2d 1, 6 (1959); *Pallas v. Dailey*, 169 Neb. 277, 280, 99 N.W.2d 6, 8 (1959); *Ricketts v. Continental Nat'l Bank*, 169 Neb. at 815, 101 N.W.2d at 158. The last of the series of these cases is *Beebe v. Kriewald*, 173 Neb. at 182, 112 N.W.2d at 775.

76. The Judicial Council had recognized in 1954, shortly after *Sloan*, the desirability of enacting a supreme court rule which would make the date of notation in the trial docket "presumptive evidence" of the date of rendition of the judgment. See *Nebraska State Bar Ass'n Proceedings, Report of Judicial Council*, 34 NEB. L. REV. 238, 239 (1954).

section 25-1301 and the addition of section 25-1301.01.<sup>77</sup> As previously indicated in the discussion of *Valentine*,<sup>78</sup> the amendment to section 25-1301 provided definitions for "rendition of a judgment" and "entry of a judgment."<sup>79</sup> Section 25-1301.01 provided that within three days after the rendition of any judgment the clerk of the court was required to send a post card to each party or his attorneys advising that a judgment had been rendered and the date of rendition thereof.<sup>80</sup>

The effect of the amendment to section 25-1301, defining "rendition of judgment" first appeared in the 1973 case of *Fritch v. Fritch*<sup>81</sup> wherein the headnote of the court stated: "[n]o judgment is rendered until the pronouncement thereof is noted on the trial docket."<sup>82</sup> It was this headnote which was subsequently utilized in *Valentine*<sup>83</sup> and which in turn was relied upon in *Spanheimer*.<sup>84</sup> Judge Clinton's concurring opinion in the *Spanheimer* case is the first effort by any judge to fully discuss the interplay among the notice of appeal, motion for new trial and rendition of judgment statutes. Judge Clinton's opinion will be further discussed below.

#### OTHER STATUTES

Thus far, attention has been focused primarily upon three statutes: section 25-1143, dealing with motion for new trial; section 25-1301, defining "judgment," "rendition of judgment," and "entry of judgment"; and section 25-1912, the notice of appeal statute. Some attention has been given to section 25-1301.01<sup>85</sup> but very slight attention has been paid to other relevant statutes.<sup>86</sup> One such stat-

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77. 1961 Neb. Laws ch. 111, §§ 1 & 2.

78. See notes 37-45 and accompanying text *supra*.

79. See text to note 43 *supra*.

80. NEB. REV. STAT. § 25-1301.01 (Reissue 1975).

81. 191 Neb. 29, 213 N.W.2d 445 (1973). The *Fritch* case, another of the "appeal dismissed" variety, is extremely brief. *Fritch* held: (1) certain orders of the trial court were "conditional" and thus not appealable; (2) an "oral allowance" of attorney fees, not noted in the trial docket, was not a "rendition of judgment" as that term is statutorily defined. *Id.* at 30, 213 N.W.2d at 446.

82. *Id.* at 30, 213 N.W.2d at 445.

83. 196 Neb. at 121, 241 N.W.2d at 542.

84. 198 Neb. at 711-12, 255 N.W.2d at 266.

85. See notes 79 & 80 and accompanying text *supra*.

86. Attorneys who have failed to timely file a motion for new trial or notice of appeal have resorted to extraordinary arguments and theories but have met with little success. One example is the attempt by the attorney to file a motion for new trial after the statutory period had run on the theory that courts have inherent authority, independent of statute, to vacate and modify their own judgments at any time during the term at which they were pronounced. This argument was accepted in *Bradley v. Slater*, 58 Neb. 554, 555, 78 N.W. 1069, 1069 (1899). As to vacation or modification of judgments rendered "after the term at which such judgments or orders were made," section 25-2001 of the statutes is controlling. NEB. REV. STAT. § 25-2001 (Reissue 1975) (emphasis added). Under subsection three of this statute, a

ute is section 25-1318 of the Nebraska Revised Statutes, which provides: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action."<sup>87</sup> Interestingly enough, this statute was prominently cited in one leading case discussing the rendition of judgment question.<sup>88</sup> Similarly, it has been cited in conjunction with the necessity for ruling by the trial court on the motion for a new trial before any appeal may be made.<sup>89</sup> But, in general, particularly in the context of the *Spanheimer* decision, this statute has been ignored.

Finally, there is a statute which has been mentioned only once<sup>90</sup> in the opinions of the Nebraska Supreme Court. This statute is section 25-1329 and it provides as follows:

In any matter submitted to and taken under advisement by the district court, or a judge thereof, such court or judge shall give the attorneys for the respective parties at least five days notice in writing sent by United States mail and addressed to their last-known place of business, if such place of business be known to such court or judge, of the time and place when judgment or other final order will be entered in such matter, and may transmit any such judgment or final order, together with any findings of fact and conclusions of law that may be made, in writing, to the clerk of the court where such matter is pending from any place within this state, to be entered by such clerk at the time provided in such notice and a statement in judgment or final order that such notice was given shall be presumptive evidence thereof. Such judgment or final order, when entered by the clerk, shall for all purposes be deemed to have been made and entered in the county where such matter is pending.<sup>91</sup>

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court is authorized to vacate a judgment or order "for mistake, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order. . . ." In *Paine v. United States Nat'l Bank*, 199 Neb. 248, 257 N.W.2d 826 (1977), a motion for new trial was filed six months after an order had been entered approving the final report of a trustee. The moving party alleged that the trial court overlooked a will provision in approving the final report of the trustee and invoked subsection three of § 25-2001. *Id.* at 248-49, 257 N.W.2d at 827. The supreme court ruled that the appellant was challenging an alleged error of law committed by the trial court and subsection three of § 25-2001 was inapplicable. *Id.* at 249-50, 257 N.W.2d at 827. Appellant's sole remedy was to appeal from the final order, which was not done. *Id.* Attempts to "nunc pro tunc" an order or judgment for the purpose of "clarifying" the date the order or judgment was rendered have met with little success. *See Ricketts v. Continental Nat'l Bank*, 169 Neb. at 815, 101 N.W.2d at 158.

87. NEB. REV. STAT. § 25-1318 (Reissue 1975).

88. *See Union Central Life Ins. Co. v. Saathoff*, 115 Neb. at 389, 213 N.W. at 343.

89. *Mueller v. Keeley*, 163 Neb. at 617-18, 80 N.W.2d at 710.

90. *Id.* at 616, 80 N.W.2d at 709-10.

91. NEB. REV. STAT. § 25-1329 (Reissue 1975).

The foregoing statute was enacted in 1935.<sup>92</sup> The "judge out of county" problem, addressed by this statute, is particularly intriguing in view of the concern voiced by Judge Clinton in the *Spanheimer* case for this type of problem.<sup>93</sup> Let us return, then, to the *Spanheimer* opinion and attempt to place some perspective on the appeal process in Nebraska.

#### *Spanheimer* AND THE ROAD AHEAD

As might be recalled, the *Spanheimer* case involved the action of defendant's lawyer, who filed a motion for a new trial after receiving the judge's letter in which the judge had stated that the plaintiff was entitled to the relief he sought, namely, to the foreclosure of his mechanic's lien. The defendant's new trial motion was on file as of June 30, 1976, and subsequently, on July 2, 1976, the decree submitted by the plaintiff was entered on the trial docket.<sup>94</sup> It was in this context that the majority of the supreme court, in an opinion by Judge C. Thomas White, held that the defendant's motion for new trial was filed prematurely, *i.e.*, prior to the rendition of the judgment, and should be treated as a nullity.<sup>95</sup> Defendant's notice of appeal filed August 6, 1976, was held untimely in view of the fact that it had not been filed within one month from the rendition of the judgment, July 2, 1976, the date the trial court signed the decree submitted by the plaintiff. This was the same day the entry of the decree was noted on the trial docket. The ultimate result, of course, was that the appeal was dismissed.<sup>96</sup>

Judge White's opinion started out with the discussion of the motion for a new trial statute, section 25-1143, moved to a discussion of the *Valentine* case and its reliance upon section 25-1301, the statute defining "rendition of judgment." *Fritch v. Fritch* was cited for its headnote: "No judgment is rendered until the pronouncement thereof is noted on the trial docket."<sup>97</sup> An *American Jurisprudence* quotation<sup>98</sup> and the case of *Pallas v. Dailey*<sup>99</sup> were cited in support of the "nullity" principle—a motion for a new trial not filed within ten days after the verdict, report or decision is rendered is a nullity.<sup>100</sup> Although the motion for a new trial was on file prior to the rendition of the judgment and therefore literally

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92. 1935 Neb. Laws ch. 42, § 1.

93. 198 Neb. at 715, 255 N.W.2d at 268.

94. *Id.* at 710-11, 255 N.W.2d at 265.

95. *Id.* at 712, 255 N.W.2d at 266.

96. *Id.*

97. See notes 81 & 82 and accompanying text *supra*.

98. 58 AM. JUR. 2d *New Trial* § 187 (1971).

99. 169 Neb. 277, 99 N.W.2d 6 (1959).

100. 198 Neb. at 711-12, 255 N.W.2d at 266. See note 16 and accompanying text *supra*.

was within the ten-day period, the majority of the court construed the "within" language of section 25-1143 as equivalent to "after." Because the motion for new trial in *Spanheimer* was not filed within ten days *after* rendition of the judgment, it was not timely filed. The notice of appeal had to have been filed within thirty days from the same date in order for the supreme court to have acquired jurisdiction, and since this was not done, the appeal was dismissed.<sup>101</sup>

The opinion of Judge Clinton in the *Spanheimer* case quoted the relevant portions of the new trial statute, the rendition of judgment statute and the notice of appeal statute. He pointed out that the language of the statutes were "not congruent"<sup>102</sup> and observed that the amendment to section 25-1301, defining "rendition of judgment," was intended to clarify the appellate process in Nebraska so that lawyers would "know when they had to accomplish the next step."<sup>103</sup> In reviewing the language of the three sets of statutes, Judge Clinton first stated that the language of section 25-1143, "decision was rendered,"

must be interpreted to mean either "rendition of judgment" or "entry of judgment" whichever occurs first because there will be occasions when there will be an "entry of judgment" without any "rendition of judgment." This would occur when the judge makes no "notation on the trial docket" but at some time signs a journal entry and it is filed.<sup>104</sup>

Judge Clinton went further in noting that under section 25-1912, the notice of appeal must be filed within one month "after" rendition of judgment. This statute does not speak of "entry of judgment" and so for purposes of section 25-1912, rendition of judgment must be read to include both "rendition" and "entry" under section 25-1301, because, as noted previously, there can be an entry of a judgment without a rendition if everything in the statutes is taken literally.<sup>105</sup> This incongruity prompted Judge Clinton to remark "there is plenty of room for construction in our application of the statutes."<sup>106</sup>

Judge Clinton further considered the problem presented in the light of how a district court judge must operate in a multi-county district and perhaps even in a single-county district. He envisioned the situation in which a district court judge has a case

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101. 198 Neb. at 711-12, 255 N.W.2d at 265-66.

102. *Id.* at 714, 255 N.W.2d at 267.

103. *Id.*

104. *Id.*

105. *Id.* at 714-15, 255 N.W.2d at 267.

106. 198 Neb. at 715, 255 N.W.2d at 267.

under advisement and makes up his mind when in his home county and away from the county where the case is docketed. At this point, the trial court writes a letter to counsel informing them of what he has decided.<sup>107</sup> There is at that time no "rendition of judgment" because he can't make a notation on the trial docket. Neither is there an entry of judgment because no journal entry has as yet been signed and filed.<sup>108</sup>

Judge Clinton also compared three recent cases—*Spanheimer, Valentine*<sup>109</sup> and *Brandt v. Mayer*.<sup>110</sup> In *Brandt*, after a motion for a new trial was timely filed and a judgment modified in response thereto, the party appealing failed to file a motion for a new trial as to the modified judgment. The supreme court in that instance "narrowly dismissed" the contention that because no motion had been filed as to the judgment appealed from, the court could not consider trial errors. The supreme court simply noted that since the purpose of the new trial motion is to give the trial court an opportunity after judgment to review and correct alleged errors in their previous proceedings, it would make no sense to require the appealing party to file another motion for new trial after the trial court responded affirmatively to his previous motion for new trial.<sup>111</sup> Finally, Judge Clinton indicated again that section 25-1143, the new trial statute, speaks in terms of "decisions rendered," presumably with the idea that the equation between "decision rendered" and "judgment rendered" should not be made as easily as has been done in the past.<sup>112</sup>

Judge McCown, in dissent, agreed with Judge Clinton that the majority approach is "hypertechnical" and stated that the "premature" new trial motion should not be equated with the motion filed too late.<sup>113</sup> Dissenting, Judge Boslaugh noted that section 25-1143 is a "trap for litigants who try to comply promptly" with the statute.<sup>114</sup> He proposed the solution of making the rule inapplicable where the trial court has notified the parties of its decision by letter or otherwise.<sup>115</sup>

Since the emphasis in this discussion is not upon the correctness of prior decisions, but rather is on pointing out pitfalls and recommending possible improvements that might be made the ex-

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107. This letter might typically state that "I am prepared to hold . . . in favor of . . . ."

108. 198 Neb. at 715, 255 N.W.2d at 268.

109. 196 Neb. at 119, 241 N.W.2d at 541.

110. 196 Neb. 751, 246 N.W.2d 203 (1976).

111. *Id.* at 754, 246 N.W.2d at 204-05.

112. 198 Neb. at 717, 255 N.W.2d at 268.

113. *Id.*

114. *Id.* at 717, 255 N.W.2d at 269.

115. *Id.*

isting system, the comments will be kept brief. It might be noted initially that the new trial statute, in not having the term "judgment" contained therein, presents an unusual situation. Going back to the Roscoe Pound decision in 1901,<sup>116</sup> the interpretation of this statute has resulted in an equation between "verdict, report, and decision" and "judgment." Prior to the 1961 amendment to section 25-1301, there was no statutory definition of "rendition of a judgment." The same situation existed in regard to the appeal statute, section 25-1912, in which the term "rendition" of judgment had been in the statutes since 1907. For the court for a number of years to interpret one statute (new trial statute) to the effect that a judgment was rendered when announced and to interpret another statute (appeal statute) to the effect that a judgment was rendered only when entered on the records of the court is anomalous to say the least.<sup>117</sup>

The recent attention that has been focused on the rendition of judgment statute and the use of this statute as the basis for interpretation of the new trial and notice of appeal statutes is not necessarily to be condemned. It should be apparent, however, that the legislative "cure" wrought in 1961 might be questioned. At a minimum, it would appear that, over the years, the supreme court has neglected the significance of section 25-1318, which specifies that all judgments and orders must be entered upon the journal of the court. This statute was relied upon at an early time but seems to have been completely forgotten in recent times.<sup>118</sup> As will be recalled, Judge Clinton viewed the problems herein as particularly acute viewed in the context of the district court judge sitting in a multi-court district. Presumably, it was that particular situation that section 25-1329 was designed for. Once again no mention is made of this statute in *Spanheimer* or any discussion of this problem. Section 25-1301.01, requiring a notice to each party of record or his attorney as to the date a judgment has been rendered, is a commendable effort as it gives the attorney a fixed date on his calendar as to when a particular judgment has been rendered and presumably informs him as to the date upon which the time for

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116. *Ames v. Parrott*, 61 Neb. at 847, 86 N.W. at 503.

117. Still in all, the fact that for a number of years the supreme court had enunciated and adhered to clear rules in interpreting the new trial and notice of appeal statutes should not have allowed litigants to claim that ambiguity existed. Living under the old system (*i.e.*, prior to the 1941 change in section 25-1912) did not require resolving the theoretical inconsistency of defining "rendition of judgment" two ways.

118. The period of time in which the statute's application would have been most relevant is the period from 1941 to 1961, the time during which "rendition of judgment" under the appeal statute was construed to mean announcement of decision. See notes 28-34 and accompanying text *supra*.

filing a motion for new trial and, in some instances, the date for filing a notice of appeal commences to run.

Although it may not be necessary or desirable for there to be a particular statute detailing when a judgment is rendered for all purposes, it would seem important for litigants, the attorneys and the supreme court to have one fixed rule in regard to rendition of judgment for computing times to file the motion for new trial and the notice for appeal.<sup>119</sup> Consideration might be given to the federal system wherein the motion for new trial and notice of appeal are keyed to "entry of judgment"—a term defined with specificity.<sup>120</sup> In the absence of any statutory declaration of when a judgment is rendered,<sup>121</sup> a quotation from the Nebraska court seems to make eminent sense, namely, "[i]n the nature of things, a judgment must be rendered before it can be entered".<sup>122</sup> Yet, contrast with this the part of Judge Clinton's opinion in *Spanheimer* wherein he noted that, because of statutory definitions contained in the 1961 legislation, "there will be occasions when there will be an 'entry of judgment' without any 'rendition of judgment'".<sup>123</sup> It can be seriously questioned whether the statutory reform of 1961, which defined "rendition" and "entry" of judgment represented progress.<sup>124</sup> As this author stated in conjunction with appeals from the county board of equalization to the district courts,<sup>125</sup> there hardly seems to be any good reason why the appeal process should be so difficult to follow and so fraught with peril.

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119. The virtue of *Spanheimer*, as pointed out by Judge Clinton, is that one fixed definition of "rendition of judgment" now applies for filing motions for new trial and notices of appeal. 198 Neb. at 717, 255 N.W.2d at 268. Other areas of doubt probably remain, however, as will be discussed *infra*.

120. See FED. R. CIV. P. 58 (entry of judgment); FED. R. APP. P. 4 (notice of appeal); FED. R. CIV. P. 59 (motion for new trial).

121. This was the situation as it existed in Nebraska prior to 1961. See note 44 and accompanying text *supra*.

122. *Luikart v. Bredthauer*, 132 Neb. at 65, 271 N.W. at 167.

123. 198 Neb. at 714, 255 N.W.2d at 267.

124. In other words, the "common law" distinction between rendition and entry of judgment, as articulated by Pound in *Ames* and by the *Luikart* court, should have been sufficient to resolve questions over the meaning of "rendition" and "entry" of judgment. The peculiar problem relating to appeals where the filing of the transcript was a jurisdictional act could be handled by holding that, for this purpose, "rendition" must be read as "entry."

125. See Volkmer, *Appeals from the County Board of Equalization: Not a Land of Milk and Honey*, 9 CREIGHTON L. REV. 149, 163 (1975) [hereinafter cited as Volkmer]. In this little corner of the world, things are better now. See *United Way of the Midlands v. Board of Equalization*, 199 Neb. 323, 327, 259 N.W.2d 270, 272 (1977), *overruling in part*, *Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 103, 225 N.W.2d 855, 860 (1975).

## OTHER APPELLATE PROCEEDINGS

While the majority of the cases in the Nebraska Supreme Court discussing appellate procedures concern the appeals of civil cases from the district court to the supreme court, there are recurring problems, not unlike the problems previously discussed, with respect to other appellate proceedings. In this section of the article, attention will be focused upon these other appellate proceedings, namely: error proceedings, appeals of inferior court judgments to the district court, and the appeal of criminal cases from the district court to the Nebraska Supreme Court.

## ERROR PROCEEDINGS

While it is not the purpose of this article to review in detail the history of petition in error proceedings in Nebraska, it is noteworthy to observe that proceedings in error have a long history.<sup>126</sup> Traditionally, error proceedings were utilized to obtain district court review of inferior court proceedings or of rulings or orders made "by any tribunal, board or officer exercising judicial functions."<sup>127</sup> Prior to 1907 error proceedings were available in the supreme court for review of civil cases.<sup>128</sup> Recent statutory enactments to be discussed below have eliminated error proceedings in the district court for review of civil judgments of inferior courts. However, error proceedings are still in many instances the only method of review of a judgment rendered or final order made by a tribunal, board or office exercising a judicial function.<sup>129</sup>

The interplay between the petition in error statute and the statutes providing for appeals under the Nebraska Administrative Procedure Act<sup>130</sup> will not be discussed in detail. It will be sufficient for present purposes to note that the appeal statute of the Administrative Procedure Act of the State of Nebraska provides that "[n]othing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law,"<sup>131</sup> and "[t]he review provided by this section shall not be available where other provisions of law prescribe the method of appeal."<sup>132</sup> This

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126. The present statutes specifying the general nature of error proceedings, NEB. REV. STAT. § 25-1901 to 08 (Reissue 1975), can be traced back to the territorial laws of 1858. See 1858 Neb. Terr. Laws, Code of Civil Procedure, §§ 520-51, at 196-203.

127. NEB. REV. STAT. § 25-1901 (Reissue 1975).

128. Cf. *Brandt v. State*, 80 Neb. 843, 844, 115 N.W. 327, 327 (1908) (ruling that under 1907 law, error proceedings are confined to criminal cases).

129. See *McDonald v. Rentfrow*, 171 Neb. 479, 486, 106 N.W.2d 682, 687 (1960). Syllabus five states that "[w]here no method of appeal is provided by statute the appropriate proceeding is a proceeding in error." *Id.* at 479, 106 N.W.2d at 684.

130. NEB. REV. STAT. §§ 84-917 to 919 (Reissue 1976).

131. *Id.* § 84-917(1).

132. *Id.* § 84-917(7).

language has been interpreted to mean that in certain instances in which plaintiff seeks to secure a review of the decision of an administrative body, the appealing party may resort to the method of petition in error.<sup>133</sup> In other words, review under the Administrative Procedures Act is not exclusive.

The statute regulating the time period in which error proceedings must be taken is section 25-1931 of the Nebraska Revised Statutes which provides, in part that "[n]o proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of."<sup>134</sup> A person commencing an error proceeding in the district court is required to file a transcript of the proceeding sought to be reviewed<sup>135</sup> "within one calendar month after the rendition of the judgment or making of the final order complained of."<sup>136</sup> The requirement of filing a transcript within the one calendar month time period has been held to be jurisdictional "at least since 1905."<sup>137</sup> As in the case of appeals from the district court to the supreme court in civil cases, the question arises as to when there has been the rendition of a judgment or the making of the final order complained of which starts the time running for the filing of the transcript.

In the 1965 case of *Brown v. City of Omaha*, the supreme court held that the personnel board of the city of Omaha rendered its judgment at the time that it voted and announced its decision.<sup>138</sup> The supreme court relied upon the *Ricketts* case which had interpreted section 25-1912 (the notice of appeal statute) to the effect that the rendition of the judgment or final order takes place when the decision is announced.<sup>139</sup> Thus the court held the rule for judicial proceedings to be applicable to administrative proceedings. Judge Smith, in a dissent which was joined by Judge Spencer, viewed the analogy to the district court procedure as inappropriate. Judge Smith pointed out that so far as appeals to the supreme court were concerned, prior to 1941 the filing of the transcript was

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133. *Downer v. Ihms*, 192 Neb. 594, 601, 223 N.W.2d 148, 152 (1974). In *Downer*, a Department of Public Welfare decision terminating plaintiff's eligibility for disability aid was questioned. *Id.* at 595-96, 223 N.W.2d at 149. The supreme court found no other provisions of law prescribing the method of appeal and ruled that orders of the Department of Public Welfare are renewable by either petition in error or appeal under the Administrative Procedure Act. *Id.* at 598-99, 601, 223 N.W.2d at 150, 152.

134. NEB. REV. STAT. § 25-1931 (Reissue 1975).

135. NEB. REV. STAT. § 25-1905 (Reissue 1975).

136. *Id.*

137. See *Downer v. Ihms*, 192 Neb. at 602, 223 N.W.2d at 152.

138. 179 Neb. 224, 228, 137 N.W.2d 814, 817 (1965).

139. *Id.* See note 33 and accompanying text *supra*.

jurisdictional, and the supreme court had held repeatedly that the time for filing commenced "when the judgment was entered of record, . . . " "so that it . . . [was] within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court." <sup>140</sup> In 1941, the filing of the transcript lost its jurisdictional feature, but the phrase "rendition of judgment" was not changed.<sup>141</sup> The result of this change, according to the *Sloan* and *Ricketts* decisions, as Judge Smith pointed out, was the "rendition" was then construed to mean "announcement of decision."<sup>142</sup> Judge Smith then noted, citing section 25-1301 that "[i]f we stretch the analogy a little further, we run into the present statutory provision that a notation on the trial docket is an integral part of the rendition."<sup>143</sup>

In 1976, the supreme court was asked to reexamine the *Brown* holding in *Marcotte v. City of Omaha*. In *Marcotte*, it was pointed out to the court that the "rendition" of judgment interpretation of *Sloan* and *Ricketts* had been changed by virtue of the statutory definition of "rendition of judgment."<sup>144</sup> Secondly, it was argued that, since a transcript filing is jurisdictional in error proceedings, the court should follow the rule of *Bickel v. Dutcher* which held that when the filing of the transcript is jurisdictional, the judgment is not rendered until it is entered on the record.<sup>145</sup>

In *Marcotte*, Judge Clinton rejected both of these arguments noting first that certainty and stability in procedural areas are desirable. Secondly, he noted that the statute defining rendition of judgment, section 25-1301(2), applies only to courts and not to administrative tribunals exercising judicial powers. Thirdly, he noted that the filing of the transcript as a jurisdictional act will not be held to defeat the jurisdiction of the appellate court if the failure to file the transcript was occasioned solely by the failure of the public official charged with the responsibility for furnishing the transcript. Finally, Judge Clinton stated that it is the filing of the certified copy of the judgment or order which is jurisdictional and not the filing of a certified copy of exceptions.<sup>146</sup>

It is clear then under the *Marcotte* decision that, under section 25-1931, the time for commencing the error proceeding commences from the date the decision is announced and that no notation or

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140. *Id.* at 229, 137 N.W.2d at 818 (quoting *Sloan v. Gibson*, 156 Neb. at 625, 57 N.W.2d at 167) (quoting *Bickel v. Dutcher*, 35 Neb. at 761, 53 N.W. at 663) (Smith, J., dissenting).

141. *Id.*

142. *Id.*

143. 179 Neb. at 229-30, 137 N.W.2d at 818.

144. 196 Neb. 217, 219, 241 N.W.2d 838, 840 (1976).

145. *Id.*

146. 196 Neb. at 219-21, 241 N.W.2d at 840-41.

writing or entry of the decision is required. While Judge Clinton's analysis of the applicability of section 25-1301(2) may be sound, the judge has not adequately responded to the compelling rationale of *Bickel v. Dutcher* that, in a situation where the filing of the transcript is jurisdictional, the entry of judgment is necessary before there has been a rendition of the judgment.<sup>147</sup> Since there were no dissents in the *Marcotte* case, it is apparent that Nebraska lawyers must live with the rule that, in petition in error proceedings from an administrative tribunal to the district court, the filing of the certified copy of the judgment must be made within thirty days from the date the decision is announced. This is a burdensome rule and the only recourse left is legislative action. The irony of interpreting "rendition of judgment" differently under the appeal and petition in error statutes should not conceal the trap presented for litigants.<sup>148</sup>

#### APPEALS FROM MUNICIPAL AND COUNTY COURTS TO DISTRICT COURTS

##### *Civil Cases*

Appeals of civil cases from the county and municipal courts to the district courts have been greatly simplified and clarified under recent statutory enactments.<sup>149</sup> No longer do Nebraska lawyers have to look to the statutes regulating appeals from justice of the peace courts<sup>150</sup> and no longer are error proceedings available for reviewing municipal court and county court decisions.<sup>151</sup>

Presently the governing statutes for district review of inferior court judgments are contained in sections 24-541 through 551 of the Nebraska Revised Statutes. Briefly stated, the appeal procedure is as follows: Under section 24-542, the party appealing shall "within ten days from the rendition of a judgment" file a notice of appeal with the clerk of the court in which the judgment was ren-

147. See notes 59-63 and accompanying text *supra*.

148. Once again the rules seem clear if the cases are read assiduously. The question remains: Shouldn't the rules be clear from a reading of the statutes?

149. The determination as to whether a case is "civil" or "criminal" is critical, for if the case before the municipal or county court is criminal, the double jeopardy provision of the Nebraska Constitution applies. NEB. CONST. art. I, § 12. See *State v. Knoles*, 199 Neb. 211, 216, 256 N.W.2d 873, 876 (1977) (traffic violation deemed criminal; no appeal by county attorney to district court permissible after county court acquitted defendant).

Appeals in probate proceedings from the county courts to the district courts are governed by a separate set of statutes which are not included in the present discussion. See NEB. REV. STAT. § 30-1601 through 1610 (Reissue 1975).

150. NEB. REV. STAT. § 27-1301 through 1315 (Reissue 1964) (repealed 1972). Those statutes remain "alive," however, for other purposes. See Volkmer, *supra* note 125, at 152.

151. 1974 Neb. Laws L.B. 733, 83d Leg., 2d Sess.

dered.<sup>152</sup> Under section 24-543 the party appealing shall within ten days "from the rendition of judgment" post a cash bond with the clerk of the inferior court.<sup>153</sup> Under section 24-544, the clerk of the court which has rendered the decision shall then make out the certified transcript and transmit it to the appellant or his attorney who shall in turn file the same with the clerk in the district court within thirty days "from the entry of judgment."<sup>154</sup> Review by the district court is "*de novo* on the record."<sup>155</sup>

In a 1975 case construing these statutes, the Nebraska Supreme Court held that, in a case involving a purported review of a municipal court judgment by the district court, the appealing party failed to file the transcript in the district court "within thirty days from the entry of judgment in the lower court."<sup>156</sup> The filing of the transcript was regarded by the supreme court as a jurisdictional act "and unless the appellant [was] prevented from complying with the statute because of some default of the lower court," the district court acquired no jurisdiction.<sup>157</sup> The supreme court did not discuss the applicability of section 25-1301(3), which defines entry of judgment. Presumably, this statute would apply in determining the date from which the appellant must commence his duty to file the transcript.<sup>158</sup>

In a 1976 case construing these same statutes, the supreme court held that, in the appeal of the municipal or county court judgment to the district court, a motion for a new trial in the municipal court is not provided for by law.<sup>159</sup> The attempt to file a motion for a new trial did not extend the time period for filing the transcript, and the appeal to district court failed.<sup>160</sup> The syllabus to this case simply states that "notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be

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152. NEB. REV. STAT. § 24-542 (Reissue 1975).

153. *Id.* at § 24-543.

154. *Id.* at § 24-544.

155. *Id.* at § 24-541. For interpretation of this standard of review, see Phillippe v. Barbera, 195 Neb. 727, 728, 240 N.W.2d 50, 51 (1976); Von Seggern v. Kassmeier Implement, 195 Neb. 791, 794-95, 240 N.W.2d 842, 843-44 (1976).

156. First Nat'l Bank v. Mitchell, 194 Neb. 628, 629, 234 N.W.2d 220, 221 (1975).

157. *Id.* For the proposition that the filing of the transcript is a jurisdictional act, the court cited Lynde v. Wurtz, 147 Neb. 454, 23 N.W.2d 703 (1946), a case construing the since repealed justice of the peace appeal procedure statute. 194 Neb. at 629, 234 N.W.2d at 221. See note 150 *supra*.

158. Apparently this was the rule under the old justice of the peace court procedure. See Bishop v. Lincoln Baseball Club, 98 Neb. 558, 561, 153 N.W. 586, 587 (1915) (holding the time for filing an appeal does not begin to run until the judgment is entered on the docket).

159. Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 589, 239 N.W.2d 779, 780 (1976).

160. *Id.* at 588, 239 N.W.2d at 780.

prolonged by filing a motion for new trial."<sup>161</sup> Again no mention is made of the applicability of section 25-1301(2) which defines rendition of judgment, although one could presume that this section would apply.

While it is true that these newer statutes clarify and simplify the appellate process from the municipal and county courts to the district courts, it should be pointed out that the differences in terminology in sections 24-542, 543, and 544 which distinguish between "rendition of judgment" and "entry of judgment" might be a trap for litigants. One should recall Judge Clinton's discussion of rendition of judgment and entry of judgment in *Spanheimer*.<sup>162</sup> He pointed out that, because of the statutory definitions introduced in 1961, a judgment might be entered before it was rendered, an impossibility at common law if we are to believe the *Luikart* case.<sup>163</sup>

#### *Criminal Cases*<sup>164</sup>

So far as the review of the criminal cases from the district court to the state supreme court is concerned, the year 1961 is a landmark date. In a 1954 case, the Nebraska Supreme Court had observed that "[t]he method for review of all criminal cases by the Supreme Court is upon writ of error," citing section 29-2306 of the statutes.<sup>165</sup> In a 1965 case, Judge McCown observed that the effect of a 1961 amendment to the appeal statute, section 25-1912, was to abolish the writ of error and provide that appeals under the criminal code be the same as in civil cases.<sup>166</sup>

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161. *Id.*

162. See text to notes 102-111 *supra*.

163. See note 72 *supra*.

164. The discussion in this section pertains to appeals by criminal defendants from the district to the supreme court. The limited circumstances under which the county attorney may institute "error proceedings" are described in NEB. REV. STAT. § 29-2315.01 (Reissue 1975). According to this section, the county attorney is required to present an application to the trial court requesting leave to docket error proceedings within twenty days after the final order is entered. In *State v. Gillett*, 199 Neb. 829, 261 N.W.2d 763 (1978), the county attorney sought to review a district court ruling that the careless driving statute, § 39-669, was unconstitutional. The county attorney filed motions for new trial, which were overruled and sought to appeal as in the ordinary civil cases. The supreme court found the proceedings in the lower court to be criminal in nature and thus § 29-2315.01 was the only method by which the county attorney could "appeal." *Id.* at 830, 261 N.W.2d at 763. Noncompliance with this section dictated, once more, the all too familiar disposition "Appeal Dismissed."

165. *In re Mantell*, 157 Neb. 900, 904, 62 N.W.2d 308, 310 (1954) (citing NEB. REV. STAT. § 29-2306 (Reissue 1951)). The present statutory citation is the same. The old statutory scheme of review, providing for issuance of writs of error in all criminal cases, was broader than that mandated by the Nebraska Constitution. See NEB. CONST. art. I, § 23 (right of appeal extended only to felonies).

166. *State v. Longmore*, 178 Neb. 509, 511, 134 N.W.2d 66, 69 (1965).

Prior to 1961, the time for commencing error proceedings for criminal case review was governed by section 25-1931, which provides, in part, that the action to reverse or modify the judgment or final order must be commenced within "one calendar month after the rendition of the judgment or the making of the final order complained of."<sup>167</sup> Once more the supreme court had to grapple with the phrase "rendition of judgment," this time in a different context with different problems.

The different problems arose in conjunction with filing the motion for a new trial in the criminal case and the time gap between the time a verdict of guilty was pronounced and the date of sentencing. It might initially be observed that section 25-1931 makes no mention of the new trial motion as affecting the time for commencing error proceedings. Reason and logic would dictate that a timely filed new trial motion would prevent the finality a judgment must possess in order to be reviewable in an error proceeding. In other words, the timely filed new trial motion in the error cases should have operated exactly as in appeal cases; the time for commencing the error proceedings would not commence until the motion for new trial was overruled. And it was so held in error cases, in regard to both civil<sup>168</sup> and criminal<sup>169</sup> cases. The next difficulty the court encountered in regard to the new trial motion in the criminal error proceeding was predictable.

In the 1950 case of *Fisher v. State*, the jury verdict was returned on April 2 and sentence was pronounced on April 4, 1950, although the journal entry disclosing this fact was not filed until April 18.<sup>170</sup> A motion for new trial was filed on April 8 and, from a journal entry filed on May 27, it appears the motion for new trial was overruled on the same day it was filed, namely, April 8, 1950.<sup>171</sup> The defendant filed a petition in error and transcript in the supreme court on May 29.<sup>172</sup> Chief Justice Simmons cited the language of section 25-1931 and inquired as to whether the one-month period began from April 8, 1950, the date upon which the motion for new trial was overruled, or May 17, 1950, the date of the journal

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167. NEB. REV. STAT. § 25-1931 (Reissue 1975).

168. See *Bowers v. Raitt*, 96 Neb. 460, 461, 148 N.W. 93, 94 (1914); *Clark v. McDowell*, 58 Neb. 593, 594, 79 N.W. 158, 158 (1899). In 1892, the three-member supreme court turned completely around on this issue. Compare *Sharp v. Brown*, 34 Neb. 406, 410-11, 51 N.W. 1030, 1031 (1892) (holding that time for filing proceedings in error commences to run from time of overruling motion for new trial), with *Phenix Ins. Co. v. Swantkowski*, 31 Neb. 245, 247, 47 N.W. 917, 917-18 (1891) (holding that time for filing proceedings in error determined with reference to date of rendition of judgment without regard to time of overruling of motion for new trial).

169. *Goodman v. State*, 131 Neb. 662, 663, 269 N.W. 383, 383 (1936).

170. 153 Neb. 226, 227, 43 N.W.2d 600, 601 (1950).

171. *Id.*

172. *Id.*

entry which showed the motion for a new trial had been overruled. The Chief Justice turned to the appeal statute and the interpretation it had received in *Saathoff*: a judgment was rendered only when it was entered upon the journal.<sup>173</sup> Chief Justice Simmons noted further that the transcript in the error proceeding must not only show the filing of the motion but also the ruling of the trial court thereon. The transcript cannot be prepared and filed unless and until the trial court's ruling on the motion for new trial is entered upon the journal.<sup>174</sup> Chief Justice Simmons' conclusion was as follows: "[W]e hold that in error proceedings under section 25-1931, . . . the one-month-calendar period begins to run from the time the court's ruling on a motion for new trial has been entered on the journal of the court."<sup>175</sup>

In the 1960 case of *Kennedy v. State*,<sup>176</sup> the record showed that Kennedy had been found guilty by a district court jury of illegal possession of burglary tools and concealed weapons and that within five days of the jury verdict a motion for a new trial was filed. This motion was timely filed but was subsequently overruled by the trial court on November 30. Thereafter on December 11, the trial court set down for hearing on December 21 the charge that plaintiff was an habitual criminal. At the December 21st hearing the trial court found defendant to be an habitual criminal. On January 11th of the following year the defendant was sentenced to serve fifteen years. The error proceedings in the supreme court were filed within one calendar month thereafter. The question as presented to the supreme court was whether the error proceedings were timely filed.<sup>177</sup> Judge Wenke first reviewed prior history and concluded that no judgment will be regarded as final unless a sentence is pronounced.<sup>178</sup> Judge Wenke also noted that a new trial motion must be filed and a ruling obtained thereon in order to review alleged errors occurring during the trial. The conclusion reached was that "error proceedings may be taken from the overruling of the motion for new trial or the imposition of sentence, whichever is the later."<sup>179</sup>

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173. *Id.* (citing *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. at 589, 213 N.W. at 343). *Saathoff* in turn relied on the language of what is now NEB. REV. STAT. § 25-1318 (Reissue 1975), the statute requiring all judgments and orders to be entered upon the journal of the court.

174. 153 Neb. at 228-29, 43 N.W.2d at 602. The Chief Justice's thinking here is directly traceable to *Bickel v. Dutcher*, although no citation appears. See notes 59-62 and accompanying text *supra*.

175. 153 Neb. at 229, 43 N.W.2d at 602.

176. 170 Neb. 193, 101 N.W.2d 853 (1960).

177. *Id.* at 195, 101 N.W.2d at 855.

178. *Id.* at 195-96, 101 N.W.2d at 855.

179. *Id.* at 196, 101 N.W.2d at 855.

As will be recalled, the writ of error was virtually abolished in 1961 and the review procedure for criminal cases from the district court to the supreme court was placed under the same statute as the appeal for civil cases, namely, section 25-1912 of the Nebraska Revised Statutes.<sup>180</sup> One of the effects of the 1961 amendment placing criminal appeals under section 25-1912 is to raise again the question of the timely filed motion for a new trial and the time allowed for commencing the appeal.

The interplay between the motion for a new trial statute in the criminal proceeding, section 29-2103, and the governing appeal statute, section 25-1912, has been discussed in recent cases of the Nebraska Supreme Court. The interplay usually obtains because, as in the civil cases, the filing of a motion for a new trial in a criminal case affects the scope of review. In the 977 case of *State v. Price*, the Attorney General argued that the defendant's failure to file a motion for new trial should be treated as a jurisdictional defect.<sup>181</sup> The supreme court disagreed, stating that a motion for a new trial is not mandatory to give the said that it would not "ordinarily consider any error not presented to the trial court by a motion for new trial if the trial court would have authority to correct the error assigned."<sup>182</sup> Thus, as in civil cases, it is clear that the defendant's failure to file a motion for a new trial in the criminal case will not be treated as a jurisdictional defect, but it will affect the scope of review.<sup>183</sup> As in the case of civil actions, the timeliness of the filing of the motion for new trial is critical, for if timely filed it will, under section 25-1912, extend the period of time within which the defendant may appeal the guilty verdict.<sup>184</sup> Whether or not a motion for a new trial in a criminal case is timely filed depends upon the defendant's compliance with section 29-2103 which provides, in part, that the application for a new trial shall be filed "within ten days after the verdict was rendered unless unavoidably prevented."<sup>185</sup>

In the 1976 case of *State v. Lacy*, the record revealed that the defendant Lacy did not file his motion for a new trial within ten days from the date of the verdict but did file it within ten days from the date of his sentencing.<sup>186</sup> The state argued that Lacy failed to file his new trial motion within the ten day period allowed

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180. See text to notes 165-166 *supra*.

181. 198 Neb. 229, 230, 252 N.W.2d 165, 166 (1977).

182. *Id.* at 231, 252 N.W.2d at 166.

183. See, e.g., *State v. Beans*, 199 Neb. 807, 261 N.W.2d 749 (1978).

184. Section 25-1912 requires that the jurisdictional steps be completed within one month "from the overruling of a motion for a new trial in said cause." NEB. REV. STAT. § 25-1912 (Reissue 1975).

185. NEB. REV. STAT. § 29-2103 (Reissue 1975).

186. 195 Neb. 299, 305, 237 N.W.2d 650, 653 (1976).

by statute.<sup>187</sup> In addressing this contention the supreme court noted that "an element of ambiguity" was introduced in two prior cases in which the statement was made that the motion for a new trial in a criminal action must be filed "within 10 days after the verdict or judgment is rendered. . . ."<sup>188</sup> In order to correct the ambiguity, the *Lacy* court specifically held that:

the time requirements of section 29-2103 . . . are mandatory and that a motion for a new trial under that section must be filed within 10 days after the *verdict* is rendered. The motion may not be filed within 10 days after the date of sentencing, unless of course, the verdict and sentencing occur on the same day.<sup>189</sup>

Thus Lacy's motion for a new trial was not timely filed and, although this would not have deprived the supreme court of jurisdiction in the particular case, it would have, under traditional thinking, limited the supreme court's scope of review.

In the case of *Betts v. State*, also decided in 1976, the untimely filing of the motion for a new trial had the effect of causing the appeal to fail.<sup>190</sup> In *Betts*, the defendant's guilty plea was accepted on August 14, and he was sentenced on September 26. On October 3, he filed a motion for a new trial which was overruled on October 17. The notice of appeal was filed on November 10.<sup>191</sup> The supreme court noted that although *Betts* had filed his notice of appeal within one month of the overruling of the motion of the new trial, the critical inquiry was whether or not the motion for a new trial was timely filed so as to extend the period within which the notice of appeal could be filed. Since the motion for a new trial was filed more than ten days after the plea of guilty, and that was the critical date rather than the date of sentencing according to *Lacy*, the motion for new trial was not timely filed.<sup>192</sup> The belated motion for new trial was given the same treatment it had received in civil cases—it was considered a "nullity." Thus the time for filing the notice of appeal commenced on September 26, the date of sentencing, and since the notice of appeal was not filed within thirty days thereafter, the supreme court did not acquire jurisdiction.<sup>193</sup>

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187. *Id.* at 304, 237 N.W.2d at 653.

188. *Id.* at 305, 237 N.W.2d at 653 (quoting *Stanosheck v. State*, 168 Neb. 43, 43, 95 N.W.2d 197, 198 (1959)). See also *Vacek v. Marburger*, 188 Neb. 180, 183, 195 N.W.2d 515, 517 (1972).

189. 195 Neb. at 305, 237 N.W.2d at 654.

190. 196 Neb. 572, 575, 244 N.W.2d 195, 196 (1976).

191. *Id.* at 573, 244 N.W.2d at 196.

192. *Id.* at 573-74, 244 N.W.2d at 196.

193. *Id.* at 574, 244 N.W.2d at 196.

After the *Betts* and *Lacy* cases, the rules became a little bit clearer for the defense attorney: the defendant was required to file a motion for new trial at the time of the entry of the verdict against him and could not safely wait until sentencing to do so. This raises at least two problems. First, the motion for new trial might be overruled before sentencing, thus raising the question as to when the notice of appeal had to be filed. Furthermore, until he is sentenced, the defendant might not know whether he wishes to appeal.

In the recent case of *State v. Kelley* the supreme court referred to these problems and ruled that if sentencing occurs after the motion for a new trial has been overruled, then the time for computing the appeal runs from the date of sentencing.<sup>194</sup> In *Kelley*, the court responded to the defendant's argument about not knowing whether he wishes to appeal until after sentencing by noting that the defendant who has been found guilty and is awaiting sentencing may lay a timely foundation for review by filing the motion for new trial as this motion does not mandate an appeal.<sup>195</sup> The court further pointed out that on appeal, it may consider certain types of errors despite the fact that a motion for a new trial has not been filed. The outstanding example of the type of error that the court might consider even in the absence of a motion for new trial is the complaint of an excessive sentence.<sup>196</sup> Thus, the criminal defendant who does not file the motion for new trial but then receives an unexpectedly stiff sentence is not prejudiced, at least as to the excessiveness of sentence issue. In the 1977 case of *State v. Price*, the supreme court had already noted that another new trial motion filed after sentencing "would be futile because the trial court has no authority to change a sentence after it has once been pronounced and the defendant has left the courtroom."<sup>197</sup>

As distinguished from civil cases like *Spanheimer*, the problem area on the criminal side has not focused upon the issue as to when a judgment is "rendered" or when the motion for new trial is overruled. Most of the recent controversy in the recent criminal cases revolved around the time gap between the guilty verdict and sentencing. A review of the cases cited would indicate that, in the area of criminal appeals, it would be possible to file a premature motion for new trial which could be treated as a nullity à la

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194. 198 Neb. 805, 810, 255 N.W.2d 840, 843 (1977). The court cited *Kennedy v. State*, a case decided under the old writ of error statute which construed section 25-1931. 170 Neb. 193, 195-96, 101 N.W.2d 853, 855 (1960).

195. 198 Neb. at 810, 255 N.W.2d at 843.

196. *Id.* at 810, 255 N.W.2d at 843-44.

197. 198 Neb. 229, 231, 252 N.W.2d 165-66 (1977).

*Spanheimer*, and, according to *Betts*, it is also possible that the motion for new trial belatedly filed will result in the all-too-familiar refrain "Appeal Dismissed." So far as a parting glance at the motion for new trial procedure is concerned, attention might be directed to the language of the motion for new trial statute in criminal cases, section 29-2103, which states that the motion shall be filed "within ten days after the verdict was rendered unless unavoidably prevented."<sup>198</sup> On the civil side, it will be recalled that the language of section 25-1143 is "within ten days . . . after the verdict, report or decision was rendered. . . ."<sup>199</sup> It remains to be seen whether in the criminal cases the emphasis will be shifted to the issue of the necessity of journalizing the judgment and the potential applicability of section 25-1301.

### CONCLUSION

It might be thought that, after a discussion of all of the cases herein, the Nebraska Supreme Court has by judicial opinion clarified the appellate procedure to the degree that any lawyer of average intelligence should not be tripped up with regard to technicalities inherent in the statutory scheme.<sup>200</sup> As Judge Clinton noted in the *Spanheimer* opinion, there was plenty of room for construction in the statutes and there still is. It is hoped that the present discussion has illuminated the judicial flesh that has been grafted upon the statutory bones.<sup>201</sup>

198. NEB. REV. STAT. § 29-2103 (Reissue 1975).

199. NEB. REV. STAT. § 25-1143 (Reissue 1975).

200. The sympathies of the author are with the members of the practicing bar who have struggled manfully with these problems over the years. The plight of the Nebraska lawyer might best be revealed by reviewing selected passages of NEBRASKA PRACTICE, the form book to which a great number of Nebraska attorneys turn for guidance. As to certain of the issues discussed in this article, NEBRASKA PRACTICE offers the following:

(1) Time for filing motion for new trial in civil case: The time for filing "begins to run from the time the decision was rendered and not from the time it was filed or entered on the journal of the court." No change is indicated in the supplement. 4 W. MOORE, NEBRASKA PRACTICE, § 3175(e) (1965).

(2) Time for filing notice of appeal—civil case—district court to supreme court: The notice of appeal must be filed within one month of the rendition of the judgment or decree. "A judgment is rendered when the court announces its decision and not at the time a notation thereof is made on the records." 2 W. MOORE, NEBRASKA PRACTICE, § 1256 (1964). No change is indicated in the supplement.

(3) Time for commencing error proceedings: "The time for instituting error proceedings commences to run when the ruling on [sic] a final order has been entered on the journal." *Id.* at § 1230. Once again, no change is indicated in the supplement.

It is debatable whether these statements were true when published; but it should be painfully clear that, as of 1978, the above statements are erroneous.

201. For the record, the author believes, as did Judges McCown and Boslaugh, that the interpretation by the majority of the court in *Spanheimer* was hypertech-

In addition to illustrating the present state of affairs, perhaps this article will spur statutory revisions in the appellate procedure with the goal of obtaining that element which should never be lacking in any statutory scheme, namely, clarity.

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cal and a trap for litigants. See notes 113-116 and accompanying text *supra*. See also *Partridge v. Presley*, 189 F.2d 645 (D.C. Cir. 1951) (motion for new trial preceded entry of judgment, Rule 59(b) of FED. R. CIV. P. required motion to be served "not later than 10 days after the entry of the judgment." *Held*, motion was timely filed: "It is perhaps somewhat unusual practice to move for a new trial before the actual entry of a judgment, but to do so is not forbidden by Rule 59(b).") *Id.* at 646.