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WINIFRED HULA, APPELLANT, V. WALDEMAR CARL SOENNICHSEN ET AL., APPELLEES.

134 N. W. 2d 47

Filed March 19, 1965. No. 35936.

1. **Workmen's Compensation.** In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity.
2. ———. The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery.
3. ———. The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim.
4. ———. In a rehearing in the Nebraska Workmen's Compensation Court a de novo consideration is required.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Tesar, Kirchner, Reefe & Rogers and Walter Smith, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This is a workmen's compensation case brought by the plaintiff Winifred Hula against the defendants Waldemar Carl Soennichsen and Mathilda Marte Soennichsen, doing business as Soennichsen's, a partnership, and The Western Casualty & Surety Company. When the defendant is mentioned herein it will refer to the partnership named.

Plaintiff, who was 67 years of age, was employed by defendant as a clerk in its store at Plattsmouth, Nebraska. She worked half days on Tuesdays through Fridays and all day Saturdays putting in a total of 32 hours for which she was compensated at the rate of 75 cents an hour, making $24 a week. The hours were arranged to keep her compensation below that requiring

a reduction in Social Security payments which she was drawing.

On October 9, 1959, about 1 o'clock, she went up on a balcony in the store building to get some draperies for a customer. With a heavy bolt of "monks" cloth which she got and had in her arms she fell over some pasteboard boxes striking herself on the bolt. She testified she was dazed and must have struck on her right side as "that is where most of the trouble has been." Going downstairs she told the only fellow employee in the store of the fall. She waited on one or two more customers and put things away in a cupboard. Then feeling nervous and shaky, she walked to her home 2 blocks away. At home she went to bed and was in bed most of the time for several days. She said her arms ached and a rib on the right front of her chest was bruised and sore. This soreness increased and a week later she went to Dr. G. O. Austria at Plattsmouth. Thereafter she saw nine doctors who treated her and whose reports and findings were introduced in evidence but who did not testify at the trial. These reports will be discussed later. She claims she is suffering from nerves, weakness in her legs and across her lower back when she tries to work or gets out and pulls weeds, that sometimes she has a twitching in her body and it feels as though needles are sticking her inside, and her right leg and hip bother her at night.

The only witness at the trial aside from the plaintiff herself was her husband, Charles Hula. He told of her coming home slowly on the day of the accident, October 9, 1959, "like she couldn't hardly walk," and as though "she was all to pieces." She went to bed and thereafter she stayed home every day, sleeping most of the time. He stated that he notices she tires easily and complains of her back hurting after pulling weeds. She does not have as brisk a step as she used to and cannot walk very far without tiring. She complains that her back and legs are weak. Before, she was full of

pep and never complained of her back, hips, or legs. Previously she did her housework and work at the store but has not worked away from home since. Plaintiff does her own housework although her husband helps her wash and carries out the clothes to dry and the papers and things to burn.

Before the plaintiff filed action she was paid $60 compensation for disability at $20 per week, the first week being deducted under the law. Her medical and travel expense was also previously paid, being $124.30.

The first hearing was before one judge of the Nebraska Workmen's Compensation Court, hereinafter referred to as the compensation court. Her petition was dismissed and she was denied further compensation.

Upon rehearing before the entire compensation court, it held plaintiff was not entitled to permanent total disability as claimed but was entitled to temporary total disability until January 8, 1960. She was allowed $20 a week for 13 weeks, credit being given for the 3 weeks previously paid. It allowed medical and travel expense in the sum of $77 in addition to the $124.30 which had been paid. Other medical expense was disallowed.

On appeal to the district court for Douglas County, a trial resulted in a judgment affirming the award in the compensation court and dismissing the appeal. A motion for a new trial was overruled and the case is brought here on appeal.

Plaintiff asserts error in the trial court's judgment in failing to find that the accident had resulted in the plaintiff being unemployable rendering her totally and permanently disabled, in finding her disability ceased January 8, 1960, and in disallowing all other medical and incidental expense.

In considering the question before us, we are restricted as far as medical evidence is concerned to the reports of the doctors together with the doctor, hospital, and drug bills which were all admitted in evidence with-

out testimony of the doctors concerning them.

The report of Dr. Austria of Plattsmouth, whom the plaintiff first consulted, is dated February 24, 1960. It shows he first examined the plaintiff October 16, 1959, when she gave a history of the accident. He reports the results of this examination, stating she complained of her chest and right side. At first the pain was not great but that in her right chest increased as time passed and was aggravated by deep breathing, bending over, and carrying things. He found no evidence of fractures or dislocations. He found a bruise and old hematoma (swelling containing blood) at the level of the seventh and eighth ribs on the right antero-lateral side. Her blood pressure appeared to be higher than normal. His diagnosis was (1) bruise contusion and hematoma right side chest over seventh rib; (2) bruise and contusion both buttocks; and (3) nutritional anemia. His prognosis was, "Should have good recovery." He prescribed analgesics and muscle relaxants, vitamin shots, application of heat to the bruised areas, and local novocain injections to tender spots in chest. The plaintiff testified the doctor also gave her hormone treatments and B-12's but she did not know what for.

Plaintiff testified she next went for examination to Dr. W. R. Hamsa at Omaha. He made his first three examinations of the plaintiff on November 16, 1959, December 17, 1959, and January 8, 1960. The report of the first examination showed a sprain of the upper thoracic spine and a traumatic trochanteric bursitis of the right hip. His report of this examination stated: "I would expect six to twelve weeks of symptoms in anyone with this type of a fall, and the presence of degenerative changes will doubtless prolong these symptoms." His report of the last of these three examinations on January 8, 1960, stated: "Examination showed a free spine for an individual of 68 years, except for slight restriction of extension. Tenderness persisted in the dorsolumbar region in midline only. The right hip was now painless.

It is my opinion that this patient was in such condition that she could return to work from the mechanical standpoint, but that her general condition would probably be the deciding factor." On May 11, 1960, another examination was made, the report thereof showing: "Examination showed tenderness of the right iliac crest in its middle one-third, that is true lateral aspect of abdominal muscle attachments, but all leg tests were negative. She was advised that orthopedic findings suggested good progress, if not full recovery, and that medical study would be advisable for her general condition."

The plaintiff states she had a kidney flareup while being treated by Dr. Hamsa and he suggested she see Dr. Harley E. Anderson for a pelvic examination. A report of Dr. Anderson dated February 26, 1960, shows he first examined the plaintiff at the behest of Dr. Hamsa on December 17, 1959, and that he saw her again February 3, 1960. She was complaining of a uterine prolapse which she had been told was due to childbearing. A pelvic examination disclosed a cystocele, a small rectocele, high blood pressure, and other ailments which the doctor did not purport to connect with the accident.

Dr. Frank J. Iwersen of Omaha reports the results after an examination on February 26, 1960, of plaintiff's chest and lower extremities including the area of the bruises related by the plaintiff. The report concluded: "It is my impression that this patient probably suffered some contusions and sprains of the muscles of the right leg and low back at the time of her injury, however, I feel that she is making a very excellent recovery and at this time has very minimal complaints and objective symptoms are negligible; there being only mild tenderness over the low back area. The patient's genital urinary and pelvic complaints have also completely cleared and she has no complaints referable to this. I would feel that the patient should have a complete recovery from this injury with no residuals."

Dr. R. W. Tyson of Murray, Nebraska, treated her for

hypertension and nervousness starting April 4, 1960, and has seen her a dozen times. His last report says he had no idea what her blood pressure was before the accident, and that specialists in Omaha had been seen in regard to her injuries and he had given no attention to that phase of her trouble.

Dr. Henry J. Lehnhoff, Jr., reports his examinations of June 3, 1960, and June 7, 1960. Plaintiff gave a history of the accident and complained of distress in the lower abdomen and nervous crying spells. His examination disclosed the cystocele and rectocele which he considered mild. Urinalysis showed the presence of pus in the urine due to chronic cystitis which was intensified by a nervous tendency but which he thought she probably could control. He stated: "I have found no permanent disability resulting from the accident. She did have some nervous stress. Her blood pressure is now controlled by the medicine Doctor Tyson gives her."

A report dated August 29, 1960, by Dr. Howard B. Hunt of Omaha states that a radiographic study of the pelvis of the plaintiff disclosed an extensive cystic rarefaction through the right acetabulum (the cup-shaped socket in the hipbone that receives the head of the thighbone) and a smaller cyst in a comparable position on the left acetabulum. The doctor does not relate his findings to the accident one way or the other.

On January 10, 1961, Dr. Hamsa reports concerning a subsequent examination on January 9, 1961, almost precisely a year after his previous examination, in which he states: "Examination shows a quite free spine without discomfort. The hips are quite free for this stocky build, but the extremes of motion of the right hip reproduces right groin discomfort. Tenderness localizes over the right postero-lateral back musculature and leg tests are negative. The chest is free." He notes, however, possible early traumatic arthritis of the right hip. Plaintiff was reexamined by him March 1 and 31, 1961. The cyst above the acetabulum of the right hip is here

first mentioned by him and he concludes: "I am unable to state whether this hip joint change antedated her accident, which occurred on 10/9/59. At that time her symptoms did not particularly mention hip pain; hence, this area was not x-rayed. However, the hip joint evidence now is sufficient to explain right hip pain persisting. The disability, however, is not measurable. Such a change is predisposed to strain or injury."

Dr. Harold N. Neu reports at length concerning his examination of the plaintiff on April 11, 1960, concluding: "It is my impression that this woman has a benign essential hypertension which probably has been existing for some time. This is suggested by the cardiac silhouette and by the marked left axis deviation of the electrocardiogram. It would be my opinion that this is completely unrelated to the fall which she had. Her condition is quite common in women of her age and is in no sense to be construed as secondary to such a fall."

On July 26, 1961, Dr. F. J. Mnuk of Omaha made a report concerning an examination of the plaintiff made July 23, 1961. The history was related by the plaintiff and he concludes: "It is my opinion that Mrs. Winifred Hula sustained injury to her right hip and back as result of this fall. From the history that she gave of being free from pain and symptoms, and having suffered no disability to her back and hip prior to this fall, I am of the opinion that the fall aggravated a pre-existing dormant conditon in her back and hip. The reports clearly indicate that the arthritic condition in her right hip is more severe than the arthritic condition in her left hip. In a back and hip of her type, injury of any kind would increase the amount of pain and extent of the arthritic condition. It is my further opinion that from the amount of involvement in the spine and hip, as shown by my examination and the X-ray reports, that Mrs. Hula will not be able to again engage in gainful employment and is totally disabled from carrying on her

previous type of endeavor." The report does not mention the cysts.

Dr. Mnuk referred the plaintiff to the X-ray department of St. Catherine's Hospital at Omaha. A report was made July 24, 1961, by James Kelly, M.D., which concludes: "Films of the dorsal, lumbar spine, pelvis and hip areas show some arthritic changes as described above. There are no changes in any area that would indicate definite previous fracture or other type of trauma."

All of the reports mentioned were from doctors selected by the plaintiff herself or from those to whom she had been referred by the doctors consulted by her except Dr. Neu and Dr. Iwersen who examined her on behalf of the defendant insurance company and Dr. Mnuk whose examination took place at the suggestion of her own counsel.

As far as the course of treatment concerning nutritional anemia, cystocele, rectocele, uterine prolapse, the cystitis or inflammation of the bladder, and the high blood pressure, the reports of the doctors completely fail to connect any of these ailments with the injury sustained by the plaintiff. Most of the reports, in fact, expressly state there was no such connection. Plaintiff nevertheless urges that any disability resulting therefrom was caused or aggravated by the accident, basing her contention almost entirely on the testimony of the plaintiff and her husband that the plaintiff had no such ailments before the accident.

Further, plaintiff claims that regardless of whether the ailments in the paragraph immediately preceding were caused or contributed to by the accident that the reports of Dr. Mnuk and Dr. Hamsa establish that she is suffering from an arthritic condition in her right hip which the fall aggravated. Dr. Hamsa's report of an examination in January 1961 does note a possible early traumatic arthritic condition of the right hip. However, he does not necessarily relate this finding to the acci-

dent now being considered. In his report of the two examinations in March 1961, he states her original symptoms did not mention this pain. He speaks of the cyst above the acetabulum and states there is sclerosis of the margins of this cyst and spurring above at the edge of the acetabulum, which condition he states is quite old and is at least of 2 or 3 years' duration. He adds that the disability is not measurable. After an earlier examination on May 11, 1960, almost a year earlier, he had found the right back and leg tests negative.

The report of Dr. Mnuk alone relates the condition he diagnoses to the accident related to him by the plaintiff. The report is based on an examination made more than a year and 9 months after the accident. It is significant that his examination was suggested by the plaintiff's counsel and took place 4 days before the trial before the whole compensation court and was reported the day before. It does not mention the cysts which had been discovered by the other doctors. Moreover, the report of the physician at St. Catherine's Hospital concerning the X-rays there taken at Dr. Mnuk's request fails to find any changes in the area that would indicate fracture or other type of trauma. Neither is Dr. Mnuk's conclusion borne out by the reports of the other doctors.

Considering the evidence before us de novo as we are required, we conclude that the plaintiff has failed to establish that she has suffered permanent injury from the accident or an aggravation of a previous ailment therefrom.

It further appears from Dr. Hamsa's examination of January 8, 1960, that the plaintiff was then able to return to work and that the results of the accident had been alleviated.

In Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N. W. 2d 159, the following rules were set forth by this court: "In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity.

"The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery.

"The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim.

"In a rehearing in the Nebraska Workmen's Compensation Court a de novo consideration is required."

The doctor bill of Dr. Hamsa to January 8, 1960, as well as the bills of St. Catherine's Hospital, Drs. Gross & Iwersen, and Drs. Neu & Reedy, together with certain travel expenses of the plaintiff and a portion of Dr. Austria's bill have been paid or allowed. The compensation court disallowed the other doctor bills and medical and travel expenses claimed, holding the rest were not connected with treatments related to the accident. We conclude its findings in this respect were correct.

We conclude the trial court properly applied the rules stated to the case before us and its judgment dismissing the plaintiff's petition was correct and should be and is affirmed.

AFFIRMED.

ROSS CAPPELLANO, APPELLANT, V. ANTHONY PANE, APPELLEE.

134 N. W. 2d 76

Filed March 26, 1965. No. 35849.

1. **Automobiles: Statutes.** The Iowa guest statute, although in derogation of common law, is to be liberally construed with a view to promote its objects and assist the parties in securing justice.
2. **Automobiles.** Under the Iowa guest statute, in determining whether the occupant is a guest, each case must be decided in the light of its own facts, and it is always important to ascertain, if possible, what it was that primarily motivated the undertaking.
3. ———. Under the Iowa guest statute, to remove a passenger

from guest category, it is not sufficient that parties have a common interest and purpose in the trip or that it is contemplated that some indirect benefit will accrue to the operator, but the motive or provocation for the invitation must be more than social, the transportation must be in furtherance of something in the nature of a business or commercial interest, and the benefit derived must be material and tangible and must flow from and depend on transportation.

4. **Automobiles: Negligence.** Under the Iowa guest statute, there is a rebuttable presumption that an occupant riding in a car operated by another person is a guest within the meaning of the guest statute, and he has the burden of proving otherwise in an action predicated upon negligence of the operator.
5. ———: ———. Under the Iowa guest statute, defendant in an automobile negligence action is not required to raise the question of the passenger's status as a guest as an affirmative defense, but plaintiff, if a passenger, must prove as part of his main case that he was riding in the automobile in some relationship other than as a guest.
6. **Automobiles.** Ordinarily under the Iowa guest statute where the only benefits conferred upon the person extending the invitation are those incidental to hospitality, companionship, or society, the passenger is held to be a guest. Where the passenger is a social guest or casual invitee he is usually regarded as a guest even though he may contribute something toward the expenses of the journey and may be expected to operate the car on part of the trip.
7. ———. The mere division of expenses among members of a party riding in an automobile does not render the person so contributing a passenger for hire as regards applicability of the Iowa guest statute.
8. **Automobiles: Negligence.** As used in the Iowa guest statute, "reckless operation" means proceeding without heed of or concern for consequences. It means more than negligent operation. It may but does not necessarily include willfulness or wantonness. It implies no care coupled with disregard for consequences. Speed alone does not amount to recklessness. Conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless.
9. ———: ———. Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences.
10. ———: ———. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show

some act of the host that amounts to utter indifference to the safety of the guest.

11. ———: ———. To establish reckless operation under the Iowa guest statute, it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting to an almost certain probability and not a possibility; and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Stoehr, Rickerson, Sodoro & Caporale and Frank Meares, for appellant.

Haney, Walsh & Wall and Gordon H. Miles, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

The plaintiff Ross Cappellano brought this action against the defendant Anthony Pane in the district court for Douglas County, Nebraska. Its purpose was to recover for personal injuries which the plaintiff sustained in a one-car accident while riding in defendant's automobile. The accident occurred on U. S Highway No. 75 in the State of Iowa which requires our application of the laws of that state to the cause of action.

At a trial to a jury, the defendant's motion for a dismissal or in the alternative for a directed verdict for the defendant made at the close of the plaintiff's evidence was sustained and the case was dismissed. Plaintiff brings the cause here on appeal after his motion for a new trial was overruled.

The plaintiff assigns error to the trial court in its sustaining defendant's motion for a directed verdict which plaintiff claims was contrary to the law and the evidence presented.

Plaintiff Ross Cappellano was seriously injured in a one-car accident which occurred on U. S. Highway No. 75, hereinafter referred to as highway 75, near Mondamin, Iowa, on September 18, 1960. Plaintiff at that time was riding on the front seat of a 1953 Buick two-door hardtop then operated and owned by the defendant. Both plaintiff and defendant were residents of Omaha, Nebraska. They were friends, having known each other since the defendant came to Omaha from Italy 6 to 8 years previously. The morning before the accident the plaintiff drove to the defendant's home and asked if the defendant wanted to go to the dog races at Sioux City, Iowa. The defendant said he would like to go but that he would take his car. Later the defendant picked up the plaintiff at the plaintiff's home. After attending the dog races, the accident occurred while they were returning to Omaha from Sioux City. They had previously attended race tracks together at Columbus and Grand Island, Nebraska. Defendant had never before driven over the road which they took on their trip but the plaintiff had. The defendant did not know the road, had no road map, and did not ask anyone how to get there. The defendant admitted that under the circumstances the plaintiff must have directed him and that the plaintiff was the one who must have known the way. The road taken by them included a portion of highway 75 through Mondamin. On their return over this same segment the accident occurred.

They left the race track right after seeing the last race about 6 o'clock p.m. Plaintiff had won $88 at the races and the defendant told plaintiff that he had lost. Defendant asked to borrow $20. Plaintiff gave him $20. Plaintiff testified on direct examination: "I said, 'Keep ten for the car and keep ten for yourself.' You know, I more or less loaned him ten, and the other ten was for the car." When asked, "By the 'car,' you mean what?" he answered, "Service, you know, for taking me up, for him and I. He paid for going up, and I wanted to pay my

share going back." The defendant accepted the money and it was given to him out of the $88 which the plaintiff had won. When plaintiff was asked on cross-examination, "Now, Mr. Pane wasn't charging you for this ride, was he?" he answered, "No, he wasn't; not right offhand, he wasn't, no."

Before reaching Mondamin it had become dark and the lights on the car were on. Plaintiff had previously laid down in the front seat about dusk after they had gone 10 or 15 miles out of Sioux City on the interstate before reaching highway 75. He testified that just before lying down he told the defendant to, " 'Take it easy, because we don't want to get a ticket.' " that there were " 'a lot of highway patrols. Keep it down.' " After this he fell asleep and remembers nothing of what happened until after the accident.

The testimony concerning what occurred at and near the scene of the accident is supplied by Michael Koory, Jr., and Sam Grasso, both of whom reside in Omaha and had traveled the road many times. They had been to the same race course that day and were returning to Omaha, both riding in the front seat of an automobile driven by Koory. What later was identified as the Pane car passed that in which they rode to its left going south just north of Mondamin on highway 75 with its lights on. Koory was then driving at from 60 to 70 miles per hour. The highway there is a two-lane blacktop road. The weather was clear and the road was dry but vision was limited by darkness. A short distance further south from where the Pane car passed them highway 75 curves sharply to the east, or left, in going to Omaha. A warning sign 1½ by 1½ feet square is located before the curve is reached although its exact distance from the curve is not shown. It consists of a curved arrow pointing to the east. At the point where the curve begins to turn east there is a dirt or graveled road proceeding on south in the general direction of highway 75 although not pecisely in line with it. An

area is left between the highway as it makes the curve and the dirt road. The Pane car continued straight ahead off the highway into the area between the two roads. From the point where the automobile left the road the ground drops off approximately 6 feet and there is a sort of gully there. The defendant's car went down the drop and traveled a distance of 100 yards or more landing on its roof upon a pile of rocks or boulders. Both occupants were thrown from the car on opposite sides and landed a considerable distance from it.

Concerning the nature of the curve, Koory said: "It is a curve that I would say you would have to take with caution or know it is there or it is very easily missed." One not familiar with it might have gotten the impression the road went straight on south, particularly so if cars were approaching from that direction. Grasso's testimony was much the same as to the nature of the curve. As the Pane car passed, Grasso said, " 'This car is going to go by us; I hope he makes the curve.' " He saw dust flying and exclaimed, " 'I don't think he made the curve.' "

Two questions are raised by the plaintiff's contention that there was error in the trial court sustaining the defendant's motion for a directed verdict. The first question concerns whether the plaintiff was a guest within the meaning of the Iowa code. Section 321.494, I. C. A., 1946, reads: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle."

Concerning the first question, the plaintiff's argument is two-pronged. He contends the plaintiff as a rider in the vehicle directed the route to be taken by the defendant and this he claims constituted a benefit to the defendant, or a mutual benefit to both of them. This

because it is shown the defendant did not know the road from Omaha to Sioux City, had no road map, and made no inquiries, and because defendant concedes that plaintiff assisted him in directing the course of the route to be taken. He also urges that in any event the payment of the $10 for the use of the car and the $10 as a loan made him a passenger for hire and not a guest. He urges that because of either contention, or the two combined, at least the question of whether he was a guest or a passenger for hire or one whose presence was for the benefit of both of them mutually should have been submitted to the jury.

There are many cases from the Supreme Court of Iowa interpreting the guest statute set out with respect to the status of those riding in an automobile driven by others. The case of Nielsen v. Kohlstedt, 254 Iowa 470, 117 N. W. 2d 900, was a case where a "mud mixer" to a bricklayer, and the bricklayer himself, both engaged in construction work on the same job, rode together to their work. The plaintiff, the "mud mixer," was injured by an accident which occurred while riding in the defendant bricklayer's car as a result of an intersection collision. The court held that a motion for a directed verdict should have been sustained and reversed a judgment entered for the plaintiff on a verdict. In doing so, the following rules were laid down: Guest statute, although in derogation of common law, is to be liberally construed with a view to promote its objects and assist the parties in securing justice.

In determining whether the occupant is a guest, each case must be decided in the light of its own facts, and it is always important to ascertain, if possible, what it was that primarily motivated the undertaking.

To remove a passenger from guest category, it is not sufficient that parties have a common interest and purpose in the trip or that it is contemplated that some indirect benefit will accrue to the operator, but the motive or provocation for the invitation must be more

than social, the transportation must be in furtherance of something in the nature of a business or commercial interest, and the benefit derived must be material and tangible and must flow from and depend on transportation, although it is sufficient if the benefit comes from a third person.

Murray v. Lang, 252 Iowa 260, 106 N. W. 2d 643, was a case where two young men, one the son of the owner of the automobile and the other the operator thereof, were friends. Both had dates at the town of Kellogg. The son of the owner, who was killed in the accident, had the car to use in keeping his date. The operator went along so he would be enabled to keep his date also but was permitted to drive. In an action against both the driver of the other car and the operator of the car in which the deceased rode, the decedent was treated by the court to be the owner of the car in which he rode. The appellate court held the trial court was correct in holding as a matter of law that the decedent was a guest in the car at the time, stating: "Whether he be owner or passenger—there is a presumption—rebuttable—that an occupant riding in a car operated by another person is a guest within the meaning of the guest statute, and he has the burden of proving otherwise in an action predicated upon negligence of the operator."

The plaintiff in his brief relies to a considerable extent on the case of Livingston v. Schreckengost, 255 Iowa 1102, 125 N. W. 2d 126, where two schoolteachers living at Mason City, Iowa, were attending summer school at the State College of Iowa at Cedar Falls. There was evidence of an agreement to share expenses of commuting between the two cities, one to drive one day and the other the next. In a suit by the administratrix of the estate of the one killed in an automobile accident while the other was driving, the Iowa court held there was a jury question of whether the purpose of the arrangement was primarily social and saving of expenses incidental,

bringing the guest statute into application, or whether the relationship was primarily one of business, and held: Defendant in an automobile negligence action is not required to raise the question of the passenger's status as a guest as an affirmative defense, but plaintiff, if a passenger, must prove as part of her main case that she was riding in the automobile in some relationship other than as a guest. In the cited case the court said: " 'Ordinarily where the only benefits conferred upon the person extending the invitation are those incidental to hospitality, companionship or society, the passenger is held to be a guest. Where the passenger is a social guest or casual invitee he is usually regarded as a guest even though he may contribute something toward the expenses of the journey and may be expected to operate the car on part of the trip.' " Many Iowa cases are there cited.

Other cases of the Iowa court refer more particularly to the relation of the parties as affected by the payment of money to the owner or operator by the injured party. Included among them is the case of McCornack v. Pickerell, 225 Iowa 1076, 283 N. W. 899, where plaintiff was riding in the automobile at the invitation of defendant with the understanding that plaintiff was to pay for a third of the gas and oil, take a lunch, and help pay expenses of the trip. The court found the plaintiff was not a passenger for hire but a guest who could not under the automobile guest statute recover for mere negligence. It held the mere division of expenses among members of a party riding in an automobile does not render the person so contributing a passenger for hire as regards applicability of the automobile guest statute. The appellate court concluded that although there was a verdict and judgment for the plaintiff, the trial court should have sustained defendant's motion for a directed verdict. A similar case with like results is Haas v. Owens, 248 Iowa 781, 81 N. W. 2d 654.

It appears quite clearly that the purpose of the plaintiff in going to Sioux City was primarily social. Apparently both plaintiff and defendant enjoy going to races. They had done so before. The plaintiff first suggested the present trip. It would appear he desired companionship not relating to business. There was no agreement as to the payment of expenses in advance, nor was any shown on the occasions of the previous trips to Columbus or Grand Island. The contention that the plaintiff's presence was of value to the defendant in directing the roads to be taken lacks substance. We cannot regard it as material or tangible. The defendant could easily have procured maps or made inquiry and ascertained the way, but quite naturally relied on his friend who had suggested the trip and was present and familiar with the route. This is consistent with a social outing as well as a business trip. Plaintiff seems to argue he was in a sense acting as a guide to the defendant in the operation of his automobile. It might be said in passing that if he so considered himself, he seems to have failed in his office at the crucial period of the trip when, at the approach of darkness after giving a final and rather perfunctory warning, he laid back and went to sleep. Neither are we impressed with the payment of $10 on the expense of the car. The defendant had requested a loan of $20. The plaintiff had been quite fortunate at the races, very probably unusually so, and had won $88. His companion had lost. Plaintiff appears to have loaned him $10 and gratuitously given him $10. If the defendant had been the lucky one he might have done likewise. The burden to show the trip was of a business nature was on the plaintiff. The same is true as to the burden of showing he was a passenger for hire. The Iowa court in cases which appear as favorable to the plaintiff as the one before us upon these issues has held as a matter of law that the occupant of the car was a guest within the meaning of the statute. The plaintiff's

contention that he was not a guest under the circumstances cannot be sustained.

Having decided that the plaintiff's status in the defendant's car was that of a guest, the question remains as to whether or not there was sufficient evidence to submit the question of whether the defendant was guilty of reckless driving within the terms of section 321.494, I. C. A., 1946. This court as late as 1951 reviewed the cases under the Iowa statute in the case of Yanney v. Nemer, 154 Neb. 188, 47 N. W. 2d 368. Many of the applicable Iowa cases are cited in the opinion in that case. There this court called attention to the review of the Iowa cases in Russell v. Turner, 56 F. Supp. 455, and the appeal thereof in 148 F. 2d 562. The same case pointed out other Nebraska cases where the Iowa guest statute had been reviewed and construed before. We have now been cited by the plaintiff and defendant to more recent Iowa cases, most of which we will not review for the reason that we can find in them no departure to those rules which we set out in Yanney v. Nemer, *supra,* which were as follows: "As used in the Iowa guest statute, 'reckless operation' means proceeding without heed of or concern for consequences. It means more than negligent operation. It may but does not necessarily include willfulness or wantonness. It implies no care coupled with disregard for consequences. Speed alone does not amount to recklessness. Conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless.

"Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences.

"In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest.

"To establish reckless operation under the Iowa guest

statute, it is necessary to show that the danger was known to the driver, or was so obvious and apparent that the driver must be held to have known of it; or that there was a danger amounting to an almost certain probability and not a possibility; and that the driver, with conscious knowledge of such situation, did not exercise the slightest care to avoid injury to his guest."

We deem it appropriate, however, to discuss the case of Fritz v. Wohler, 247 Iowa 1039, 78 N. W. 2d 27, a 1956 case in which again the Iowa Supreme Court sustained the judgment of the trial court in directing a verdict for the defendant, and the Iowa court reviewed the cases construing its guest statute as follows: "Throughout the 25 years of deciding reckless-driving cases we have consistently based the question of submission to the jury on a foundation of similar principles of law. We quote from the first decision rendered in 1931 and from one of our two recent decisions rendered in 1956. In Siesseger v. Puth, supra, we said at page 182 of 213 Iowa: 'In light of the circumstances under which said chapter 119 was passed, it is apparent, we think that the Legislature intended the word "reckless" therein to mean "proceeding without heed of or concern for consequences." To be "reckless," one must be more than "negligent." Recklessness may include "wilfulness" or "wantonness," but if the conduct is more than negligent, it may be "reckless" without being "wilful" or "wanton," but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies "no care, coupled with disregard for consequences." ' In the recent decision of Nesci v. Willey, supra, we said at page 624 of 247 Iowa, page 259 of 75 N. W. 2d: 'To constitute recklessness under the guest statute, conduct must be more than negligent and must manifest a heedless disregard for or indifference to the consequences or the rights or safety of others. It, of course, need not involve moral turpitude or wanton and willful misconduct. Harvey

v. Clark, supra (232 Iowa 729, 6 N. W. 2d 144, 143 A. L. R. 1141). There must be an awareness, actual or constructive, of the unusual danger presented by the circumstances, and also a manifestation of "no care." Schneider v. Parish, supra (242 Iowa 1147, 49 N. W. 2d 535). We have frequently and consistently held that conduct arising from mere inadvertence, thoughtlessness or error in judgment is not reckless. Harvey v. Clark, Olson v. Hodges (236 Iowa 612, 19 N. W. 2d 676) and Schneider v. Parish, all supra, and cases cited therein.' "

We think the discussion in this case as well as our review of the other Iowa cases in the briefs of the parties show that there has been no departure by the Iowa court from the rules stated by this court in its review in Yanney v. Nemer, *supra.*

In the case before us the defendant operator of the car had only been over the road in question once and that was in the opposite direction and in the daytime. He approached a curve which according to the testimony of the plaintiff's own witnesses was one which would have to be taken with caution and would be very easily missed. Although the defendant must have passed Koory's car at a speed of more than 60 to 70 miles per hour, there is no evidence as to any statutory speed limit applying other than a restriction to that which was reasonable and proper. Also in Fritz v. Wohler, *supra,* it was held that speed alone could not be considered reckless driving. The plaintiff urges that the distance the automobile traveled after it left the road before it came to rest on its top is significant but it would only indicate speed at the most, and moreover there was drop of 6 feet from the road and the car was found in the gully. Whether or not defendant lost control when the car took the drop is not shown. We do not think the evidence submitted shows that the defendant used no care coupled with heedless disregard or indifference to the consequences. Neither does it

show that because he had once driven the road in the daytime and in an opposite direction that he was aware actually or constructively of the unusual danger presented by the circumstances. It may be conceded that his conduct arose from inadvertence, thoughtlessness, and an error in judgment but as a matter of law reckless conduct was not established.

It follows that the judgment of the trial court was right and should be and is affirmed.

AFFIRMED.

IN RE ESTATE OF MARY EDITH LAMBIE, DECEASED. WILLIAM MONMOUTH LAMBIE, APPELLEE, V. GERALD D. STAHL, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF MARY EDITH LAMBIE, DECEASED, APPELLEE, IMPLEADED WITH WALLACE H. LAMBIE, APPELLANT.
134 N. W. 2d 86

Filed March 26, 1965. No. 35853.

1. **Courts: Descent and Distribution.** On its probate side a county court lacks competency to determine disputed title to personal property except as an incident to its jurisdiction over settlement and distribution.
2. ———: ———. On a claim by a legal representative of a decedent's estate, the coincidence that the alleged debtor with an adverse defense is also named a legatee, without other circumstances, does not establish probate jurisdiction to render a personal judgment against him.

Appeal from the district court for Clay County: NORRIS CHADDERDON, Judge. Affirmed as modified.

E. Merle McDermott and Flansburg, Mattson, Field, Ricketts, Sorensen & Gourlay, for appellant.

S. W. Moger, Leon A. Sprague, and John A. Bottorf, for appellee Lambie.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

Review of a final administration account in a decedent's estate is the occasion for determination of probate jurisdiction to render a money judgment on a claim on behalf of the legal representative against a named legatee whose defense is adverse to the estate. The county court approved the administration account; but on appeal the district court, after a trial, overruled the order of approval and remanded the cause with directions.

Procedural events have obscured the primary issue. Wallace H. Lambie and William Monmouth Lambie are named residuary legatees in the will of their mother, Mary, deceased. In the course of administration of her estate William filed objections to the final administration account, alleging that Wallace had not accounted for rentals collected by him for her and that the estate was not ready to be closed. The administrator, with will annexed, later filed a supplemental report to which was annexed a profit and loss statement furnished by Wallace. The county court then found that there were no additional assets, overruled the objections, and approved the administration account as supplemented.

On appeal William prayed that Wallace be directed to make a complete report and that judgment be rendered against him for $58,000. The district court made findings upon which any liability of Wallace was to be based, and directed him to file a report in county court.

On the jurisdictional issue we look to the relationship between parties and claim. William requests neither a surcharge on the administration account nor an application of the doctrine of retainer. The case for jurisdiction must rest on fiduciary transactions prior to Mary's death and Wallace's status as a named legatee. It is not enough.

A title dispute between an estate representative and a third person with an adverse claim is ordinarily decided in another forum. Exceptions have arisen to meet a

practical need for expanded probate jurisdiction until today determination of title is often recognized as an incident to jurisdiction over settlement and distribution. See In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483.

The reason for expansion marks off the limit. Jurisdiction to enforce a right of retainer does not imply jurisdiction to render a personal judgment. See, Nelson v. Janssen, 144 Neb. 811, 14 N. W. 2d 662; Thompson v. McCune, 333 Mo. 758, 63 S. W. 2d 41; State ex rel. Toller v. Ennis, 222 Mo. App. 713, 7 S. W. 2d 737; In re Sheley's Estate, 35 N. M. 358, 298 P. 942. A contrary pronouncement in Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711, is disapproved.

That principle emphasizes the requirement that there be an exercise of probate jurisdiction. Insufficient is Wallace's dual status as an alleged debtor with an adverse defense and a named legatee. See, In re Donaldson's Estate (Fla. App.), 147 So. 2d 552; In re Singleton's Estate, 26 Nev. 106, 64 P. 513; Stewart v. Lohr, 1 Wash. 341, 25 P. 457, 22 Am. S. R. 150.

Different rules have been applied to a claim against a legal representative or against a creditor for a refund. See, Whiteside v. Whiteside, 159 Neb. 362, 67 N. W. 2d 141; In re Estate of Wiley, *supra;* In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829; Howells State Bank v. Estate of Muller, 113 Neb. 177, 202 N. W. 450. They do not control here.

With Wallace's concession that the administrator is a proper party to prosecute the claim, we conclude that it has not been administered and that approval of this item of the administration account is premature. We express no opinion on the merits of the claim and we decide that the findings of the district court in this respect are erroneous because inappropriate.

The judgment under review is correct in disallowing this item of the administration account, but it should be modified by: (1) Instructing the administrator to

prosecute the claim and directing him to account to the county court; and (2) vacating the remand to the county court. As so modified, the judgment should be, and is, affirmed with costs in this court apportioned equally between Wallace and William.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. LONGMORE, APPELLANT.
134 N. W. 2d 66

Filed March 26, 1965. No. 35856.

1. **New Trial: Appeal and Error.** An order overruling a motion for a new trial and placing the defendant on probation is a final appealable order under section 25-1912, R. S. Supp., 1963.
2. **Appeal and Error.** Neither a request for, nor an acceptance of, an order of probation is, in itself, a voluntary waiver of the right of appeal.
3. ———. A defendant must appeal from the order within the statutory time. He may not take the benefit of his probation and hold off on his appeal.
4. **Criminal Law: Evidence.** In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.
5. ———: ———. The court must first determine on evidence taken out of the presence of the jury, if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made. The question to be determined by the court is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis.
6. ———: ———. Counsel for the defendant, before the confession is admitted, has a right to cross-examine the witnesses who propose to testify to it as to the circumstances surrounding the making of it, and may also call at the same time independent witnesses and examine them, going thoroughly into the whole matter as to how the confession came to be made, the parties present, and the physical condition and state of mind of the prisoner at the time it was made; and then the court, with all these facts before it, is to pass upon its admission.

7. ———: ———. The admission of the confession in evidence constitutes the court's independent determination that the confession is voluntary.
8. ———: ———. The extent to which defendant's right to consult counsel, during the period prior to and during the interrogation, was delayed or denied is clearly proper to be shown.
9. ———: ———. The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury.
10. **Constitutional Law: Evidence.** The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains.
11. **Homicide: Trial.** A defendant formally indicted and charged with a homicide is entitled to the right of effective counsel at every step of the proceedings.
12. **Constitutional Law: Evidence.** A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights.
13. ———: ———. A confession obtained in violation of the defendant's constitutional rights is involuntary and inadmissible in evidence.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Reversed and remanded.

E. J. McCarthy and Frank J. Kneifl, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is a criminal action in which Robert E. Longmore was charged with second degree murder and found guilty of manslaughter by verdict of the jury. Thereafter the district court entered an order which overruled the motion for a new trial and in the same order placed

Longmore on probation for 2 years under conditions. Appeal was promptly taken.

The State filed a motion to dismiss the appeal upon the ground that no final order of judgment has been entered, there being no sentence; and that Longmore had accepted the terms and conditions of his probation and, therefore, had waived his right of appeal.

The issues raised in the motion to dismiss have not been passed upon before by this court and necessitate a decision upon the motion before considering the case on the merits.

Article I, section 23, of the Nebraska Constitution, provides in part that: "The writ of error shall be a writ of right in all cases of felony; * * *." In 1961, the Legislature, in effect, abolished the writ of error, and provided that appeals under the criminal code be the same as in civil cases. § 25-1912, R. S. Supp., 1963.

The development of the law on the issues involved here can be seen from a thorough examination of the cases; but differences in statutes, constitutions, and factual situations have led to many different results. The authorities reflect the divergent attitudes of the various courts which have passed upon the issues. See, 4 Am. Jur. 2d, Appeal and Error, §§ 161, 270, 274, pp. 674, 764, 767, and supplements; 24 C. J. S., Criminal Law, §§ 1649, 1668, pp. 1004, 1047, and supplements; Annotations, 126 A. L. R. 1210, 117 A. L. R. 929.

The State points out that we have held many times that a judgment or final order must include a sentence. None of the cases cited involved a probation order. Apparently the last such pronouncement was in Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853, and it also held that error proceedings may be taken from the overruling of the motion for new trial, or the imposition of sentence, whichever is the later.

Historically the courts generally held that imposition of a sentence was required for finality; and that acceptance of probation waived the defendant's right to appeal.

The federal rule has developed from that point. See, Berman v. United States, 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204 (relied upon by the State here); Birnbaum v. United States, 107 F. 2d 885; Nix v. United States, 131 F. 2d 857. The present federal rule, however, has been in effect since 1943.

Korematsu v. United States, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497, established this rule. In that case, the court said: "In the Berman case, supra, we held that the appeal was proper where the sentence was imposed and suspended, and the defendant was placed on probation. The probationary surveillance is the same whether or not sentence is imposed." The court further said: "* * * a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.' Cooper v. United States, 91 F. 2d 195, 199.

"The difference to the probationer between imposition of sentence followed by probation, as in the Berman case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. Probation, like parole, 'is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency,' Zerbst v. Kidwell, 304 U. S. 359, 363, and this end is served in the same fashion whether or not probation is preceded by imposition of sentence. In either case, the liberty of an individual judicially determined to have committed an offense is abridged in the public interest. In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.' Berman v. United States, supra, 212, 213."

Many, if not most, of the cases on the issue of waiver of the right of appeal by acceptance of probation, involve cases where the defendant accepted probation, and later attempted to appeal when the probation was terminated

and sentence imposed. One of the leading cases on the issue for many years was the case of Brooks v. State, 51 Ariz. 544, 78 P. 2d 498, 117 A. L. R. 925. It has been cited as an authority for the historical rule on many occasions. The defendant there was given a suspended sentence and probation and almost 2 years later violated the conditions of his probation and sentence was thereupon entered. The court held that by accepting the benefits of the probation he had waived his right of appeal. In 1962 the Arizona court overruled the Brooks case in State v. Heron, 92 Ariz. 114, 374 P. 2d 871. The court stated: "The policy expressed by the cases holding the sentence is the judgment seems to be that the defendant should be grateful he is not behind bars. He cannot appeal from his conviction because he is better off than he might be. If he wants to test his conviction he must give up his freedom and appeal from his cell. * * *

"One who is placed on probation is subjected to an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. In either case the defendant is worse off than he would be had he not been convicted."

For cases related in result or reasoning, but on other grounds or issues, see, State v. Carroll (N. D.), 123 N. W. 2d 659; Rash v. State (Tex. Cr.), 323 S. W. 2d 53; State v. Miller, 225 N. C. 213, 34 S. E. 2d 143; State v. Carpenter, 67 Idaho 277, 176 P. 2d 919.

Our statutes make it mandatory that the district court "* * * ascertain, if practicable, through the agency of a probation officer or otherwise, the age of the accused, whether the offense of which he is found guilty by such verdict is his first offense, the extent of the moral turpitude involved in the act committed by the accused, and such other facts and circumstances relating to the accused as he may desire to know." § 29-2217, R. R. S. 1943. "In case such judge, considering the age of the accused, his former course of life, disposition, habits,

and inclinations, or any other obtainable information, should be of the opinion that the accused would refrain from engaging in or committing further criminal acts in the future, the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation * * *." § 29-2218, R. R. S. 1943.

Our statutes on probation make no requirement or provision for either a request from, or an acceptance by, the accused. Historically, the attitude was that a defendant who asked for and accepted probation, had conceded his guilt and thrown himself on the mercy of the court. Under modern probation provisions and procedures, and our present judicial administration, it would be straining logic to the utmost to assume that where the accused asked for probation, he received it only because of the request. It is almost more difficult to contend that after probation is granted and the order entered, it was not really a judicial determination by the court, but was, instead, inspired by the defendant, and was made with an implied condition that he waives his right to appeal by accepting. Such an historical position ignores the realities of the situation. Neither reason nor justice authorize or require any such conclusion. We point out also that the defendant here filed his notice of appeal within the time limit and 11 days after he acknowledged receipt of the order of probation. It can scarcely be said that his attitude was inconsistent with an intention to take an appeal.

In view of our constitutional guaranty of the right of appeal and our statutes which combined civil and criminal appeal procedures in 1961, we hold that an order overruling a motion for a new trial and placing the defendant on probation is a final appealable order under section 25-1912, R. S. Supp., 1963. We hold also that neither a request for, nor an acceptance of, an order of probation is, in itself, a voluntary waiver of the right of appeal. The obvious corollary holding is that a de-

fendant must appeal from the order within the statutory time. He may not take the benefit of his probation and hold off on his appeal.

The motion to dismiss is overruled. We proceed now to a determination of the case on the merits.

The defendant, Robert E. Longmore, was 49 years old, had an eighth grade education, and had been employed by the railroad on the section for 12 to 15 years. He had been married for 29 years. He had lived in Plattsmouth, Nebraska, for approximately 25 years until 1960; and in Ashland, Nebraska, until September 1963, when he moved to Waterbury, Nebraska, where he resided on January 18, 1964. On that date, the defendant and his wife were at a cafe-filling station in Willis, Nebraska. The defendant's wife was employed at the cafe as a waitress. During the course of the evening, one Thomas Quinn, the deceased, had called the defendant's wife vile and filthy names. The defendant had remonstrated and the proprietor had evicted Quinn. At about 10 p.m., Quinn returned to the cafe and again commenced calling defendant's wife vile and filthy names. The defendant and the deceased scuffled in the presence of some 13 to 15 persons in the cafe. After the scuffle, the deceased had a wound on the left side of his neck which had severed the carotid artery and the jugular vein from which the deceased subsequently died. No one saw a knife or weapon. In the early morning of January 19, 1964, defendant was taken into custody by the Dakota County sheriff, questioned by the sheriff and the county attorney, and released at 3 a.m., January 19, 1964, into the custody of Florence and Vernon Chase of South Sioux City, Nebraska. The defendant was again taken into custody on January 19, 1964, at approximately 9:30 a.m., released later, and arrested again about 2:30 p.m., the same afternoon. The defendant was released January 20, 1964, at approximately 8:30 p.m., after a coroner's inquest was held. The defendant was represented at the coroner's inquest by the firm of McCarthy & Kneifl

of South Sioux City, Nebraska. The first part of the week preceding February 14, 1964, the county attorney of Dakota County hired a professional investigator and polygraph examiner from Chicago to investigate the matter. The defendant and his wife were summoned by the authorities to be present for further investigation and the defendant and his wife presented themselves on the morning of February 15, 1964, with their attorney. The defendant and his wife were interrogated by the authorities in the presence of their attorney at the city hall in South Sioux City, Nebraska, and released. During the interrogation, the defendant and his wife were given advice by their attorney concerning matters propounded to them. The authorities were informed that the defendant and his wife could be found at the home of Florence and Vernon Chase if needed further. Later that day, February 15, 1964, the defendant and his wife were charged with second degree murder and warrants were issued for their arrest. The sheriff received the warrants from the county attorney sometime between 8 and 10:30 p.m. on Saturday night, February 15, 1964. In the early morning of Sunday, February 16, between 1:30 and 2 a.m., the sheriff went to the Vernon Chase residence and arrested the defendant and his wife. During the time they were getting up and getting dressed, the sheriff permitted the defendant to call his attorney and advise him that he was being arrested. At the time of the arrest, the sheriff told the defendant's attorney that he was taking the defendant and his wife to jail. The defendant's attorney told the defendant to go along with the sheriff and that the attorney would be right there. The sheriff took the defendant and his wife directly from the Chase residence to Pender, Nebraska, a distance of approximately 40 miles into another county and put them in jail. Vernon Chase inquired where they were taking the defendant and his wife, but the sheriff did not answer. At approximately 2 a.m. on Sunday morning of February 16, the defendant's attorney,

looking for the defendant and his wife, asked the county attorney, in the presence of sergeant Wayne Rowe of the Nebraska Safety Patrol, the whereabouts of his clients. The county attorney refused to tell the defendant's counsel the whereabouts of the defendant and his wife, although the county attorney knew they were enroute to Pender, Nebraska, and he had, prior to that time, made arrangements with the sheriff of Thurston County, Nebraska, to bring the defendant and his wife to Pender. The county attorney and sergeant Wayne Rowe then picked up Leonard Harrelson, the professional investigator, and went directly to Pender, Nebraska, arriving between 3 and 4 a.m. The defendant's wife was interrogated extensively and thereafter at approximately 6:40 a.m., Leonard Harrelson, the professional investigator, took the defendant to an office on the second floor of the courthouse. The sheriff of Dakota County, the deputy sheriff of Dakota County, the sheriff of Thurston County, the county attorney of Dakota County, and sergeant Wayne Rowe of the Nebraska Safety Patrol were present when the defendant was taken to an upstairs room for questioning by Mr. Harrelson alone. The defendant at the very outset of the questioning by Mr. Harrelson stated that he did not want to answer any questions unless his attorney was present. Mr. Harrelson inquired if he knew where his attorney was and suggested to him that his attorney might not be representing him any longer since he was charged with second degree murder. This much was admitted by Leonard Harrelson. The defendant testified that Harrelson threatened him with first degree murder charges and threatened that his wife would also be charged with first degree murder if he did not confess. He said that he saw his wife crying, knew that she was in poor health, and knew that she had been interrogated also. The defendant also testified that Harrelson promised that if the defendant confessed, his wife would be set free the first thing in the morning. The defendant then

agreed to make a statement which he wrote out in his own handwriting in the presence of sergeant Rowe. A preliminary portion of the statement was dictated by Leonard Harrelson. Neither the defendant nor his wife were subjected to any physical threats or violence of any kind. The defendant was not at any time during the interrogation advised of any rights that he had, nor that he had an absolute right not to say anything. After the defendant had signed the statement or confession, which became exhibit 7, he was brought out into the presence of his wife. The defendant's wife was then released and taken home by the sheriff.

The principal issue in this case is whether exhibit 7, the defendant's confession, which was admitted in evidence, was obtained in violation of his rights under the Constitutions of this state and the United States.

"In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made." Parker v. State, 164 Neb. 614, 83 N. W. 2d 347, and cases there cited. The court must first determine on evidence taken out of the presence of the jury, if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made. The question to be determined by the court is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis. It is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. Holthus v. State, 138 Neb. 200, 292 N. W. 603; Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, affirmed, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86. Before the confession is received in evidence, the defendant may introduce evidence to show that the confession is involuntary and

for this purpose may show all of the circumstances under which the confession was made. Counsel for the defendant, before the confession is admitted, has a right to cross-examine the witnesses who propose to testify to it as to the circumstances surrounding the making of it, and may also call at the same time independent witnesses and examine them, going thoroughly into the whole matter as to how the confession came to be made, the parties present, and the physical condition and state of mind of the prisoner at the time it was made; and then the court, with all these facts before it, is to pass upon its admission. Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824; Tramp v. State, 104 Neb. 222, 176 N. W. 543.

Under Nebraska procedure, the admission of the confession in evidence constitutes the court's independent determination that the confession is voluntary. See Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908.

The interrogation of the defendant's wife was clearly a part of the circumstances surrounding the making of the defendant's confession and should have been admitted. The extent to which defendant's right to consult counsel, during the period prior to and during the interrogation, was delayed or denied is clearly proper to be shown. Stagemeyer v. State, *supra.*

The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury. Parker v. State, *supra.*

The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains. Gallegos v. State, *supra.* It became settled in the case of Spano v. New York, 360 U. S. 315,

79 S. Ct. 1202, 3 L. Ed. 2d 1265, that at least as to one formally indicted and charged with a homicide, he is entitled to counsel at every step of the proceedings. As stated by Mr. Justice Douglas in a concurring opinion in that case: "The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. * * * Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself * * *. This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel." Mr. Justice Stewart's concurring opinion held: "Indeed the right to the assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial."

In the case of Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A. L. R. 2d 733, which has already become a classic landmark, Mr. Justice Black stated: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

In the case of Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246, Mr. Justice Stewart's language in the Spano case was paraphrased as follows: "It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" The court in the Massiah case also stated: "Ever since this

Court's decision in the Spano case, the New York courts have unequivocally followed this constitutional rule. 'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' "

In the case at bar, the evidence clearly establishes a violation of the defendant's constitutional rights. The defendant had previously been interrogated on several occasions; and the authorities knew that he was represented by specific counsel retained by him and knew that his counsel was trying to find him. He and his wife were arrested in the middle of the night and taken to a jail 40 miles away in another county. The county attorney, the sheriff and deputy sheriff of one county, the sheriff of another county, a sergeant of the Nebraska Safety Patrol, and the professional private investigator employed by the county attorney all arrived there at approximately 3 a.m. on a Sunday morning and proceeded to interrogate the defendant and his wife. The officials refused to tell the attorney retained by the defendant where the defendant and his wife were; the defendant refused to answer any questions unless his attorney was present; and the professional investigator cleverly misled him into believing that his attorney no longer represented him. No one advised him that he had an absolute right to remain silent. While the professional investigator denies that any promises were made to release his wife if he confessed, the fact remains that immediately after the defendant signed the confession, his wife was released and taken home, although the warrant against her for second degree murder was still outstanding. All of the facts together indicate without any question that this was a secret interrogation, planned and prepared in advance, and deliberately excluding defendant's known counsel. All of the facts

and circumstances establish the fact that the confession was involuntarily made in violation of the due process clause of the Constitutions of the State of Nebraska and of the United States.

A defendant formally indicted and charged with a homicide is entitled to the right of effective counsel at every step of the proceeding. While it is important that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence.

A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights. A confession obtained in violation of the defendant's constitutional rights is involuntary and inadmissible in evidence.

Robert E. Longmore was effectively denied the right of counsel and his constitutional rights were violated. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CARTER, J., dissenting.

I dissent from the opinion of the court in this case on two basic grounds: First, that there is no appealable order and, second, that any right of appeal possessed by the defendant was waived.

As to the first point, it has always been the law of this state that a sentence is necessary to the right of appeal in a criminal case. Farrington v. State, 116 Neb. 712, 218 N. W. 590; Gartner v. State, 36 Neb. 280, 54 N. W. 516. In the instant case the jury returned a verdict of guilty, a motion for a new trial was filed and overruled, and sentence was suspended as provided by section 29-2218, R. R. S. 1943. In Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853, we made it clear that a motion for a new trial that is overruled before sentence is imposed in a criminal case is an interlocutory as distinguished from a final appealable order. The majority opinion

holds that the overruling of a motion for a new trial before sentence and placing a defendant on probation is a final order under section 25-1912, R. S. Supp., 1963. I submit that this creates an exception to our long-established rule and that no logical basis exists for promulgating such exception.

As to the second point, the majority rule is: "As a general rule, the voluntary acceptance of a suspended sentence, probation, or parole waives the defendant's right to appeal." Annotation, 117 A. L. R. 929. In the instant case defendant's counsel pleaded ardently for a suspended sentence and probation. The court granted a suspended sentence and fixed the terms of the probation. A copy of the probation order was given to the defendant, who signed a statement appended thereto in which he acknowledged that he knew its provisions and that he knew he was subject to sentence on the verdict of guilty if he violated its terms. He further accepted probation by accepting release from custody in accordance with its provisions.

The request and grant of a suspension of sentence has the effect of suspending all further proceedings in the case. This is effective not only upon the State but upon the defendant as well. The suspension of all proceedings at the request of the defendant implies an admission of the doing of some legal wrong and his probation for rehabilitation purposes, and not punishment. The terms of the probation require that he conduct himself for a limited period of time as all law-abiding and responsible citizens do. The fact that he is subjected to surveillance by a probation officer to see that he complies does not have the effect of changing probation to punishment. I submit that the statement in Brooks v. State, 51 Ariz. 544, 78 P. 2d 498, 117 A. L. R. 925, that, in accepting a choice between the benefits of suspension and contesting the case by appeal, the defendant should not be permitted to change his position and take the benefit of both and, as that court said: "He cannot eat his

cake and have it too." Many, many cases support this position which I shall not take the space to cite.

A contrary rule has developed in some state jurisdictions since the case of Korematsu v. United States, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497. The basis of that decision is the statement from that opinion to the effect that an appeal can be taken notwithstanding probation on the theory that probation is an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. If this be true, every juvenile delinquent who is placed on probation has received a criminal sentence, a situation which both the courts and Legislature of this state have sought to avoid. The rule adopted by the majority from the Korematsu case is but another instance of coddling of criminals and persons charged with crime by that court which has become so prevalent in recent years.

No basis exists for making an exception to our established rule requiring a final order which includes a sentence before an appeal can be taken to this court in criminal cases. An appeal from a suspended proceeding is an inconsistency of terms. In any event, the request, grant, and acceptance of a suspension of the proceedings by a defendant in accordance with the statute means what the statute says and amounts to a waiver of any further proceedings, including an appeal.

BERTHOL BROWN, APPELLEE, V. K. B. KAAR, DOING BUSINESS AS KAAR SERVICE, APPELLANT.

134 N. W. 2d 60

Filed March 26, 1965. No. 35859.

1. **Negligence: Trial.** It is prejudicial error for the trial court to submit to the jury allegations of negligence for which there is no proof.
2. **Trial: Appeal and Error.** Whether requested to do so or not, the trial court has the duty of instructing on issues presented

by the pleadings and the evidence, and failure to do so constitutes prejudicial error.

3. **Witnesses: Evidence.** A witness is not competent to give an opinion unless shown to possess the necessary learning, knowledge, skill, or practical experience to enable him to give the opinion testimony.
4. **Negligence: Evidence.** Evidence of subsequent conduct of one whose negligence is alleged to have caused or contributed to an accident or injury is inadmissible to show antecedent negligence.
5. **Negligence.** Negligence is never presumed and cannot be inferred from the mere fact that an accident happened.
6. ———. Whether errors of judgment will or will not make the defendant expert liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has handled the matter skillfully or has exercised such reasonable skill and diligence as is ordinarily exercised in his business or profession.
7. ———. If the defendant's conduct was negligent and was a substantial factor in bringing about the situation, the normal action of livestock operating in conjunction with it is not a superseding cause of harm.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Reversed and remanded.

Kier, Cobb & Luedtke, Janice L. Gradwohl, and John P. Glynn, Jr., for appellant.

Baylor, Evnen, Baylor & Urbom and J. Arthur Curtiss, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is an action against an automobile wrecker operator for damages to a livestock truck trailer and cargo when it tipped over during attempts to move it back on the highway. The jury verdict was for the plaintiff and the defendant has appealed. The principal issues involve rulings on admissibility of evidence and instructions to the jury.

The plaintiff was driving a livestock truck trailer loaded with 165 hogs on four decks between Omaha

and Lincoln, Nebraska, on the westbound lanes of the interstate highway in a blizzard. He hit a snowbank and went off the highway and down into the median area between the eastbound and westbound lanes of the four-lane divided highway. The area sloped down from the shoulder on each side to the center portion of the median, which was more or less level and approximately 3 feet below the level of the pavement. The truck trailer was at an angle to the pavement, with the left rear wheels at approximately the junction of the median and the bottom of the slope. The front main duals were closer to the pavement and further up the slope. The tractor and cab were on further up the slope at a sharper angle, and closest to the pavement. The truck trailer was slanting to the left after the accident, and at all times during the attempted removal operations.

The accident occurred about 2 a.m. The first efforts with a small wrecker were made about 4 a.m. and later efforts were made with large and small wreckers commencing around 10 or 10:30 a.m. Because of the construction of the trailer, the unit could not be pulled backward and initial efforts were all made to pull the unit forward and back onto the westbound lanes from which it had come. There is a dispute as to whether any of the initial efforts to remove the unit moved it at all, but in any event, at about noon, it was apparent that there was a good prospect that the truck might tip over to the left and onto the median. In an effort to prevent this, one wrecker attached a cable to the right rear frame of the trailer on the high side and put tension on it at approximately a 90 degree angle to the right. There is evidence that when this was done, the right rear duals of the trailer were lifted 6 inches to 1 foot off the slope. Approximately 10 minutes after this occurred, the truck trailer slowly fell over onto its left side. During all of the operations, the hogs were moving around in their

compartments and were crowding more and more to the left or low side.

The plaintiff's petition alleged that defendant was negligent in four particulars: (1) In failing to pull the tractor and van to the next turn-around in the median of said highway where they could have been removed in an upright position; (2) in attempting to extricate the tractor and van by pulling them sidewise and uphill; (3) in attempting to extricate the tractor and van by hooking the equipment onto the high side thereof, and raising it still higher; and (4) in failing to anchor the upper portions of the tractor and van or otherwise to prevent the same from tipping over. All four of these allegations were submitted to the jury, with an instruction that it was sufficient if the plaintiff proved any one or more of them.

It is prejudicial error for the trial court to submit to the jury allegations of negligence for which there is no proof. Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. There was no evidence that the defendant attempted to extricate the tractor and trailer by pulling them sidewise and uphill and this issue should not have been submitted to the jury.

The allegation that defendant was negligent in failing to pull the tractor trailer to the next turn-around in the median of the highway where they could have been removed in an upright position is not supported by any testimony that this was the only proper and reasonable way to attempt to extricate the tractor and trailer. There may have been many other methods or alternative choices for removing them which were reasonable and proper. The only evidence submitted by the plaintiff himself on this issue was the suggestion of a highway patrolman that it might be done in that fashion, and the evidence that after the upset, and removal of the hogs from the trailer, the tractor and trailer were removed that way. Both of these matters will be referred to later. This is clearly insufficient to establish

negligence in this situation, particularly where the only expert testimony on the issue was that that method of attempting to extricate them was improper. This testimony was that the rear wheels of the tractor were supporting the lower front side of the trailer, and that to turn the tractor down to the median would have removed the support of the wheels and tipped the load over to begin with. The jury was, in effect, instructed that any method of removal except that of pulling them down into the median and to the next turn-around was negligent, and this is simply not supported by the evidence.

The defendant also complains that the fourth allegation of negligence, the failure to anchor the upper portions of the tractor and trailer or otherwise prevent the same tipping over, was improperly submitted. The objection is that the evidence showed that the trailer body was aluminum with no place to hook onto the upper portions and that he cannot be chargeable with negligence where the evidence was that the upper portions could not be hooked onto for anchoring. While the first portion of the allegation and instruction may have been confusing in limiting the anchoring to the upper portions, obviously, the upper portions and the lower portions were fastened together. It would, of course, be clearer if there had been no reference to portions. The allegation and the instruction also did not limit the matter to anchoring the upper portions, but also can be treated as an allegation of a failure otherwise to prevent the equipment from tipping over. While the choice of words may not have been exact, the meaning of the allegation and the instruction with respect to it, considered as a whole, were reasonably clear. Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743.

The only instruction submitted to the jury on the subject of negligence was a portion of instruction No. 5 which was simply the ordinary reasonable man definition. Nowhere did the court submit any instruction as to the duty of care owed by the defendant to the

plaintiff. The court did not advise the jury whether the defendant's duty to the plaintiff was that of an insurer or an expert or whether it was that of ordinary care. Whether requested to do so or not, the trial court has the duty of instructing on issues presented by the pleadings and the evidence, and failure to do so constitutes prejudicial error. Welstead v. Jim Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308. The duty of care owed by the defendant was a fundamental and basic issue of the case. We think the proper instruction should have advised the jury that the defendant, who was engaged for the purpose of removing the tractor and trailer for a valuable consideration, owed the plaintiff the duty of using such diligence, skill, and care as are ordinarily employed by those persons in the wrecker business in the community and area in which he was engaged in such business.

The defendant also predicates error by the trial court in permitting a state highway patrolman, who was admittedly not an expert, to testify that he told an employee of the defendant at a time before the truck trailer tipped over, that the patrolman thought the truck could be pulled down off the shoulder and into the median, then down through the median and further on west toward another drainage dam, and then up the corner by the drainage dam and onto the highway. In fact, this statement by the patrolman, coupled with testimony as to how the equipment was removed after it had tipped over, was the only basis upon which the assumption that it would be negligence to remove it in any other manner was predicated. It is clear that a witness is not competent to give an opinion unless shown to possess the necessary learning, knowledge, skill, or practical experience to enable him to give the opinion testimony. See, 20 Am. Jur., Evidence, §§ 783, 786, pp. 656, 659; Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110. The plaintiff contends that the testimony was admissible for the purpose of showing that the defendant had no-

tice of an alternative method but it was clearly opinion evidence and was not limited to that purpose.

The defendant also complains that the patrolman and another witness were both permitted to testify that after the truck trailer had tipped over, and after the livestock had been removed, the truck trailer was then righted and removed in the manner suggested by the patrolman originally. This, of course, was also the basis for the first specific allegation of negligence and there was no testimony by any expert witness that this was a proper method of removal, much less that it was the only proper method of removal under the conditions existing prior to the time the equipment tipped over. In fact, the only expert testimony on the subject was that in its loaded condition and position prior to tipping over, that method of removal in itself would have caused the equipment to tip over. It is clear that evidence of subsequent conduct of one whose negligence is alleged to have caused or contributed to an accident or injury is inadmissible to show antecedent negligence. 65 C. J. S., Negligence, § 224, p. 1042. See, also, Tankersley v. Lincoln Traction Co., 101 Neb. 578, 163 N. W. 850.

The defendant asserts that negligence is never presumed and cannot be inferred from the mere fact that an accident happened. This, of course, is true. The jury was specifically instructed to that effect. The plaintiff, however, offered no competent evidence as to the usual and customary manner of removing a truck trailer in the circumstances shown and the jury was allowed to speculate and conjecture on different theories as to how the tractor and trailer should have been removed. This applies to the first and second allegations of negligence. As to these, they amounted to a choice between courses of action as to methods of removal and it would seem that the situation might be analogous to malpractice cases and governed by those rules. Whether errors of judgment will or will not make the defendant expert liable in a given case depends not merely upon the fact

that he may be ordinarily skillful as such, but whether he has handled the matter skillfully or has exercised such reasonable skill and diligence as is ordinarily exercised in his business or profession. Johnson v. Winston, 68 Neb. 425, 94 N. W. 607; In re Estate of Johnson, 145 Neb. 333, 16 N. W. 2d 504.

The defendant also urges that it is incumbent on the plaintiff to prove that the alleged negligent acts of the defendant were the proximate cause of his injury and that there was no intervening cause occasioning such injury. The defendant's position is that the movement of the livestock to the low side of the trailer alone caused the trailer to tip over. He contends that even though the jury might find from the evidence that the defendant actually raised the high side of the trailer at one time, this had nothing to do with the upset, and the movement of the livestock was an independent intervening cause. While there is a dispute in the evidence as to whether the defendant had actually raised or lifted the high side of the trailer, there is direct testimony that he had done so. All of the parties were aware of the fact that the trailer was loaded with livestock; and that the trailer was in a slanted or tilted position. They were, or should have been, aware of the fact that livestock, even more than an inanimate load, would tend to shift to the low side. The fact that the trailer stood in its position for some 10 or 12 hours without falling over before the defendant applied the tension or lift is at least probative evidence which was for the jury. There is certainly no testimony that the action of the livestock, under the circumstances, was anything other than normal. If the defendant's conduct was negligent and was a substantial factor in bringing about the situation, the normal action of livestock operating in conjunction with it is not a superseding cause of harm. See Restatement, Torts, §§ 441, 442, 443, pp. 1185, 1188, 1189. There was testimony that the defendant lifted the right rear wheels of the trailer 6 inches to 1 foot

off the ground on the high side when it was already leaning to the left; and that the entire unit slowly fell over within 10 minutes after this action at a time when the defendant's truck was still attached to the right rear side with tension applied. The jury could have found that this action was the proximate cause of the upset.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings in conformity with the opinion herein.

REVERSED AND REMANDED.

WESLEY LILJEHORN ET AL., APPELLEES, V. GENE L. FYFE ET AL., APPELLANTS.
134 N. W. 2d 230

Filed March 26, 1965. No. 35861.

1. **Courts: Appeal and Error.** Under the terms of section 27-1303, R. R. S. 1943, applicable to appeals from county court, it is the mandatory duty of the county judge to sign and certify a transcript of his proceedings within the time allowed by the statute.
2. ———: ———. The oversight of a county judge in failing to attach his signature to the certification of a transcript cannot be charged to an appellant, and he may not be deprived of his right to be heard on appeal because of the omission on the part of the county judge.
3. **Appeal and Error.** Official neglect in signing and certifying a transcript may not be excused by saying that a properly certified transcript would have been ready had the appellant called and made a demand for the same.
4. ———. A party cannot be deprived of his right to appeal by the wrong of an officer when he is without fault himself.
5. **Courts.** The district court may, by proper order, compel an inferior court or tribunal to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission.

Appeal from the district court for Phelps County: NORRIS CHADDERDON, Judge. Reversed and remanded with directions.

Aten & Noble, for appellants.

Anderson, Storms & Anderson, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

The district court dismissed defendants' appeal from county court because a purported transcript, although filed in 30 days, was not signed and certified by the county judge. The defendants appeal to this court asserting that the appeal should not have been dismissed and that their motion for diminution of the record to require proper signing and certification of the transcript should have been sustained. We reverse the judgment, holding that the district court had jurisdiction of the appeal and should have required proper signing and certification of the transcript by the county judge.

On October 14, 1963, after the entry of adverse judgment in county court on October 7, 1963, defendants filed a notice of appeal to the district court and a request for a certified transcript. This request invoked the language of the applicable statute, section 27-1303, R. R. S. 1943, as follows in part: "The justice shall make out a certified transcript of his proceedings, including the undertaking taken for such appeal, and shall, on demand, deliver the same to the appellant or his agent, who shall deliver the same to the clerk of the court to which such appeal may be taken, within thirty days next following the rendition of such judgment."

The time for filing expired November 6, 1963. Defendants' counsel phoned the clerk of the county court early in November and inquired about the transcript. The clerk of the county court already had the transcript prepared. On November 5, 1963, she took it to the county judge who failed to sign or certify it, but did deliver it to the clerk of the district court who filed it on November 5, 1963.

By the terms of the statute, it was the judge's mandatory duty to sign and certify the transcript. The duty of defendants to demand and deliver it to the district court was a separate and subsequent duty. There was no duty on their part to request its certification or to see to it that it was certified. It appears that defendants' duty of delivery under these statutes was performed by the county judge as a volunteer. The county judge, under the plain words of the statute, alone must sign and certify the transcript and it is obvious that it is a nondelegable duty. In re Estate of House, 144 Neb. 870, 15 N. W. 2d 56, dealt with a situation where an appellant secured from a county judge an unsigned transcript and filed it within 30 days. In holding that the failure of proper certification could not be charged to the appellant, the court said: "The oversight of the county judge in failing to attach his signature to the certification of the transcript cannot therefore be charged to the appellant and he cannot be deprived of his right to be heard on appeal because of the omission on the part of the county judge."

No proper transcript has been prepared and signed to this day in this case. Consequently, this sole duty being that of the county judge, it becomes immaterial to inquire, as plaintiffs would have us do, as to what would have happened if the defendants had inquired of the county judge about the transcript on November 6, 1963. This is made clear in Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211, where it was said: "* * * the case of Cheney v. Buckmaster, 29 Neb., 420, is authority for holding that where a transcript was ordered promptly a party intending to appeal is justified in relying upon the presumption that it will be prepared within a proper period, and that he cannot be deprived of his appeal by the failure of the county judge to so prepare it. The plaintiff in error ordered the transcript immediately upon the rendition of judgment, and he was not required by law to procure it and file it in the

district court within any shorter time than 30 days after the rendition of judgment. The transcript was not prepared within the time, and even had the attorney not been ill, had he gone to the county judge to request the transcript upon the thirtieth day it would not have been ready."

As we see it, plaintiffs' whole argument is premised on the proposition that somehow defendants had the duty of taking proper steps to see to it that the transcript was signed. This position is untenable.

Plaintiffs insist on a strict application of the requirements of the statute as being conditions precedent to the right of appeal. They cite cases where an appellant relied on the judge or some other agency to perform his statutory duty to file a properly prepared transcript within the 30 days. There is no doubt that if the officer or judge undertakes to perform some act *not required of him,* he acts as agent of appellant and his neglect or failure is attributable to appellant himself. Van Sant v. Francisco, 55 Neb. 650, 75 N. W. 1086; Larson v. Wegner, 120 Neb. 449, 233 N. W. 253. But, where the default relates only to the failure of the officer to perform a duty imposed on him by law, the right to appeal is not destroyed by the failure to perfect the appeal in time. In such a case appeal may be had after the time fixed by statute and a proper transcript filed after term. Dobson v. Dobson, 7 Neb. 296; Continental Building & Loan Assn. v. Mills, 44 Neb. 136, 62 N. W. 478; Goetz Brewing Co. v. Waln, 92 Neb. 614, 139 N. W. 230, Ann. Cas. 1914A 336; In re Estate of House, *supra;* Cheney v. Buckmaster, 29 Neb. 420, 45 N. W. 640; Omaha Coal, Coke & Lime Co. v. Fay, *supra.* The record here on its face shows an utter failure by the court to perform a mandatory statutory duty charged as the responsibility of the judge alone. The defendants had no duty to perform in securing the signing and certification of the transcript. This stands out in this case because the county judge did actually perform the defendants' job of de-

livering the transcript to the clerk of the district court within time. Defendants could not be at fault for not again requesting that something be done which already had been done. They were not required to perform a futile act. Kates v. Spencer, 105 Neb. 599, 181 N. W. 520, held that official neglect cannot be excused by saying a properly prepared transcript would have been ready had appellants called in due time and made another demand.

Plaintiffs, citing cases from other jurisdictions, argue that the district court was without power to compel the completion of a properly certified transcript. The case of Goetz Brewing Co. v. Waln, *supra,* is decisive of this point as well as the other contentions of plaintiffs. In that case a noncertified transcript was filed in 30 days, the same as here. Said the court: "It is apparent from this record that the failure of the county judge to certify to the transcript was not the fault of plaintiff, and it is the well-settled law of this state that a party cannot be deprived of his appeal by the wrong of the officer, when he is without fault himself. In making the order for the proper certification of the transcript, the court was well within the power conferred by section 28, ch. 19, Comp. St. 1911, which provides: 'The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission.'"

The statute cited in the above case is now section 24-313, R. R. S. 1943.

The judgment is reversed and the cause remanded with directions to overrule the motion to dismiss the appeal and to sustain the motion for diminution of the record by requiring certification of the transcript by the county judge.

REVERSED AND REMANDED WITH DIRECTIONS.

BESS A. RICHARDS, APPELLEE AND CROSS-APPELLANT, V. BOARD OF EQUALIZATION OF THAYER COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.
134 N. W. 2d 56

Filed March 26, 1965. No. 35864.

1. **Taxation.** It is presumed that a county board of equalization has properly performed its official duties in determining the actual value of property for tax purposes and that in making an assessment it acted upon sufficient competent evidence to support its action.
2. ———. For purposes of taxation, the terms actual value, market value, and fair market value are synonymous terms and mean exactly the same thing.
3. ———. The actual value of property for taxation purposes is to be determined by using the applicable elements of actual value, including those specified by section 77-112, R. R. S. 1943.
4. **Taxation: Appeal and Error.** In a trial on appeal the trial court may properly consider all applicable elements of actual value which are supported by evidence of probative force bearing upon the actual value of the property for tax purposes.

Appeal from the district court for Thayer County: JOSEPH ACH, Judge. Affirmed.

Leonard J. Germer, for appellants.

J. L. Richards, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This case involves a controversy concerning the value on January 1, 1963, of the east 35 feet of Lot 4, Block 16, Original Town of Hebron, Nebraska, for tax purposes. The trial court found the actual value of the property to be $15,500 and the assessed value to be $5,425. The county and the county board of equalization have appealed and the taxpayer has cross-appealed.

The subject property is located on the south side of Lincoln Avenue, facing north. It has a 35-foot frontage and a depth of 165 feet. It is occupied by a 1-story

brick building 35 feet wide and 120 feet long. The east line of the building adjoins the alley in Block 16. The evidence shows that the intersection of Lincoln Avenue and Fourth Street is the center of the commercial section of the town, and the closer to this intersection, the more valuable the property. The subject property is approximately one-half block west of this intersection.

The property is generally described as having outside walls of brick, with a plate glass front. It has a flat, composition roof. The basement is unfinished, but has a concrete floor, and is suitable for storage purposes. The interior finish of the building is plaster on brick. The building has water and sewer connections, and is steam-heated, fired with gas. There are two balconies in the building, one used and the other not. The front of the building is not modern. The ceilings are very high and the lighting average. The construction of the building is good and it is in good repair. The location is average and the building could, with some remodeling, be adapted to other uses than its present use as a retail dry-goods store.

The county assessor testified that the actual value of the property was ascertained by him on a cost of reproduction less depreciation basis in accordance with a cost data formula prepared by a professional appraisal firm. He stated that he made a personal inspection of the property and found it to be well constructed and in good repair. By the cost of reproduction method under the cost data formula, he determined the reproduction cost to be $36,894. He depreciated this reproduction cost as provided by the formula for a 34-year-old building by 46 percent, thereby fixing the value of the building at $19,920. To this was added the value of the lot, which was determined to be $2,355. After making minor deductions for inaccurate measurements and one additional year of depreciation, the actual value of the property for taxation purposes was fixed at $22,275. The appellants called a professional appraiser, who used substan-

tially the same cost of reproduction formula and a depreciation for 34 years of 45 percent and arrived at an actual value of the property of $22,100.

The evidence in behalf of the taxpayer shows that the subject property was constructed in 1929 and that it has been kept in good repair. No modernization of the building has been done since it was originally constructed. It presently rents for $150 per month. The upkeep averages $200 per year, taxes in 1963 were $765.94, and personal liability, plate glass, and fire insurance were shown to be approximately $100 per year.

Two realtors testified to a substantial downward trend in the market value of commercial buildings of this type in Hebron the past 4 years. They testified that several similar buildings in the town are vacant, some of which have stood vacant for the past 4 years. Each had similar buildings listed for sale which have not been sold even at much reduced prices from the original asking prices. Some reduction in value has been brought about by businesses in the downtown commercial area moving to the highway immediately east of the city. They testified to a very depressed market for this type of property over the last few years which has had the effect of reducing the market value of commercial buildings of this type. There was evidence of the value of other commercial buildings, alleged to be comparable to the subject property, which were asserted as evidence of a want of uniformity in the fixing of the actual value of the property here involved. This generally constitutes the evidence produced by the parties in support of their respective claims.

The applicable statute is section 77-112, R. R. S. 1943, which provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) com-

parison with other properties of known or recognized value; and (6) market value in the ordinary course of trade." For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Many elements enter into a determination of actual value, some of which are set out in the statute.

The evidence shows that the county assessor made a personal inspection of the property before fixing its value for taxation purposes. The presumption of correctness disappears, however, if there is competent evidence to the contrary and thereafter the reasonableness of the valuation fixed by the board of equalization is one of fact to be determined from the evidence unaided by presumption. Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730. An appeal to the district court from the action of a county board of equalization is triable as in equity and a further appeal to this court is tried de novo. The burden is on the complaining taxpayer to establish that the valuation for tax purposes is excessive. Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627.

The valuation fixed by the county board of equalization in the instant case is based primarily on a cost of reproduction less depreciation formula. The cost of reproduction less depreciation is but one element to be considered in determining actual value. The county board of equalization assumes that its valuation, having the support of any single element tending to establish actual value, requires the affirmance on appeal of the actual value determined by it. Such assumption is without substance. All available evidence of actual value is competent at all hearings on the issue. Consequently, on appeal to the district court all of the criteria of actual value is pertinent to the issue, including the elements set forth in section 77-112, R. R. S. 1943.

It is contended by the complaining taxpayer that the cost of reproduction less depreciation formula does not

produce actual value because of other elements of actual value shown by the evidence. The rent being paid for the use of the building is $1,800 per year. In considering this item and the expense of maintenance and taxes, an excessive valuation is indicated. The amount of rent, standing alone, under the evidence in this case, would indicate an actual value of $18,000, as the trial court found. There is evidence by realtors, who qualified as experts, that a change of conditions had occurred in Hebron during the prior 4 years which materially reduced the market value of commercial property. One such realtor testified that the reasonable market value of the subject property was $10,000. Another fixed it at $12,500, and a third had no opinion as to its actual value. Based solely on the expert opinion as to market value, the trial court concluded from this evidence alone that it would sustain a finding of $11,225 as the market value of the property. The court could properly find that the opinions of the experts unduly depressed the market value because of the failure of this type of property to sell in the market during the previous 4 years. The want of any market for a period of time does not necessarily mean an excessive reduction of actual value.

The evidence shows that the trial court during the trial made a personal inspection of the property and made findings of fact with reference thereto. The relative location was found to be average, but the desirability and functional use to be less than average. The depreciation was found to be more than average, and 1½ percent per year was found to be more realistic than the 46 percent for 34 years allowed by the reproduction cost less depreciation formula. After making corrections based on these findings, it was found that the actual value of the building based on reproduction cost less depreciation was $18,080. Adding the value of the lot in the amount of $2,355, the actual value of the property under the reproduction cost less depreciation formula is $20,435.

There is evidence in the record attempting to compare the actual valuation of the subject property with similar properties. Some were newer buildings that had been vacant for varying periods. Some had differences in location and use that affected their actual value. The evidence as to any discrimination between the subject property and other similar properties is not very helpful in the case. The existing differences in the criteria for establishing actual value because of comparisons as to location, use, age, rental value, and other pertinent considerations leads us to the view that such evidence does not support the contentions of the taxpayer.

It is true, as we have heretofore said in S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N. W. 2d 569: "Actual value is largely a matter of opinion. There are no yardsticks by which it can be determined with complete accuracy." The evidence of the two experts on market value is only their opinions based on their training and experience. The trial court is not obliged to accept this evidence at its face value.

The trial court found that there were three elements set out in section 77-112, R. R. S. 1943, that were supported by evidence. The court found that the rental value of the property indicated an actual value of $18,000, that the reproduction cost less depreciation formula indicated a value of $20,435, and that the expert evidence as to market value indicated a value of $11,225. The location of the property was found to be average and consequently was not considered as tending to raise or lower the actual value as determined by other elements of actual value. The court also found that the evidence of comparisons with other properties of known or recognized value had no probative force. The trial court gave substantially equal weight to each of the applicable elements set forth in section 77-112, R. R. S. 1943, and fixed the value of the subject property on the three factors discussed at $16,530. The trial court then allowed a deduction of $1,030 for the below-average desirability

and functional use of the property. The trial court then fixed its actual value at $15,500 and its assessed value at 35 percent of this amount, the same being $5,425. We think the evidence supports the findings of the trial court.

There is a presumption that the county board of equalization properly performed its official duties in determining the actual value of the subject property for tax purposes, and that it acted on sufficient evidence in fixing its actual value. The presumption disappears when there is competent evidence to the contrary, as there is in the instant case. The reasonableness of the valuation made by the county board of equalization then becomes a question of fact to be determined from all the evidence tending to establish the actual value of the property. In determining this question, the fact-finding body will consider all pertinent evidence of actual value, including those contained in section 77-112, R. R. S. 1943, which are applicable. Leech, Inc. v. Board of Equalization, 176 Neb. 841, 127 N. W. 2d 917. This the trial court did in the instant case and its findings of fact are supported by the evidence.

The taxpayer has cross-appealed, asserting that the evidence shows the actual value does not exceed $12,500. For the reasons heretofore stated we cannot sustain this conclusion. The opinion evidence of the expert, placing the market value of the property at $12,500, is but a single factor in the determination of actual value. Like all opinion evidence, it may be given such weight as the trier of fact may determine in connection with all the evidence adduced on the question.

Our holding that the actual value of the property was $15,500 on January 1, 1963, under the evidence adduced, has the corollary effect of holding that it is not less than that amount. We necessarily conclude that the contention raised by the cross-appeal is not supported by the evidence and cannot be sustained.

The judgment of the district court is sustained by the evidence and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF RICHARD L. MARKHAM FOR A WRIT OF HABEAS CORPUS.
RICHARD L. MARKHAM, APPELLEE, V. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, APPELLANT.
134 N. W. 2d 84

Filed March 26, 1965. No. 35886.

1. **Constitutional Law: Criminal Law.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture.
2. ———: ———. A penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid is invalid.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Richard L. Kuhlman, for appellant.

Kerrigan, Line & Martin, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is a proceeding for a writ of habeas corpus brought by Richard L. Markham against the sheriff of Dodge County, Nebraska. The district court found that the imprisonment of the plaintiff was unlawful and ordered that he be discharged from confinement. The defendant appeals.

An information was filed in the district court for Dodge

County, Nebraska, alleging that on April 18, 1964, the plaintiff possessed a firearm with a barrel less than 12 inches in length and that in 1961 the plaintiff had been convicted of armed robbery, a crime of violence amounting to a felony. Thereafter the plaintiff was placed in the custody of the defendant pursuant to a mittimus issued out of the district court for Dodge County, Nebraska. The plaintiff then commenced this action, alleging that his detention was unlawful because the statute under which he was held, section 28-1011.07, R. S. Supp., 1961, was unconstitutional.

Section 28-1011.07, R. S. Supp., 1961, provides as follows: "It shall be unlawful for any person who is charged either by complaint, information or indictment with a crime of violence, or who has been convicted of a crime of violence amounting to a felony, or who is a fugitive from justice, to possess any firearm with a barrel less than twelve inches in length, or brass or iron knuckles. Such charge may be on file, or such conviction may have been had, in any court of the United States, the several states, territories, possessions, or the District of Columbia." Section 28-1011.09, R. S. Supp., 1961, provides that a violation of section 28-1011.07, R. S. Supp., 1961, is a felony and prescribes the penalty to be imposed upon conviction of the offense.

The plaintiff contends that section 28-1011.07, R. S. Supp., 1961, is unconstitutional because it is vague and uncertain and makes criminal an act which an accused may have no way of knowing is criminal at the time of its commission.

The statute prohibits the possession of certain weapons by any person who has been charged with a crime of violence or has been convicted of a crime of violence amounting to a felony. The plaintiff contends that the statute is vague and uncertain because the term "crime of violence" is not defined in the act.

The term, crime of violence, does not appear to have a well-known or adjudicated meaning. The parties cite

no authority in which a definition of the term may be found and it is not defined in any dictionary or reference book known to us. The term has been used in similar legislation in some jurisdictions, but such statutes specify which crimes are to be considered as crimes of violence within their meaning.

It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678. The dividing line between what is lawful and unlawful cannot be left to conjecture.

A similar term appears in section 29-2620, R. R. S. 1943, of the indeterminate sentence law. In a number of cases this court has been required to decide whether under that act a particular crime was a "crime of violence" against the person of another. See Draper v. Sigler, 177 Neb. 726, 131 N. W. 2d 131. These cases illustrate the problem involved in determining which crimes should be classified as crimes of violence.

The plaintiff further contends that the statute is invalid because it applies to any person charged with a crime of violence without regard to whether the person knows that such a charge has been made. Thus, the statute could make an act criminal where the person accused would have no way of knowing that the act was a crime at the time of its commission.

Although the Legislature may enact criminal statutes which do not include criminal intent or guilty knowledge as an element of the crime, a penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid is invalid. State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L. R. A. N. S. 1216, Ann. Cas. 1912B 917; 22 C. J. S., Criminal Law, § 30, p. 102; 14 Am. Jur., Criminal Law, § 16, p. 769.

We conclude that section 28-1011.07, R. S. Supp., 1961, contravenes the due process clause of the Constitution of Nebraska and is, therefore, invalid. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

FREDERICK SCHWIEGER, APPELLANT, V. ISLAND SUPPLY COMPANY, APPELLEE.
134 N. W. 2d 233

Filed March 26, 1965. No. 35916.

1. **Workmen's Compensation.** A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations contained in section 48-137, R. R. S. 1943, by payments made by an employer as therein provided, must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action against a general demurrer.
2. ———. Where an employer furnishes medical, surgical, and hospital services to an employee, the payments therefor constitute payment of compensation within the meaning of the Nebraska Workmen's Compensation Act.
3. ———. Where an employee who suffered an accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of the Nebraska Workmen's Compensation Act.
4. ———. To be effective to toll the statute of limitations, the employer must have furnished medical services or made payment therefor within a period of 1 year before the filing of the petition.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Kelly & Kelly, for appellant.

Luebs, Elson, Tracy & Huebner and Jon F. Luebs, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is a workmen's compensation case involving two issues: First, whether or not plaintiff's petition stated a cause of action; and, second, whether or not plaintiff's claim for compensation was barred by the statute of limitations.

Plaintiff's petition has been dismissed after hearing at three previous stages. It was dismissed by the single judge of the Nebraska Workmen's Compensation Court who first heard it; by that court sitting en banc; and by the district court for Hall County. Plaintiff has perfected his appeal to this court.

Plaintiff allegedly hurt his back on June 16, 1959, when a fellow employee dropped his end of a 10-foot steel pipe which they were lifting. Plaintiff was off work for about 2 weeks, during which time he was treated by a chiropractor. He returned to his employment and worked until the first part of August 1959. Thereafter he was admitted to the hospital for a back difficulty. He resumed his employment again in December 1959, and worked until about the middle of January 1960, when he returned to the hospital for 3 weeks. He returned to his employment sometime in August 1960, and remained in defendant's employ until February 8, 1961.

Plaintiff was paid compensation for temporary total disability from August 7, 1959, to October 18, 1959, and for the period from January 20, 1960, to June 9, 1960. The medical and hospital bills incurred during this period were paid by defendant's compensation carrier.

Doctor Robert M. House, an orthopedic specialist to whom plaintiff was originally referred, was plaintiff's physician until January 1961. Plaintiff then consulted another doctor for about 3 weeks. On February 8, 1961, plaintiff went to the Mayo Clinic at Rochester, Minnesota, where a spinal fusion was performed. The day previous to going to Rochester he discussed the trip with his employer who wrote the following letter to the clinic:

"Mr. Frederick Schwieger is an employee of our Company.

"At the time of his injury, we were insured with Employers Mutual Liability Insurance Company of Wausau, 120 N 69, Omaha 32, Nebraska.

"If the bills are sent to us, we will forward them to the Company for payment."

Plaintiff returned to Grand Island March 3, 1961, but never thereafter resumed his employment.

About November 8, 1961, defendant's counsel orally requested one of plaintiff's counsel to have the plaintiff reexamined by Doctor Robert M. House to get an up-to-date evaluation report. On two or three occasions thereafter up to January 23, 1962, defendant's counsel inquired of plaintiff's counsel whether or not plaintiff had been reexamined. About January 25, 1962, defendant's counsel was informed by plaintiff's counsel that he had received a report from Doctor House. No copy of this report was furnished the defendant or the defendant's counsel until the hearing herein on August 8, 1963, and no discussion was ever had on the evaluation report. Doctor House's bill for the reevaluation examination of January 23, 1962, has never been paid, nor has the Mayo Clinic bill incurred by the plaintiff in February 1961, ever been paid. The defendant's compensation carrier has paid no compensation since June 9, 1960, and no medical or hospital bill since May 10, 1961.

On June 3, 1961, plaintiff, who then was represented by his present counsel, wrote to the Nebraska Workmen's Compensation Court to inquire about workmen's compensation benefits and about getting his employer's compensation carrier to pay his medical bills at the Mayo Clinic. The presiding judge replied to his letter on June 8, 1961, advised him that he was entitled to a hearing to determine his rights if he wished to file a petition, and enclosed some blank petition forms to be completed and filed. Plaintiff's petition was not filed until May 21, 1963, or almost 2 years later. Plaintiff has

been drawing Social Security for total disability since the latter part of March 1962, or more than 1 year previous to the filing of the petition herein.

Section 48-137, R. R. S. 1943, provides as follows: "In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173. In case of death, all claims for compensation shall be forever barred unless, within one year after the death, the parties shall have agreed upon the compensation under this act, or unless within one year after the death, one of the parties shall have filed a petition as provided in section 48-173. Where, however, payments of compensation have been made in any case, such limitation shall not take effect until the expiration of one year from the time of the making of the last payment. In the event of legal disability of an injured employee such limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

In Bame v. Lipsett, Inc., 172 Neb. 623, 111 N. W. 2d 380, we held: "A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations contained in section 48-137, R. R. S. 1943, by payments made by an employer as therein provided, must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action as against a general demurrer."

Does plaintiff's petition state a cause of action? The petition was filed May 21, 1963, and bears a filing stamp showing that date. The accident happened June 16, 1959. There is an allegation that defendant paid compensation up to and including June 5, 1960, but since that date has refused to make payments. There is an allegation that some of plaintiff's medical bills have been

paid by defendant and some have not. There is the further allegation that in January 1962, the plaintiff had a reevaluation made of his condition at the special insistence and request of the defendant. Under no construction of section 48-137, R. R. S. 1943, as applied to the allegations of the petition could the period for filing a petition be extended beyond January 1963. It is evident, therefore, that the petition on its face fails to state a cause of action because it shows it was not brought within the period required by section 48-137, R. R. S. 1943.

In Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N. W. 117, we held: "Where an employer furnishes medical, surgical, and hospital services to an employee, * * * the payments therefor constitute payment of compensation within the meaning of the employers' liability act."

Where an employee who suffered an accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of the Workmen's Compensation Act. See, Gourley v. City of Grand Island, 168 Neb. 538, 96 N. W. 2d 309; Wengler v. Grosshans Lumber Co., 173 Neb. 839, 115 N. W. 2d 415.

Plaintiff seeks to avoid the operation of the statute on the theory that his employer has furnished medical, surgical, and hospital services to him which constitute payment of compensation within the meaning of the Workmen's Compensation Act. The distinguishing characteristic between the cases cited above on which plaintiff relies and the instant case is that in those cases the services were furnished within 1 year before the filing of the petition. In the instant case, under the most favorable construction of the plaintiff's evidence, assuming that an examination for a reevaluation is medical service within the rule, a point we do not here decide, the last medical service plaintiff could possibly claim was fur-

nished to him by the defendant was on January 23, 1962. The petition was not filed until May 21, 1963, some 16 months thereafter.

While the point is not argued and no authorities are cited in the brief, plaintiff seems to imply that until payment is actually made for the medical services furnished plaintiff, the statute is tolled. He calls attention to the fact that the bills at the Mayo Clinic for services in February 1961, and for Doctor House for a reevaluation examination on January 23, 1962, have never been paid. We will assume for the purpose of discussion only that these were medical services furnished by the employer to the plaintiff.

To adopt plaintiff's premise would be an unwarranted extension of the statute. We have previously construed the words "payments of compensation" in section 48-137, R. R. S. 1943, to include all medical, surgical, and hospital expenses furnished to an employee. The exact wording of the statute is: "Where, however, payments of compensation *have been made in any case,* such limitation shall not take effect until the expiration of one year from the time of the making of the last payment." (Italics supplied.) To now hold that the statute is tolled not from the furnishing of such service but pending the payment of a bill which may never be paid would constitute judicial legislation rather than statutory construction.

While this precise point has not heretofore been directly presented to this court, it was involved in Bame v. Lipsett, Inc., 172 Neb. 623, 111 N. W. 2d 380. In that case plaintiff alleged that he was requested to submit to a medical examination in another city; that he made the trip and was examined; but he was never reimbursed for the expenses incurred in making the trip. In that case, which involved the statute of limitations, we said: "This trip and examination were likewise more than a year before action was brought and could not toll the statute."

We conclude that the judgment of the district court in affirming the dismissal on rehearing filed in the Nebraska Workmen's Compensation Court and dismissing plaintiff's petition on appeal was proper and should be affirmed.

AFFIRMED.

WALTER MEAD, GUARDIAN OF RALPH MEAD, INCOMPETENT, APPELLEE AND CROSS-APPELLANT, V. MISSOURI VALLEY GRAIN, INC., APPELLANT AND CROSS-APPELLEE.
134 N. W. 2d 243

Filed March 26, 1965. No. 35924.

1. **Workmen's Compensation.** The general rule is that injury by freezing is compensable where the employee's exposure is greater than that of the general public in the same locality.
2. ———. It is not necessary that an employee be exposed to risk greater than other employees in the same or similar employment in order that an injury may be compensable but the question is whether in the performance of his duties he was exposed to the dangers to a greater extent than the ordinary person in such locality.
3. ———. It was clearly the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in subdivision (3) of section 48-121, R. R. S. 1943, to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury.
4. ———. However, where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability.
5. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.
6. **Trial.** It is within the sound discretion of the court to permit a party to withdraw his rest and introduce additional testimony.

Appeal from the district court for Otoe County: JOHN M. DIERKS, Judge. Affirmed as modified.

Pilcher, Howard & Hickman, for appellant.

Betty Peterson Sharp, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

The Nebraska Workmen's Compensation Court and the district court awarded Ralph Mead, hereinafter referred to as plaintiff, compensation for disability resulting from frozen feet and subsequent amputations. The defendant appeals.

The temperature in Nebraska City on January 28, 1963, varied between 12 degrees below to 7 degrees above zero. Plaintiff was 52 years old and in good health. He went to work at 7 a.m., sealing (coopering) box cars for grain shipment and was dressed warmly, with two pair of socks, engineer boots, and two-buckle overshoes on his feet. The box cars were unprotected, with one or both doors open, were unheated, and the wind blew through them. They were elevated with the cold air circulating above and below the surface on which the plaintiff worked. Plaintiff sealed or coopered eight box cars. This consisted of nailing boards and other material on the doors and required mostly a standing operation by the plaintiff accumulative to many hours of such standing during the day. There were six men on the job, and when they reported, there was objection to working because of the extreme cold. The manager ordered the work done stating that it was pretty cold but there was a shipping order and the cars had to go out. At about 9 a.m., plaintiff's feet started stinging and hurting. He would walk and stomp on them. In the afternoon, they got worse and he continually complained to fellow employees about them. The men could and did warm themselves in the office from time to time, but

the plaintiff did not. Plaintiff had difficulty getting out of the last box car because his feet were stinging and were stiff. The men quit work at 6 p.m. Plaintiff arrived home at 8 p.m., and had walked about half a mile in the intervening period. At home, he undressed, found ice between his boots and overshoes, and his two pair of socks were frozen hard. His feet were frozen, were red and stiff, got redder, and he used kerosene on them. He suffered pain, the pain got worse, and he took aspirin. He did not go to work the next day and stayed at home. He was admitted to the hospital 2 days later, became delirious, and suffered toxinemia. The diagnosis was acute frostbite. The tissues and bones were both frozen. It was apparent from the outset that amputation would be necessary, and treatment was for the purpose of setting a demarcation line. In April, the toes and head of the metatarsal of the right foot were amputated and the left foot was amputated above the ankle. He was in the hospital for 6 months, was fitted with prosthetic devices for both feet, uses crutches to walk, and has a continuing ulcer on the right heel. A blood sugar condition has developed. Mead had a high pain tolerance level. He is a common laborer, his weight-bearing capacity and center of gravity have been affected and interrupted, and his ability to bend, lift, stoop, kneel, or twist has been impaired. He cannot carry loads, and he cannot perform common labor at all. The opinion of the plaintiff's doctor as to causation, which is the only one in the record, is that the freezing occurred during the working hours of January 28, 1963, producing plaintiff's present disability. None of the other workmen on the job January 28, 1963, suffered any freezing.

Defendant contends that plaintiff did not prove that he sustained an accident arising out of and in the course of his employment. The general rule is that injury by freezing is compensable where the employee's exposure is greater than that of the general public in the same locality. Laudenklos v. Department of Roads & Irriga-

tion, 132 Neb. 234, 271 N. W. 790; McNeil v. Omaha Flour Mills Co., 129 Neb. 329, 261 N. W. 694; State ex rel. Nelson v. District Court of Ramsey County, 138 Minn. 260, 164 N. W. 917, L. R. A. 1918F 921; State ex rel. Virginia & Rainy Lake Co. v. District Court of St. Louis County, 138 Minn. 131, 164 N. W. 585, L. R. A. 1918C 116; Yellow Cab Co. v. Industrial Commission, 210 Wis. 460, 246 N. W. 689; Larke v. John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 A. 320, L. R. A. 1916E 584; Riley v. City of Boise, 54 Idaho 335, 31 P. 2d 968; 99 C. J. S., Workmen's Compensation, § 188, p. 648; 58 Am. Jur., Workmen's Compensation, § 260, p. 760. As the above authorities note, the difficulty arises in the application of this rule to the facts, and there is a diversity of opinion that will support opposite conclusions in many cases such as this one. Factual color matching of cases gives us little help. We are of the opinion that the plaintiff is within the above rule and that his exposure or peril was greater than that of the public generally. We are of the opinion that the plaintiff's exposure was special, peculiar, and greater than that of the general public. He was required to work in open, unprotected, and elevated box cars in temperatures ranging to 12 degrees below zero while standing most of the time at his work, the normal movement and activity in response to low temperatures being limited by the requirements of the job. Nor are we unmindful of the fact that a fair inference from the evidence is that, except for the urgency of the shipping requirements of the employer, the employees would not have been called or required to work. The employees themselves protested, but the employer insisted on the work being performed. The general normal public exposure to outside weather conditions does not reach the special combination of conditions to which the plaintiff was required to be exposed by the particular conditions of this employment. We take judicial notice of the fact that the general public and the community may be exposed to outside temperatures,

but certainly are not generally exposed to a combination of conditions of outside work such as present here.

There is no evidence that general construction work in the community, or work of this type, is generally conducted at the temperatures and under the conditions present in this case. The risk of the cold was common to all outside, but the required conditions of this employment brought a danger and a peculiar aggravated risk which threatened more particularly the employees of defendant, of which plaintiff was one. See, Nelson v. Creamery Package Mfg. Co., 215 Minn. 25, 9 N. W. 2d 320; Riley v. City of Boise, *supra;* State ex rel. Nelson v. District Court of Ramsey County, *supra;* Nikkiczuk v. McArthur, 9 Alberta L. R. 503, 28 Dom. L. R. 279.

Defendant, citing cases, argues that the other employees did not suffer from freezing and that plaintiff's risk was no greater than that of his fellow employees. We reject this defense as it was rejected in the Laudenklos case, *supra.* We point out further that if the plaintiff was peculiarly susceptible to frostbite, this would not be a defense. The law does not penalize the thin skinned.

Defendant, citing cases, argues that plaintiff failed to warm himself from time to time. But, plaintiff violated no instructions and kept diligently on the job. The employer had told him that the box cars had to be coopered in spite of the cold. Now, the employer claims that the plaintiff was negligent in not leaving the job to warm himself, but it is not contended that he willfully exposed himself or was guilty of willful misconduct, which would be a defense. § 48-102, R. R. S. 1943. Nor is it contended that he knew, during the working hours, that his feet were frozen. He is not required to take the precautions which others might have and did take. There is no merit to this contention.

Did the freezing occur during the course of employment? Defendant argues that it could have occurred before plaintiff went to work or in the 2 hours after

work before he discovered the condition. Plaintiff's uncontradicted evidence is that he had been inside the day before; that he had no trouble before going to work; that he walked to the job and his feet were warm; and that the stinging trouble started about 9 a.m. while on the job. The medical testimony as to causation is to the same effect. Defendant's doctor gave no opinion to the contrary. Plaintiff pulled a toenail off the evening of January 28, 1963, and defendant speculates that this could not have happened if the freezing occurred during the working hours. It could have been pulled or torn off because of being frozen to his socks, or as the defendant's doctor testified, "* * * if the toenail came off on this day, that there must have been some trouble with the toenail to start with, a fungus infection, for instance, can loosen the toenail and they can come off for this reason." The fact that he tore his toenail off leads us to no inference that the freezing occurred before work. Defendant argues that he could have frozen his feet in the approximately half hour he was walking outside after work. The evidence shows that he had increasing difficulty during the day, had a stiffening and numbing as he got out of the last box car, and his feet really bothered him as they started to warm up. It would seem unreasonable that he could work all day standing in the box cars, not freeze his feet, and then suddenly freeze them when he started exercising them by walking. The freezing extended into the bone, blackening it, and as the plaintiff's doctor testified, could not be caused by a half-hour exposure. We come to the conclusion that the freezing was in the course of employment and that the evidence would not support a conclusion to the contrary.

On the amount of compensation, the district court took the 100 percent left-foot loss, averaged it with a 60 percent disability finding on the right foot, and awarded 80 percent two-member permanent partial disability under subdivision (3), section 48-121, R. R. S.

1943. If it was a two-member disability only, this was the correct method of computation. Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218. Defendant asserts a right-foot loss of use of 25 to 30 percent and the plaintiff cross-appeals for a determination of permanent total disability under subdivision (1), section 48-121, R. R. S. 1943. Where is the dividing line as to which subdivision applies? General disabilities which are the normal, usual, and logical consequence of injuries to specific members are not compensable under subdivision (1), section 48-121, R. R. S. 1943. We have said that it was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3), section 48-121, R. R. S. 1943, without regard to the extent of the subsequent disability suffered with respect to the particular work or industry of the employee. Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220. But, where an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed, he may be compensated under subdivision (1) or (2) of section 48-121, R. R. S. 1943. Haler v. Gering Bean Co., *supra;* Ottens v. Western Contracting Co,. 139 Neb. 78, 296 N. W. 431.

In resolving this question, we are posed with the usual conflicts in, and the refined analyses of, the meaning of medical testimony. But, we are aided in this case by many undisputed objective facts and certain inescapable conclusions from the whole evidence.

(1) The plaintiff is a common laborer and is fitted for nothing else. He must walk with crutches, cannot lift weight, and has almost a complete limitation of the ability to twist, stoop, bend, run, climb ladders, or walk upstairs. He loses his balance easily, fatigues quickly, and has lost all general agility to perform the ordinary function of common labor or ordinary co-

ordinated movement. Compare Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275, and Haler v. Gering Bean Co., *supra,* where industrial total disability was awarded under subdivision (1), section 48-121, R. R. S. 1943, where there was some ability to work remaining after injury to schedule members.

(2) Plaintiff suffers from a hip and back disability involving pain and tension caused from an inability to adjust to the use of the prosthetic devices, the distortion of the sense of balance, and the bodily center of gravity. When he walks with the aid of crutches, it causes him pain.

(3) There is a continuing unhealed painful ulcer on his right heel that has defied treatment.

(4) The bones of his right foot were frozen deeply, gangrene and toxinemia developed, and all of the toes and part of the metatarsal bones of the arch have been amputated resulting in a "cold blue extremity," lack of proper nutrition, impairment of circulation, and an increased danger from exposure to the cold.

(5) An abnormal blood sugar condition accompanying original acidosis and toxinemia is still present and has not cleared up.

(6) Plaintiff has suffered digestive difficulties resulting from stresses he has been subjected to and he has an increased general susceptibility to the cold.

The plaintiff was in good health prior to the freezing with full ability to work, had none of the above pains or disabilities, and had a high pain threshhold.

Plaintiff has lost more than the tape-measured length of the amputated portions of his feet. We shall not indulge in medical speculation as to what the normal, usual, and logical consequences of an amputation alone are. Nor do we accept defendant's attempt to minutely fragmentize and thus destroy the significance of the various resulting general disabilities of the plaintiff. The undisputed import of the injuries to the plaintiff is to destroy the physical functions indispensable to the

performance of his work. It is the combination of the results of both the freezing and the loss of anatomical integrity that has produced a general bodily disability to the whole man. Thus, the plaintiff's disability results from both the freezing injury and the amputations, and from an interrelating combination of the consequences of both. No matter how the medical battle may go as to whether any individual item of disability is a normal or usual consequence of an amputation, we have no doubt that an almost undisputed picture of destruction of the normal body physical function and consequent work disability is not the normal, usual, and logical consequence of partial loss and amputation of specific members.

To so hold would penalize a plaintiff having a general bodily disability resulting from injuries in an accident merely because the origin of said general disabilities is found in a specific member loss compensated for under subdivision (3), section 48-121, R. R. S. 1943.

We hold that the cross-appeal should be sustained and that the plaintiff is entitled to an award for permanent total disability under subdivision (1), section 48-121, R. R. S. 1943.

Defendant asserts error in permitting plaintiff to withdraw his rest and adduce medical testimony as to causation, a subject not covered by any of the previous medical testimony. Defendant's right to adduce controverting or additional testimony was preserved. We find no abuse of the trial court's sound discretion to permit this. The plaintiff's attorney is allowed $500 for services in this court. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

ROY RUNGE, APPELLANT, V. THOMAS C. TRAVIS, APPELLEE.
134 N. W. 2d 291

Filed April 2, 1965. No. 35858.

1. **Master and Servant: Negligence.** On the issue of his contributory negligence a servant of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation.
2. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Mitchell, Taylor & Beatty, for appellant.

Tye, Worlock, Knapp & Tye, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

A cascade of wire and corn from a crib injured plaintiff who was on the outside but at work on the inside. This action against his employer was dismissed by the district court on the ground that there was no question of fact for the jury.

Our summary of evidence on issues of negligence and contributory negligence begins with the crib. Its height was 17 feet. Above a wood base 1 foot high there were four rings, one upon another. The bottom ring was made of lath and wire. It was anchored in the south part by two posts, which formed a gate for removal of the corn. The upper rings were made of wire. They were not attached to the posts, to the bottom ring, or to each other.

In the fall of 1961 defendant filled the crib with 1,500 bushels of green corn. Later he withdrew 380 bushels through the gate. As a result the part of the mass above the gate was lowered. This incline was visible

on the date of the accident, March 7, 1962.

With plaintiff's acquiescence defendant decided to remove corn from the north part. Together the parties cut a hole in the wood ring from top to bottom at a point opposite the gate. The ears were packed tightly together. Plaintiff poked them a number of times with his scoop shovel. Several times he looked up to see the effect.

Defendant departed after plaintiff had taken out a few shovelfuls. Frank Kremlecek, defendant's father-in-law, subsequently arrived. After plaintiff had removed 70 bushels, the fourth ring and part of the third ring suddenly toppled to the ground. Frank shouted a warning but plaintiff could not escape.

Plaintiff's knowledge and experience were not wide for his 55 years. He received no formal education beyond the eighth grade. Farming on land of others was his single livelihood. His own cribs were composed of one or two rings. His experience with the four-ring size was limited to one occasion, and that in 1947. That crib was anchored by high poles. Prior to the accident he had seen cribs of this size in the community.

There follows from the evidence the legal conclusion that contributory negligence in comparison with the negligence of defendant bars recovery. The risk was extraordinary. The structure had weak props in view of the work to be done, but not one unsafe condition was concealed. The construction of the crib, the props, and the compactness and shape of the mass—all were open and obvious under the circumstances. The situation was uncomplicated.

Stability varied during progress of the work. Plaintiff poked and he looked up for falling corn. A servant of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation. See, Halsey v. Merchants Motor Freight, Inc., 160 Neb. 732, 71 N. W. 2d 311; Brown v. Swift & Co., 91 Neb. 532, 136 N. W. 726.

"One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent." Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

The judgment should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. LESLIE A. WARREN ET AL., APPELLANTS, V. ALBERT G. KLEMAN, CITY CLERK-TREASURER OF THE CITY OF BEATRICE, GAGE COUNTY, NEBRASKA, APPELLEE.

134 N. W. 2d 254

Filed April 2, 1965. No. 35863.

1. **Pleading.** A general demurrer admits the truth of all material facts well pleaded, but does not admit the conclusions of law.
2. ———. As a general rule, only the pleading demurred to may be considered in passing on the demurrer.
3. ———. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial.
4. ———. Neither can the court consider extrinsic facts admitted by the parties or by counsel, nor the conclusions of the pleader, except when they are supported by, and necessarily result from, ultimate facts stated in the pleading.
5. ———. The ultimate or issuable facts to be established should be alleged in a pleading.
6. **Mandamus: Municipal Corporations.** Before a petition states a cause of action in mandamus to compel the officers of a municipality to submit an ordinance to the voters of the city at a referendum, it must allege facts which show that the city is operating under a statute providing for such a referendum.

Appeal from the district court for Gage County: JOSEPH ACH, Judge. Affirmed.

B. W. Stewart, for appellants.

Anne P. Carstens, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This is an action brought by the relators Leslie A. Warren and Orville M. Hale as citizens and taxpayers of the city of Beatrice, Gage County, Nebraska, hereinafter referred to as the city, seeking a writ of mandamus against the respondent Albert G. Kleman, city clerk and treasurer of said city, to require him to submit the question of the approval or rejection of ordinance No. 1451 of said city to the voters thereof.

The respondent filed a special and general demurrer to the petition which will be treated as a general demurrer because that is determinative of the case before us.

The demurrer was sustained by the trial court and the relators were given 15 days leave to file an amended petition, in default of which the action would stand dismissed. The relators failed to plead further and brought the case to this court by appeal.

Since the case turns on the sufficiency of the petition, it is necessary that the substance of the facts alleged be here stated.

It alleges that the relators are taxpayers and voters of the city and the respondent is the clerk thereof, and that said city is a city of the first class organized and existing under the laws of the State of Nebraska having a mayor and council form of government. It states the mayor and council on February 6, 1964, duly adopted and approved ordinance No. 1451, entitled: "An ordinance to authorize the City of Beatrice to own, purchase, construct, equip, lease and operate within such City, off-street motor vehicle parking facilities for the use of the general public." Within 30 days thereafter the relators with others circulated a petition and filed the same with the city clerk, all as provided by law,

requesting the ordinance be submitted to the qualified and registered voters of said city at the forthcoming general election to be held April 7, 1964. The city clerk thereupon determined the petition contained 1,031 qualified registered voters which exceeded the number required and reported his findings to the city council. The council on March 9, 1964, passed resolution No. 1312 directing that said ordinance No. 1451 be placed upon the ballot as requested. However, on March 23, 1964, it passed and approved ordinance No. 1459 which repealed ordinance No. 1451, and on the same day passed resolution No. 1323 which recited the passage of the previous resolution submitting ordinance No. 1451 to the voters, the repeal of ordinance No. 1451 by ordinance No. 1459, and provided that ordinance No. 1451 should not therefore be submitted to the voters and deleted the proposition from the notice of election as originally provided by resolution No. 1312. Copies of ordinances Nos. 1451 and 1459 and resolutions Nos. 1312 and 1323 as well as the petition for the referendum are attached to the petition. The petition further alleges the filing of the referendum petition made wholly illegal and ineffective the passage of the repealing ordinance No. 1459 because its operation was wholly suspended until voted on by the people; that sections 19-639 and 19-640, R. R. S. 1943, set forth the steps to be taken by the respondent clerk and are controlling and must be followed; that the respondent refused and still refuses to place ordinance No. 1451 on the ballot for submission to the voters according to law and that he is subject to the penalties set forth in section 18-127, R. R. S. 1943, for failure to comply with sections 18-101 to 18-130, R. R. S. 1943; that the mayor and council were wholly without power to amend, enforce, or repeal the ordinance after the filing of the referendum petition; that the matters involved are of great public interest; and that the relators have no clear, speedy, or adequate remedy at law. It prays for the court to command by mandamus the respondent

to disregard resolution No. 1323 and proceed to submit ordinance No. 1451 to the electors of the city at a special election.

The relators assign a great number of errors to the trial court, many of which are repetitious. Briefly it can be stated they contend that the trial court erred by holding the wrong sections of the statutes hereinafter mentioned applied to submission of the ordinance to referendum in the present case; that it erred in holding the mayor and council had power to repeal ordinance No. 1451 after the referendum petition was filed; and that because of these errors and in any event the court erred in sustaining the general demurrer of the respondent.

At the outset it may be said the ultimate question which this court has before it is whether or not the petition hitherto outlined stated a cause of action irrespective of which sections or provisions of the statute applied.

The recitations of the relators in their petition state that the law governing the referendum mentioned in the pleading was contained in sections 19-639 and 19-640, R. R. S. 1943. The relators still insist that those sections of the statute are controlling in the present case. The petition, however, clearly alleges that Beatrice is a city of the first class having a mayor and council form of government. It is apparent from examination of Chapter 19, article 6, R. R. S. 1943, containing these sections, that they are applicable to cities operating under the city manager plan. Section 19-601, R. S. Supp., 1963, reads as follows: "Wherever the term this act appears in sections 19-601 to 19-661, it shall be construed as referring exclusively to those sections. The term city as used in this act includes any city having a population of one thousand or more and less than two hundred thousand." The relators contend that under this section all provisions of article 6 apply to the city of Beatrice which as a city of the first class is within the range of

populations mentioned. It, however, is quite obvious that the last sentence of the quoted section relied on by the relators refers to the cities which may come under the provisions of article 6 by adopting that form of government at the election provided for in section 19-609, R. R. S. 1943. The contention of the relators that the provisions of Chapter 19, article 6, R. R. S. 1943, apply to the government of a city operating under the mayor and council plan has no merit.

The relators contend that the trial court erred in holding section 19-431, R. R. S. 1943, is material and applicable to the proceeding, pointing out that it applies only to cities under the commission form of government. Relators are correct in asserting that section 19-431, R. R. S. 1943, relates wholly to cities under the commission form of government. It is only necessary here to say that the trial court in its supplemental memorandum expressly held it was not applicable also.

The trial court's supplemental memorandum, entered after its order sustaining the demurrer in explanation of its ruling, did apply the provisions of sections 18-101 and 18-112, R. R. S. 1943, to the proceedings set out in the relators' petition. It then held that the city which had adopted ordinance No. 1451 had the power to repeal it also. On its being repealed before submitting it to a vote of the electors, the object of the petition for the referendum was accomplished, the question was moot, and for that reason the demurrer was sustained.

Chapter 18, article 1, R. R. S. 1943, applies to all cities and villages whose voters have accepted the initiative and referendum law therein set forth, at an election provided for in section 18-129, R. R. S. 1943. It is not operative in any city until so accepted by the voters thereof. A careful study of the petition of the relators fails to find any allegation that the city of Beatrice has ever accepted or is operating under these provisions providing for the initiative and referendum.

In Griffin v. Gass, 133 Neb. 56, 274 N. W. 193, this court

held: "A general demurrer admits the truth of all material facts well pleaded, but does not admit the conclusions of law. So, also, as a general rule, only the pleading demurred to may be considered in passing on the demurrer. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. Neither can the court consider extrinsic facts admitted by the parties or by counsel, nor the conclusions of the pleader, except when they are supported by, and necessarily result from, ultimate facts stated in the pleading. * * * 'The ultimate or issuable facts to be established should be alleged in a pleading.' "

In the case of Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898, this court held: "A condition precedent of a recovery by a county from the estate of an incompetent person by virtue of section 83-352, R. S. Supp., 1955, of the expense of his care and maintenance in a state hospital which has been paid by the county is that the county allege in the statement of its cause of action and prove at the trial that the incompetent is possessed of an estate and income sufficient to meet the expense of his care and maintenance at the hospital without depriving those dependent upon him of their necessary support." In Sommerville v. Board of County Commissioners, 117 Neb. 507, 221 N. W. 433, it was stated: "One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations."

It is true that in the Clay County case and the Sommerville case the actions were based upon a statute which created the right containing a condition set out therein. This rule is stated in Duhrkopf v. Bennett, 108 Neb. 142, 187 N. W. 813, where it was said: "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and

are an integral part of the act and must be fully complied with in the manner therein prescribed."

In the case before us the right of action of the relators was not expressly conferred and made conditional by statute to the one bringing action thereon. Nevertheless, the relators have no action except under a statute providing for and requiring the submission of the ordinance in question to the voters by referendum.

In 41 Am. Jur., Pleading, § 92, p. 355, the text states: "Irrespective of whether a public or private statute must be pleaded, in all cases, one who seeks the benefit of a statute must, by averment and proof, bring himself within its provisions. The complaint must plead every fact essential to the cause of action under the statute." We think without question that before a petition states a cause of action in mandamus to compel the officers of a municipality to submit an ordinance to the voters of the city at a referendum, it must allege facts which show that the city is operating under a statute providing for such a referendum.

In the case before us the petition of the relators clearly showed that the city of Beatrice is a city of the first class with a mayor and council form of government. The provisions providing for referendum in cities operating under the commission form of government or under the city manager plan have no application. A city operating under the mayor and council form of government is not under the initiative and referendum law set forth in Chapter 18, article 1, R. R. S. 1943, unless it has adopted it as provided in section 18-129, R. R. S. 1943. There appear to be no other applicable provisions requiring the submission of the ordinance in question by referendum to the voters of the city upon their petition.

It follows that the petition of the relators did not state facts sufficient to constitute a cause of action. The other question involved is not necessary to determine in view of our decision. The demurrer was properly sustained

by the trial court and its judgment must be and is affirmed.

AFFIRMED.

ETHEL M. HANSEN ET AL., APPELLANTS, IMPLEADED WITH LLOYD HANSEN ET AL., APPELLEES, V. FRANCIS E. LADENBURGER ET AL., APPELLEES, IMPLEADED WITH MARY FRANCES JOHNSON ET AL., APPELLANTS.
134 N. W. 2d 249

Filed April 2, 1965. No. 35869.

1. Deeds. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery and the burden of proof is on him who disputes this presumption.
2. ———. A deed delivered to grantee in grantor's lifetime is operative, although enjoyment of the estate conveyed is postponed until grantor's death, as a present estate or interest is transferred by such delivery.
3. ———. In a suit to set aside a deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of the deed and producing evidence to overcome the presumption of delivery due to defendant's possession of the deed.
4. ———. This presumption is not conclusive but it raises a strong implication which can only be overcome by clear and satisfactory proof.
5. ———. This court has from an early date consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Kerrigan, Line & Martin and Sidner, Lee, Gunderson & Svoboda, for appellants.

Spear, Lamme & Simmons, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is an action to invalidate a bill of sale to a bulk

petroleum plant and conveyances to five separate tracts of real estate in which Arthur J. Ladenburger, now deceased, is grantor and his son Thomas A. Ladenburger is grantee. The action is brought by Ethel M. Hansen and Leo J. Ladenburger, daughter and son of the grantor, and their respective spouses. They will hereinafter be referred to as plaintiffs or as Ethel or Leo as the case may require. Arthur J. Ladenburger, deceased, will be referred to hereinafter as the father.

The defendants are Thomas A. Ladenburger and Francis E. Ladenburger, his brother, and their spouses; Mary Frances Johnson and Betty June Baker, granddaughters of the grantor, and their spouses; and Leo J. Ladenburger, administrator of the estate of Arthur J. Ladenburger, deceased. Mary Frances Johnson and Betty June Baker and their respective spouses filed voluntary appearances and joined in the prayer of the plaintiffs' petition. The defendants will hereinafter be referred to by their given names.

Plaintiffs allege the conveyances are invalid because they were not delivered to Thomas during the lifetime of the father with the intent to pass title during such lifetime; that said instruments were testamentary in character and were not proper testamentary dispositions; and that there was no delivery by the grantor. Previously Leo as administrator had filed an action in the same court for the same purpose. That action included all of the conveyances questioned herein as well as a bill of sale to a bulk plant at Morse Bluff and deeds to four additional parcels of real estate. A decree was entered therein for Thomas after a hearing on the merits. After a motion for a new trial was overruled, a motion was filed in the name of Leo J. Ladenburger stating: "Comes now Leo J. Ladenburger and shows to the court that he is no longer administrator of the estate of Arthur J. Ladenburger, deceased and prays that the court substitute him, as an individual, as plaintiff in the above entitled action." This was signed "LEO J. LADENBURGER,

Plaintiff." An appeal was perfected to this court and was dismissed on motion. Previous to this dismissal, the plaintiff filed a certificate from the county judge of Saunders County stating that as of May 2, 1963, Leo J. Ladenburger was still adminstrator of the father's estate. The mandate of this court is dated June 5, 1963. The present action was filed on July 10, 1963.

There is no dispute as to the facts. The father died intestate July 27, 1959. He had owned two bulk plants on leased ground, one at Bruno, Nebraska, and the other at Morse Bluff, Nebraska. On April 30, 1958, he executed bills of sale for both bulk plants to Thomas, and handed them to Thomas with instructions to put them in his own safe at home and file them after the father's death. This Thomas did. Thomas had worked in the business with the father since 1942, a part of the early period without salary. The testimony is undisputed that on several occasions the father had promised Thomas the business. About 5 years before the father's death, Thomas assumed full management and control of the Morse Bluff plant, paid the bills, and retained all of the profit. That plant was involved in the previous litigation but is not involved herein. As to the Bruno plant, which is the one involved herein, the evidence is undisputed that Thomas was consulted as to its operation, helped with the paper work, but received no income of any nature from its operation until the father's death.

In November 1954, the father had deeds prepared for four separate tracts, one of which included the home occupied by Thomas. These listed Thomas as the grantee and were handed to him in the latter part of 1956 or early 1957, with instructions to take them home, put them in his safe, and file them after the father's death, with the option of filing the deed to the home place before the father's death if Thomas desired. Thomas was to use the properties and was expected to pay taxes on them, which he did. These four properties were in-

volved in the previous litigation but are not included in this action.

The deeds to the five separate properties involved herein were dated from 1954 to 1959, and were handed to Thomas on different occasions after the four referred to above. They also listed Thomas as grantee, and were handed to him with instructions that they were to be kept in his own safe but were not to be filed until after the father's death. They were kept in Thomas' safe, to which the father did not have access, until they were filed shortly after the father's death.

The father also, but subsequent to the deeds to Thomas, gave him deeds naming the plaintiffs herein as grantees, with instructions to put them in his safe and to deliver the deeds to the named grantees to be recorded after his death. These deeds were delivered to the grantees by Thomas after the father's death. Those properties were not involved in the previous litigation and are not involved herein.

Plaintiffs concede the validity of the conveyances to Thomas embraced in the previous action which are not included in this one, and attempt to show that the differing treatment of the conveyances indicates that the ones questioned herein were intended to be testamentary and are therefore void. Plaintiffs argue that when the father intended to pass a present interest to Thomas, he permitted him to occupy the premises and required him to pay taxes. Thomas did not occupy or pay taxes on any of the properties included herein until after his father's death. One of the deeds herein also provided for the payment of an annuity to the grantor. Thomas testified he did not pay the annuity because his father collected the rent from the property and never asked for the annuity.

Thomas also testified that as to one of the properties involved, which is covered by the last deed to him dated May 6, 1959, he had previously held a deed from the father to Leo covering this same property, but that 3 or

4 months before the present deed the old one was returned to the father who substituted a $5,000 savings and loan certificate, which had previously carried Thomas' name, for it. This certificate was delivered to Leo after the father's death. The testimony on this transaction is as follows: "Q That Savings & Loan account certificate had previously been payable to you, had it not? A Yes. Q So your father exchanged the Savings & Loan certificate or switched it between you and Leo, substituting the Savings & Loan certificate for the land, is that correct? A Yes. Q And the prior deed to Leo had been received by you, before it was destroyed, just like the rest of these deeds? A It must have been, yes. Q And he told you to put it in your safe and keep it and record it after his death? A Yes — no, I wasn't to record it; I was to pass it to Leo. Q You were to pass it to Leo after your father's death just like the rest of the deeds, is that correct? A I was to record mine and pass the other ones out. There was a difference." Plaintiffs urge that this transaction evidenced the intention of the father to retain control over the deeds and to reserve the right to recall them. There is no other evidence of any nature that there was any such understanding as to any of the conveyances questioned herein.

Plaintiffs' sole authority for their position is Neylon v. Parker, 177 Neb. 187, 128 N. W. 2d 690. We submit that there is no similarity between the facts in that case and this one. The evidence in Neylon v. Parker, *supra,* was conclusive that there was no intent to pass a present interest in property. Two quit claim deeds were executed with the understanding that only one of them would be effective, depending on subsequent developments. In that case the grantee was using the deed to attempt to prove the existence of a contract to convey.

This case is much more analogous to Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632, in which a mother executed deeds to certain property to her son and to

other children and put the deeds in her own safe to which the son had access. The mother wrote out a statement in which she said each of the grantees should " 'put his on record after my death * * *.' " After the son's death, this paper and the deed to the son were found by his wife among the son's effects. She recorded the deed. The mother subsequently brought an action against the wife to cancel the deed, claiming there had never been a delivery to the son. In that case we quieted title to the property in the daughter-in-law, subject to a life estate in the mother.

If anything, the facts herein present a stronger case than those in Cerveny v. Cerveny, *supra*. This case is not so dependent on presumptions, but indicates a situation where a grantor intended to convey property retaining a life estate and requested that the deeds be held off record to accomplish that purpose. We have had many cases covering the rules to be applied to the facts herein, none of which are referred to in plaintiffs' brief.

The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery and the burden of proof is on him who disputes this presumption. See Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

A deed delivered to grantee in grantor's lifetime is operative, although enjoyment of the estate conveyed is postponed until grantor's death, as a present estate or interest is transferred by such delivery. See Kerns v. Kerns, 157 Neb. 786, 61 N. W. 2d 405.

In a suit to set aside a deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of the deed and producing evidence to overcome the presumption of delivery due to defendant's possession of the deed. See Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632.

This presumption is not conclusive but it raises a strong implication which can only be overcome by clear

and satisfactory proof. See Cain v. Killian, 156 Neb. 132, 54 N. W. 2d 368.

This court has from an early date consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case. See Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183.

This case was tried in the district court for Saunders County, March 19, 1964. A submission was taken and the plaintiffs were given 10 days to file a brief and the defendants 10 days thereafter to file an answer brief. On April 10, 1964, and prior to a decision Leo filed a motion to amend the petition, alleging that the testimony at the trial indicated that one of the tracts involved had on a previous occasion been conveyed to him, and if the court should find there had been an effective delivery during the lifetime of the father, then the court must find the prior deed effectively conveyed the interest of the father to Leo to the exclusion of the interest of Thomas arising from the second deed. Thomas objected to the motion for leave to amend on the grounds that Leo was estopped to claim title to the tract as against him. The trial court denied leave to amend and Leo gave separate notice of appeal and has filed a separate brief on this issue urging abuse of discretion.

Ignoring the question of res judicata as to Leo, which was raised at several stages herein but which we do not discuss because it would not be applicable to Ethel, the trial court did not abuse its discretion in refusing to amend after submission of the case. The testimony in question did not come as a surprise to Leo. The bill of exceptions in the previous case, which was an exhibit herein, shows that this transaction was fully described in the previous trial. Further, Leo has accepted and has continued to retain the $5,000 building and loan certificate which was changed from Thomas to Leo as a part of the questioned transaction. Even if Leo could amend, the doctrine of equitable estoppel may be applicable. See Wenzel v. Wenzel, 174 Neb. 61, 115 N. W. 2d 788.

For the reasons given, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF FRED W. THOMAS, DECEASED. GENEVIEVE M. THOMAS, APPELLANT, V. SHIRLEY ANN STERNHAGEN ET AL., APPELLEES.

134 N. W. 2d 237

Filed April 2, 1965. No. 35872.

1. **Descent and Distribution.** A "widow's allowance" or a "family allowance" out of the estate of a decedent is of purely statutory origin.
2. ———. Statutes providing for allowances or exemptions to surviving spouses or families of decedents are based on sound public policy and will generally be liberally construed for the purpose of effecting the objective intended.
3. ———. The basis of the allowance is to substitute the estate for the decedent so far as support is concerned.
4. ———. Except in cases where it is established that the decedent has not furnished any support, the widow's allowance is a right which it is mandatory upon the court to recognize, even though the widow has property and income of her own. The allowance is not intended to be limited to those in necessitous circumstances.
5. **Homesteads.** The homestead does not extend to any 160 acres nor any amount of land, as such, unless it is land upon which the dwelling house and appurtenances are situated.
6. ———. If there are two separate and noncontiguous tracts of land, on one of which the dwelling house and appurtenances are situated, only that tract is the homestead, no matter how much less than 160 acres it may contain. Even where the tracts are contiguous, unless the second tract is used in connection with the tract on which the dwelling is located, the second tract is not included.
7. ———. Two tracts separated only by a public highway are contiguous where both tracts were used and operated as one farm.
8. ———. A homestead claimant will not be permitted to lay off or select the homestead in an arbitrary, capricious, or unreasonable shape, so as to occasion loss or damage.

9. ———. It does not matter that such tract is in a different section where the tracts were contiguous and used and cultivated indiscriminately and together.
10. ———. Where two tracts of land corner with each other, they are contiguous, and, when used as one farm, may be selected as a homestead.
11. **Descent and Distribution: Exemptions.** A widow is not entitled to claim all farm machinery under subdivision (8) of section 25-1556, R. R. S. 1943, as tools of the trade of one engaged in the business of agriculture. She may, however, claim the property described in subdivision (6) of such statute, if there is any such property.

Appeal from the district court for Dawes County: ALBERT W. CRITES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Fisher & Fisher, for appellant.

Gantz, Hein & Moran, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This case involves a widow's allowance, her homestead right, and the question of whether farm implements are "tools of the trade" for purposes of exemption to the widow.

The county court granted a widow's allowance of $200 per month; approved the widow's selection of a homestead of two 80-acre tracts out of a 760-acre ranch; and assigned to the widow all of the farm machinery and tools as exempt property. The district court determined that the widow was not entitled to any widow's allowance; that she was not entitled to select, as part of the homestead, an 80-acre tract which touched only on one corner the 80 acres on which the residence was located; and that for exemption purposes, the widow was entitled only to the specific items set out in subdivision (6) of section 25-1556, R. R. S. 1943. From this determination appeal has been taken to this court.

Fred W. Thomas died testate April 24, 1962. Genevieve M. Thomas was his widow. They were married December 21, 1956. Both had adult children from former marriages, but there were no children of this marriage. The will was executed prior to the marriage and the widow had duly elected to take under the statute and not under the will. Prior to the marriage, during the marriage, and at the time of the death of her husband, the widow taught school. At the time of decedent's death, she was receiving a net salary of $328 per month. She owned individually land from which she received gross income of approximately $1,800 per year. Taxes on this land were $160 to $170 and there were some other expenses. There was a mortgage on this land of approximately $2,300 payable in annual installments of approximately $210.

The appraised value of the 760-acre ranch in the decedent's estate was $55,150. This was subject to a mortgage of $7,140. The personal property of the decedent was appraised at $5,475. Total claims filed in the estate totaled $981.82. The widow and Fred W. Thomas also had approximately $15,000 of jointly held personal property.

The decedent, Fred W. Thomas, paid all of the expenses of the household prior to his death and furnished all necessities except clothing. Prior to his death, the decedent had spent $200 to $250 per month for these living costs.

The issues in the district court were specifically limited to three: (1) Is Genevieve Thomas entitled to a widow's allowance and if so, in what amount and for what period of time? (2) Is she entitled to the homestead she selected, or if not, from what real estate is she entitled to select? (3) What specific personal property is she entitled to under section 30-103, R. R. S. 1943?

Subdivision (2) of section 30-103, R. R. S. 1943, provides: "* * * after giving such notice as the judge may require, the surviving spouse and children, if there be

children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the county court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which shall not be longer than one year after granting administration, nor for any time after the personal estate shall be assigned to the surviving husband or wife; * * *."

It is the appellant's contention that the widow has a vested right to such an allowance and that only the amount is discretionary with the court, and that the fact that she has separate property and income of her own, and is gainfully employed, cannot be permitted to completely deprive her of any allowance. Although this statute has remained virtually unchanged since 1907, there are no Nebraska cases directly in point. The right to a "widow's allowance" or a "family allowance" out of the estate of a decedent is of purely statutory origin. Such an allowance is usually an absolute provision to which a widow is entitled in her own right and is independent of any dower or other distributive interest in the estate, being maintained primarily to provide comfort and support pending administration of the estate and as a substitute for the support furnished by decedent. 34 C. J. S., Executors and Administrators, § 323, p. 20.

Statutes providing for allowances or exemptions to surviving spouses or families of decedents are based on sound public policy and will generally be liberally construed for the purpose of effecting the objective intended. In re Estate of Leavitt, 85 Neb. 521, 124 N. W. 114.

The language "shall have" would normally indicate a mandatory interpretation. Our statute and the Wisconsin statute are virtually identical in language, except that the Wisconsin statute applied only to widows. The source of both statutes was the same. The interpretation of the Wisconsin court is, therefore, persuasive

on the matter. In In re Estate of Sullivan, 200 Wis. 590, 229 N. W. 65, the Wisconsin court passed on this specific question. It was argued that the widow received certain insurance money, and other resources, and that it would be equitable to deny her support. The judgment was reversed and the cause remanded with instructions to make an allowance. The court stated: "It is considered that the object and purpose of the statute is to substitute the estate of the husband for the deceased husband during the progress of the settlement of the estate so far as support of the family is concerned. What allowance should be made is to be determined under all the facts and circumstances. Ordinarily in the case of a solvent estate it would be such sum as would maintain the family in approximately the same degree of comfort in which they were maintained by the husband. Under the statute the widow is entitled to an allowance for her support during the progress of the settlement of the estate * * *."

The only case in Nebraska bearing on this issue is the case of In re Estate of Manning, 85 Neb. 60, 122 N. W. 711. In that case, the surviving widow had been insane and supported entirely by the state for 17 years prior to the death of her husband. This court held that it was not an abuse of discretion on the part of the county court to refuse to make an allowance for her support. While this case indicates that the requirement of an allowance is not mandatory in all cases, it establishes the fact that the basis of the allowance is to substitute the estate for the decedent so far as support is concerned. That this was also the intent of our Legislature is apparent from the fact that the statute since 1907 has applied to husbands as well as wives and by the 1951 change is now simply "surviving spouse."

Except in cases where it is established that the decedent has not furnished any support, the widow's allowance is a right which it is mandatory upon the court to recognize, even though the widow has property and

income of her own. The allowance is not intended to be limited to those in necessitous circumstances. Neither do we feel that the Legislature intended to penalize widows who are gainfully employed. Under all the circumstances in this case, an allowance of $200 per month is reasonable.

The decedent owned a 760-acre ranch composed of several tracts, used as one unit. The dwelling house and improvements were in the northwest corner of an 80-acre tract described as the north half of the northwest quarter of Section 11. Immediately to the north was the west half of Section 2. To the northwest was the southeast quarter of Section 3, which touched the 80-acre tract only at the corner. This was the corner nearest the dwelling house and improvements. To the east of the 80-acre tract was the northeast quarter of Section 11. The decedent did not own any land directly south or directly west of the 80 acres on which the dwelling house and improvements were situated. The widow selected, in addition to the 80 acres where the dwelling house was situated, the 80 acres immediately to the northwest. These two tracts would touch each other only at one corner, were it not for an east-west county road. The dwelling house and appurtenances are located very near this corner.

The appellees contend that the widow was not entitled, under the statutes, to select cornering tracts, and that each 80 acres should have at least one common boundary.

Section 40-101, R. R. S. 1943, defines a homestead as: "* * * consisting of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, * * *." It is clear that the homestead was intended to consist of the residence

and the appurtenances, but this court has not previously been called upon to determine what is meant by the phrase "and the land on which the same is situated, not exceeding one hundred and sixty acres." It is very clear that this phrase does not grant a homestead of any 160 acres, nor any amount of land as such, unless it is land on which the dwelling house and appurtenances are situated. If there are two separate and noncontiguous tracts of land, on one of which the dwelling house and appurtenances are situated, only that tract is the homestead, no matter how much less than 160 acres it may contain. Even where the tracts are contiguous, unless the second tract is used in connection with the tract on which the dwelling is located, the second tract is not included. As to city lots, we have held that where there are two contiguous lots, on one of which the claimant lives with his family in an apartment house, and on the other of which there is a separate apartment house, only the lot on which the appartment house in which he lives is a homestead in the absence of affirmative evidence of a connection between the use of the two lots. First Trust Co. v. Bauer, 128 Neb. 725, 260 N. W. 194. The same basic rule should be applied outside incorporated cities or villages.

We have held that two tracts separated only by a public highway are contiguous where both tracts were used and operated as one farm. Davis v. Davis, 112 Neb. 178, 199 N. W. 113. This is the general rule. 26 Am. Jur., Homestead, § 36, p. 26.

We have also held that it does not matter that such tract is in a different section where the tracts were contiguous along their whole length and both used and cultivated, indiscriminately and together. Tindall v. Peterson, 71 Neb. 160, 98 N. W. 688.

The district court ruled that the widow could not select an additional 80 acres which touched only at a corner. The court's theory and that urged by the appellees was that if cornering alone was sufficient, there would be

nothing to prevent a selection of tracts of 20 or 40 acres, in "checkerboard" fashion, effectively covering a large area of the real estate and diminishing the value of the remainder. Apparently all the parties overlooked the fact that another tract contiguous to and having at least one common boundary with the 80-acre tract on which the dwelling was located would permit "stripping" in a fashion perhaps even more disruptive than the "checkerboarding" with which they were concerned. The possible abuse to which the district court's ruling was apparently directed was arbitrary exercise of selection. We agree that a homestead claimant will not be permitted to lay off or select the homestead in an arbitrary, capricious, or unreasonable shape, so as to occasion loss or damage. 40 C. J. S., Homesteads, § 63, p. 502. That situation is not involved in the case actually before us. The land on which the dwelling house is situated is a question of fact in each case. The specific problem with which we are concerned in this case is the question of "cornering." There are two views on the question. See, 26 Am. Jur., Homestead, § 37, p. 26; 40 C. J. S., Homesteads, § 64, p. 504; Annotation, 73 A. L. R. 142. We believe the better rule is that where two tracts of land corner with each other, they are contiguous, and, when used as one farm, may be selected as a homestead. See Oregon Mortgage Co. v. Dunbar, 87 Mont. 603, 289 P. 559, 73 A. L. R. 113.

Under the facts here, we hold that the widow had the right to select the 160 acres which she selected and that such homestead should be set aside to her.

The widow asserts that her husband was engaged in the business of agriculture at the time of his death and that all of the farm machinery and equipment is exempt to her under the provisions of subdivision (8) of section 25-1556, R. R. S. 1943, as tools and instruments used and kept for the purpose of carrying on his trade or business. Section 25-1556, R. R. S. 1943, sets out the applicable exemptions in part as follows: "No prop-

erty hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state and head of a family: * * * (6) One cow, three hogs, and all pigs under six months old, and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses, in lieu thereof; ten sheep, and the wool therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section, for the period of three months; one wagon, cart or dray, two plows and one drag; necessary gearing for the team herein exempted; and other farming implements not exceeding fifty dollars in value; (7) the provisions for the debtor and his family necessary for six months' support, either provided or growing, or both, and fuel necessary for six months; (8) the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; * * *."

The above section may not be invoked to allow one in the business of agriculture to exempt all of his farm machinery. The exemption to one engaged in agriculture, while obviously archaic, has not been changed by the Legislature and is specific. The decision of this court in Miller v. Dixon, 176 Neb. 659, 127 N. W. 2d 203, is determinative. The widow is not entitled to claim all farm machinery under subdivision (8) as tools of the trade of one engaged in the business of agriculture. She may, however, claim the property described in subdivision (6) if there is any such property.

The judgment of the district court is affirmed in part, and in part reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

MERRILL GEORGE POLLARD, APPELLEE, V. DONNA PIERCE GALLEY, FORMERLY DONNA PIERCE POLLARD, APPELLANT.
134 N. W. 2d 261

Filed April 2, 1965. No. 35882.

1. **Divorce: Infants.** Where the district court has awarded the care and custody of minor children to their grandparents by a decree that has become final, a change of such custody can be made only on evidence of changed circumstances, or that it shall be to the best interests of the children, as provided by section 42-312, R. R. S. 1943.
2. ———: ———. Where the proof does not establish the basis for a final judgment awarding custody of minor children to their grandparents, the evidence is ordinarily insufficient to establish changed conditions within the meaning of the statute.
3. **Parent and Child: Infants.** The natural rights of a parent to the custody of his children are not absolute, and where custody has been awarded to another by a judgment which has become final, the proof of changed conditions must show the suitability and responsibility of the applicant and that the best interests of the chilldren are not unduly impaired before a change in legal custody will be directed.
4. ———: ———. The indifference of a mother for the welfare of her children without reasonable excuse is a fact to be considered in determining whether or not changed circumstances are sufficient to require a change of custody to her from one having their legal custody.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Affirmed.

Hutton & Hutton and Richard P. Garden, for appellant.

Mapes & Mapes, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is an appeal from an order of the district court for Madison County dismissing an application for the modification of a divorce decree by which the defendant seeks the custody of four children previously awarded to their paternal grandparents.

On October 21, 1960, defendant Donna Pollard, now Donna Galley, was granted a divorce from the plaintiff Merrill Pollard on her cross-petition. All other issues were continued for subsequent hearing. On January 2, 1961, a further hearing was held, after which the custody of the four minor children of the parties was granted to Telfer R. Pollard and Ida B. Pollard, the children's paternal grandparents. No finding of unfitness as to either of the parties to the divorce proceeding was made by the trial court. The sole finding of the trial court was that it was for the best interests of the minor children of the parties that their care, maintenance, and custody be placed in the paternal grandparents. No appeal was taken and the decree thus entered became final.

The power of the district court to revise its decree of divorce as to the maintenance and custody of children is declared by statute as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." § 42-312, R. R. S. 1943. No attempt was made in the instant case to show that the mother was an unfit person to have the care and custody of the children; nor does the evidence show that the grandparents have failed in their duty to properly care for and maintain the children, except for some fragmentary evidence that they appeared dirty and not neatly clothed on three or four occasions. The evidence of defendant's witnesses affirmatively shows that they appeared healthy and well nourished. The sole question is, therefore, whether or not there are changed conditions warranting a revision of the decree by granting the care and custody of the children to the mother.

Defendant testified that she married Cecil Galley on December 4, 1962. They live in a three-bedroom home

for which, Galley testified, they pay rent of $60 per month. They owe $450 on the furniture in the home, which is being paid for by monthly payments of $30. They own an automobile, the value of which is not shown. Galley owns some government bonds, the amount not being specified. He owns no other real estate or personal property. He has no savings account and there is no evidence as to a bank account. The financial condition of defendant and her husband, who already had one child to support, and the prospect of adding four more ranging in ages from 5 to 10 years at the time of trial. was undoubtedly a matter of concern to the trial court in determining the sufficiency of the changed circumstances. Galley is employed at a salary of $400 per month. Defendant is not employed.

The only evidence of changed circumstances in this case comes from the defendant and her witnesses, since the trial court denied the application at the close of the defendant's evidence. From the evidence of the defendant we learn that she and her first husband were separated for 8 months before the divorce was granted on October 21, 1960. She admits she gave birth to a child in March 1961, which was adopted out. She testified that she was in the company of her former husband after the divorce, in 1961 and 1962. She makes no assertion that he is the father of this child and the inference that he is, because of association during that period, cannot be sustained because of the laws of nature. She admits that after the divorce she drank, patronized public bars, and sought the association of men. As to the circumstances existing at the time of the divorce, which persuaded the court to place the custody of the children with the grandparents, the record is devoid of evidence. She does testify that she has discontinued her evil habits and is now completely rehabilitated. Her present husband corroborates her evidence in this respect. The evidence indicates her complete disinterest in the welfare of the children since 1962. She had not seen the

children during that period. She had not written them, or sent them gifts for Christmas or on their birthdays, as a loving parent would do. Her indifference to their welfare is less than commendable. Her husband had never seen the children prior to the hearing on the application.

The circumstances existing at the time of the divorce are not shown. Neither the pleadings nor the evidence in the case are before this court. The decree of the court in that case contains no findings of facts and consequently there is not a semblance of evidence of any changed condition other than defendant's testimony as to her subsequent marriage on December 4, 1962, and the situation that has developed since that time. Without some proof of existing conditions at the time custody of the children was awarded to the grandparents, this court has little evidence to support a finding that there has been a material change of conditions. The evidence of the defendant on this subject could well be self-serving declarations for the purposes of the hearing.

The decree of the trial court awarding custody of the children to the grandparents has become final. There is no evidence that the grandparents have failed in their responsibility of caring for and maintaining these children. The grandparents have had the legal and physical custody of the children since January 2, 1961. Any change of custody must rest on changed circumstances as the statute provides. The application was considered by an experienced trial judge who had the opportunity to see and hear the witnesses. That court had a better opportunity to weigh the evidence and test the credibility of the witnesses than does this court. After hearing the evidence it determined that the evidence of changed circumstances was insufficient to change the custody of the children and uproot the ties they have formed, in favor of the defendant, whose financial ability is limited. We think the evidence is such as to sustain the action of the trial court in taking the action it did. See Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543.

The defendant relies largely on Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892. That case is clearly distinguishable. In that case the mother had legal custody of the child. She lived with her parents until she died. The issue was whether or not the father, who admittedly had not forfeited his parental right to the child, had a superior right to his child as against the grandparents, on the death of the mother. The case did not involve a change of circumstances warranting a change from one having legal custody to another. In the instant case the right of the grandparents to the custody has been finally determined, subject to the right of modification on a showing of changed circumstances, as the statute provides. The findings of the trial court show that there were no changed circumstances warranting a change of custody of these children. We cannot say that the trial court was in error in determining the factual situation as it did.

We conclude that the evidence sustains the action of the trial court and its judgment is affirmed.

AFFIRMED.

RICHARD L. DAVENPORT, ADMINISTRATOR OF THE ESTATE OF IRVIN L. EATON, DECEASED, APPELLEE, V. BANKERS LIFE COMPANY, A CORPORATION, APPELLEE, IMPLEADED WITH MILDRED M. EATON, APPELLANT.

134 N. W. 2d 258

Filed April 2, 1965. No. 35884.

1. **Insurance.** Where an insured fails to deliver a life insurance policy for endorsement of a requested change of beneficiary, after notice of refusal to make such change without it, and does not request the policy from the beneficiary who holds it, nor take any other action thereafter although there is ample time to do so, and where the evidence shows he was on friendly terms with the beneficiary, he has not done everything in his power under the circumstances to effectuate the change.
2. ———. Where the insured failed to deliver a life insurance

policy for endorsement of a requested change of beneficiary, after notice of refusal to make such change without it, and does nothing thereafter for almost 2 years, during which time the beneficiary to whom the change was requested has been dead for 8 months, he has failed to substantially comply with the provisions of the contracts, and it will be inferred that he changed or abandoned his intention to change beneficiaries.

3. ———. Where the change of beneficiary has not been effected at death, the rights of the named beneficiary become vested and the insurer cannot thereafter, by interpleader or otherwise, waive a condition of the policy so as to prejudice the named beneficiary's rights.

Appeal from the district court for Cherry County: ALBERT W. CRITES, Judge. Reversed and remanded.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellant.

Spittler & O'Kief, for appellee Davenport.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

The question for decision here is whether a request for change of beneficiary on life insurance policies was effective. By stipulation of all the parties, the policies were surrendered to the company and the money paid into court for disposition of the proceeds. The district court sustained a motion for summary judgment on behalf of the administrator of the estate of the deceased insured and against the named beneficiary, the insured's former wife. The named beneficiary has appealed.

On July 3, 1943, and October 18, 1945, respectively, the Bankers Life Company of Des Moines, Iowa, issued to Irvin L. Eaton two life insurance policies on his life, on both of which Mildred M. Eaton, wife, was named beneficiary. The policies provided that the beneficiary might be changed "* * * by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable indorsement * * *. No change shall

take effect until indorsed on the Policy by the Company."

Irvin L. Eaton and Mildred M. Eaton were divorced February 11, 1958. On August 28, 1959, Irvin L. Eaton executed change of beneficiary forms requesting that the beneficiary be changed to Anna Jean Eaton, his second wife. On September 10, 1959, the company wrote Mr. Eaton that it could not change the beneficiary without the policies for endorsement. The letter also advised that it was placing the request in the file and urged him to make every possible effort to secure the policies for endorsement.

The second Mrs. Eaton died August 27, 1960. Irvin L. Eaton died April 28, 1961. The policies at all times were in the possession of Mildred M. Eaton. The record shows that Irvin L. Eaton frequently visited Mildred M. Eaton and was on friendly terms with her prior to his death. There is no evidence that Mr. Eaton ever requested the policies from her. Mildred M. Eaton states affirmatively that he did not. There is also evidence that shortly before his death he told her to keep them. There is no evidence that Irvin L. Eaton ever tried to change the beneficiary after August 28, 1959, nor after the death of his second wife on August 27, 1960, up to the date of his death on April 28, 1961.

The cases indicate a variety of results but clearly establish that the results depend upon the particular facts involved in each case and the inferences which may be drawn from those facts. See, Annotation, 19 A. L. R. 2d, §§ 27 to 33, pp. 65 to 84; 29A Am. Jur., Insurance, § 1682, p. 761; 46 C. J. S., Insurance, § 1175, pp. 75 to 82.

The great weight of authority is that where the policy is in the possession of a beneficiary who refuses to surrender it, the insured will be held to have done everything in his power, under the circumstances, to make the change and that it is effective. This is the rule in Nebraska. Marley v. New York Life Ins. Co., 147 Neb. 646, 24 N. W. 2d 652.

Many cases hold that where it was in the insured's power to obtain and submit the policy for endorsement or where the failure to submit it was unexplained, the change of beneficiary is not effective. In a number of other cases, the failure by the insured to make a demand upon the beneficiary to return the policy, or the failure to take other steps to secure possession of the policy, has been mentioned as an additional factor for holding the attempted change of beneficiary ineffective. Other cases hold that it is not necessary to prove a demand upon the beneficiary to surrender the policy. The reason indicated by these cases is that where the beneficiary's hostile possession is established, it is a fair inference that the policy would not have been surrendered even if demanded. That is the inference we are asked to apply to this case.

It is contended not only that we should adopt an inference that possession of the policy by the beneficiary, standing alone, is sufficient to establish hostility and excuse compliance with the specific contract terms, but that such an inference is justified even where there is evidence to the contrary.

Various grounds have been given for the rule that endorsement on the policy will not be insisted upon. These include the fact that endorsement is a mere ministerial act and will not be insisted upon where the insured has done everything he could, under the existing circumstances, to effect the change; that equity will regard as done what ought to be done; that equity does not require the impossible; and that there has been substantial compliance with the terms of the policy in such a case, which is regarded as sufficient. But whatever the specific reason assigned, the rule is invariably predicated on the proposition that the insured has done everything in his power, under the circumstances, to effectuate the change of beneficiary. Annotation, 19 A. L. R. 2d, pp. 65, 80; 46 C. J. S., Insurance, § 1175, p. 81, and cases there cited.

Where an insured fails to deliver a life insurance policy for endorsement of a requested change of beneficiary, after notice of refusal to make such change without it, and does not request the policy from the beneficiary who holds it, nor take any other action thereafter although there is ample time to do so, and where the evidence shows he was on friendly terms with the beneficiary, he has not done everything in his power under the circumstances to effectuate the change.

Where the insured failed to deliver a life insurance policy for endorsement of a requested change of beneficiary, after notice of refusal to make such change without it, and does nothing thereafter for almost 2 years, during which time the beneficiary to whom the change was requested has been dead for 8 months, he has failed to substantially comply with the provisions of the contracts, and it will be inferred that he changed or abandoned his intention to change beneficiaries. Harmon v. Coyle, 209 F. 2d 200; Luckey v. Luckey, 267 F. 2d 680.

It is also contended that the requirement of delivery of the policies for endorsement of change of beneficiary is for the protection of the insurance company and not for the protection of any named beneficiary; and that the company, by interpleading, waives the provisions and the named beneficiary cannot be allowed to complain of the waiver. Where the change of beneficiary has not been effected at death, the rights of the named beneficiary become vested and the insurer cannot thereafter, by interpleader or otherwise, waive a condition of the policy so as to prejudice the named beneficiary's rights. 46 C. J. S., Insurance, § 1175, pp. 77, 78, and cases there cited.

The action of the district court in sustaining the motion for summary judgment for the plaintiff was in error. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JERRY OHLER, APPELLANT.
134 N. W. 2d 265

Filed April 9, 1965. No. 35874.

1. **Criminal Law: Evidence.** A person charged with crime may be convicted on circumstantial evidence only.
2. ———: ———. In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged.
3. ———: ———. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.
4. **Criminal Law: Trial.** It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
5. ———: ———. After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
6. **Larceny.** Since the repeal of section 29-2026, R. R. S. 1943, by Laws 1963, chapter 163, page 576, it is not required in a larceny case that the jury fix by its verdict the amount or the value of the money or property stolen.

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Affirmed.

John McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

CARTER, J.

The defendant was charged in the district court for Greeley County with stealing, taking, and carrying away money in excess of $200 belonging to the Glessinger Motor Company in Spalding, Nebraska. The jury returned a verdict of guilty. A sentence of confinement for 18 months was imposed. The defendant has appealed.

The evidence of the State shows that on October 22, 1962, the sum of from $225 to $250 was stolen from the safe in the office of the Glessinger Motor Company in Spalding, Nebraska. The business of the company was operated by Robert Glessinger. The place of business consisted of an office, showroom, and a repair shop, and was located on the main street of Spalding. On the day of the larceny Glessinger was working in the office and Ted Molczyk, a mechanic, was working in the repair shop. During the day the safe door was kept closed but unlocked. Money used in the business was kept in a tin box in the unlocked safe during business hours in lieu of a cash register.

Glessinger testified that between 4 and 4:30 p.m. on Monday, October 22, 1962, he had occasion to put some money in the cash box. At that time there was $650 in checks and between $225 and $250 in the box, belonging to the Glessinger Motor Company. Glessinger was in and about the office continuously until approximately 5 minutes after 5 p.m., when a friend drove up in front of his place of business and honked his car horn. He went out, got in the car, and he and his friend drove about 8 blocks. On their return they again parked the car in front of Glessinger's place of business. At the time he left the office Glessinger had been listening to a speech by President Kennedy on the Cuban crisis. When he returned in his friend's car they were still listening to President Kennedy on the car radio. The speech was 18 minutes in length.

While he was sitting in the car he saw the defendant come out of the company office and walk up the street.

He did not see the defendant again until he identified him on November 20, 1962, in the jail in Clay Center, Nebraska. He saw no one else enter or come out of the office before he returned to the office and found the checks and money gone. The checks were later found under a bridge outside of town and returned to him. The money was not recovered.

The mechanic testified that he did not observe the defendant or anyone else in the place during the time in question. He did not know that Glessinger was out of the office.

Glessinger notified the county sheriff of the theft. Patrolman Donald G. Grieb, safety patrol investigator, assisted local officers in the investigation. On November 20, 1962, Glessinger accompanied patrolman Grieb to Clay Center where Glessinger identified the defendant as the person he saw leaving his office on the day of the theft.

Patrolman Grieb had a conversation with the defendant in the jail in Clay Center. Defendant at first informed him that he had never been in Spalding, that he did not know where the town is located, and that in fact he was not in the state on October 22, 1962. Later in the conversation he admitted he was in Spalding on the day of the larceny and that he was in the office of the Glessinger Motor Company on the day and at the time as testified to by Glessinger. Defendant made no statements concerning the taking of the money and demanded an attorney before discussing the matter further. He made no statement as to why he was in Spalding on that day, or as to why he called at the office of the Glessinger Motor Company.

There is evidence that defendant entered a grocery store operated by one Coyne before he went to the Glessinger office. He was asked by two clerks if they could help him. He answered each clerk that they did not have what he wanted, and left the store. He went to the rear, locked screen-door of another grocery op-

erated by Dick German, who asked him what he wanted. He answered that he wanted to find out what kind of business was being operated there, and he left.

The evidence shows that he told no one who he was or what he wanted. When he found no one in the office of the Glessinger Motor Company, he did not go into the repair shop where the mechanic was working, as any person would ordinarily do. He was seen by no one after he left Glessinger's office and walked up the street. No other person was seen in or about the office during the 10 to 15 minutes that Glessinger was absent. Defendant left town immediately after he left the Glessinger office and was seen by no one after he passed from Glessinger's view.

The defendant testified in his own defense. He stated that he went to Spalding in the furtherance of his occupation as a signpainter. He had no paint or brushes, or other tools or materials of his trade with him. He explained this by testifying that he was seeking contracts for future work, but he solicited no one for such work. He testified that he entered the Glessinger office for this purpose, but finding no one in the office, he made no effort to find anyone connected with the business and immediately left.

After all the evidence was adduced, the jury could find the following facts and inferences therefrom: The Glessinger Motor Company was the owner of from $225 to $250 that was in its office safe between 5:05 and 5:18 p.m. on October 22, 1962. The defendant came into the office during this period, the only time the money was left unguarded. No other person was seen near the office or the company safe during this short period of time. Defendant did not look around for any person connected with the business, but left immediately and departed the town. Defendant went to two other stores earlier in the afternoon for no apparent reason, at least none that he gave. The inference is that, under the circumstances, he was "casing" the town. He testified that he

came to Spalding in the furtherance of his trade as a signpainter. But he carried no materials or equipment used in such business. He said he was seeking contracts for future work, but he solicited no one for any such work. He neither revealed his identity nor his trade to anyone. He admits that he left town immediately after leaving the office of the Glessinger Motor Company, which was immediately following the disappearance of the money. When interviewed by an investigator on November 20, 1962, he at first denied that he had ever been in Spalding, asserted that he did not know its location, and further stated that he had not been in the State of Nebraska on the day of the theft. After he was identified, he admitted being in Spalding and in the office of the Glessinger Motor Company in the late afternoon of October 22, 1962, less than 30 days prior to the date of the interview. All of the circumstances are consistent with each other and point to the guilt of the accused. There are no circumstances pointing to the innocence of the defendant and the only evidence supporting his defense is his denial that he is guilty.

A jury, after considering the foregoing circumstances and the inferences reasonably to be drawn therefrom, had ample evidence from which a finding of guilt could be found under the instructions of the court, informing it of the findings necessary to sustain such a conviction. The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available and where, as here, there are many circumstances pointing to the guilt of the defendant, the question is for the jury under proper instructions safeguarding the rights of the defendant. In such a situation the question of the guilt or innocence of the defendant is for the jury.

The weight and credibility of the evidence was for the jury. The jury found beyond a reasonable doubt that

defendant committed the offense. It is evident that the jury did not believe defendant's version of the evidence as it had a right to do. It is not questioned that a person may be convicted on circumstantial evidence alone, but such evidence must meet a certain test which was properly explained to the jury by the instructions.

The trial court instructed the jury, as it is required to do, that to justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Rimpley v. State, 169 Neb. 171, 98 N. W. 2d 868; Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340; Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698. The jury considered the evidence and concluded that it was sufficient to find the defendant guilty beyond a reasonable doubt and, in so doing found that the facts were consistent with each other and with his guilt, and that they were inconsistent with any reasonable hypothesis of innocence. Under the facts and circumstances shown, the foregoing questions constituted issues of fact for the jury and not this court.

In Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592, this court, in a criminal case based largely on circumstantial evidence, said: "Under this rule, in the first instance, it is a function of the jury to weigh the circumstantial evidence and to test it by the following rule found in Morgan v State, supra, and repeated in Kitts v. State, supra: 'The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.' If the jury does so find, that finding may not, as a

matter of law, be disturbed on review by this court if the evidence supporting the finding sustains some rational theory of guilt."

In this case there was competent circumstantial evidence of probative value from which the jury could reasonably infer and find that the defendant committed the offense charged. Under such circumstances the verdict of the jury is sustained by the evidence and no basis exists for this court to interfere with the jury's verdict.

The defendant contends the trial court erred in not requiring the jury by its verdict to determine the value of the money taken. While this was formerly a statutory requirement, the Legislature by Laws 1963, chapter 163, page 576, repealed the provision. Since the repeal was effective prior to the trial of this case, the trial court did not err in failing to require the jury by its verdict to fix the amount of the money stolen.

The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion because I believe while it gives lip service to it, it fails to apply the well-established law of this jurisdiction.

The only question presented by this appeal is the sufficiency of the evidence, which is wholly circumstantial, to sustain a conviction. The sufficiency of this evidence must be established in the light of well-established rules of law. See Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158. In that case we said: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt."

In State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860, we said: "In order to warrant a conviction on circum-

stantial evidence, the circumstances taken together must be of such conclusive nature and tendency as to produce a reasonable and moral certainty that the accused committed the offense charged beyond a reasonable doubt.

"In determining the weight of circumstantial evidence, a jury must find that the facts and circumstances are of such a conclusive nature as to exclude to a moral certainty every other rational hypothesis except that of guilt of the accused."

I have no quarrel with the facts stated in the majority opinion but do believe some additional observations should be made. The front door opens into a 20 by 40 foot showroom, behind which is a repair shop. On the east of the showroom, there is a parts room with an office on its north side. There is an open doorway between the showroom and the parts room which has a counter and a swinging gate. The last time Glessinger looked in the cash box was sometime before 4:30 p.m. On that occasion, someone called out in the showroom and he returned the cash box to the safe, pushed the safe door closed but did not lock it, and went out into the showroom. He cannot remember who it was that called him out. After that he was either in the showroom or the repair shop, and does not believe that anyone could have entered the office without his seeing him, until he left with a friend shortly after 5 p.m. It was not possible to see into the showroom from the repair shop. While the record indicates he was in the repair shop part of the time before he left, it does not specify how long this might have been. When he did leave he was gone 10 or 15 minutes.

The majority opinion stresses the fact that Glessinger saw no one else enter or come out of the office but the defendant before he found the checks and money gone. However, Glessinger admits that it was not possible for him to know how many people came in and went out of his showroom while he was away. "It could be quite

a number." It was Glessinger who testified as to the finding and return of the checks. This was based entirely on what others told him. The checks were returned to him by a third person to whom they had been given by the person who allegedly found them. None of these people testified at the trial.

There is absolutely no testimony as to Ohler's movements after he was seen coming out of the showroom by Glessinger. There is no testimony that he even left town along the road on which the checks were allegedly found. It was approximately a month later that the accused was picked up at Clay Center and returned to Greeley County.

I feel that the majority opinion makes an unwarranted assumption in saying: "When he found no one in the office of the Glessinger Motor Company, he did not go into the repair shop where the mechanic was working, *as any person would ordinarily do.*" (Italics supplied.) It was at least 10 or 15 minutes after 5 p.m. Ohler testified he knocked on the counter, and when he got no response left the building. An ordinary person would possibly do just that *at that time of day.*

The majority opinion comments that no other person was seen in or about the office during the 10 or 15 minutes Glessinger was absent. The question not answered is, *who was there to see them?* Glessinger was gone and the mechanic was working on a car in the repair shop where he could not see the office or the showroom. No one was called by the State to prove this fact. It is apparent that the majority opinion is putting the burden on the defendant to prove that someone else was in the vicinity who could have committed the crime.

The majority opinion states: "There are no circumstances pointing to the innocence of the defendant and the only evidence supporting his defense is his denial that he is guilty." Have we reached the place in Nebraska where a defendant must prove his innocence? I believe our rule still is that an accused is presumed to

be innocent until he has been proved guilty beyond a reasonable doubt. The defendant has been convicted solely because he had an opportunity to commit the crime because he was on the scene during a part of the period within which the crime could have been committed. It does seem a little strange that in a jurisdiction where possession of stolen property in and of itself is not sufficient to make a prima facie case of burglary or larceny (Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762), that mere presence at the scene of a crime at some time during the period when it could have been committed should be alone sufficient to do so for grand larceny.

The proper rules to be applied are the following from Rimpley v. State, 169 Neb. 171, 98 N. W. 2d 868: " 'The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.' Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592.

" 'To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.' Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611.

" 'When circumstantial evidence is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused in such a conclusive way as to exclude any other reasonable conclusion, every element essential to the conclusion must be proved by competent evidence beyond a reasonable doubt, and the existence of a reasonable doubt as to any

one of them requires an acquittal.' Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. See, also, Jeppesen v. State, *supra.*

" 'It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.' Morgan v. State, 51 Neb. 672, 71 N. W. 788. See, also, Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158; Hoffman v. State, *supra.*"

We said in Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt." In my judgment the evidence adduced does not meet this test. There is still an interval of time when someone else might have been in the office and have had the same opportunity the evidence indicates was presented to the defendant. Glessinger conceded that it was possible for others to have been in the office while he was gone. The most we can say about the evidence adduced is that the defendant had an opportunity to commit the crime and there is a strong suspicion that he did, but this falls far short of proving him guilty beyond a reasonable doubt. There is no question but that the actions of the defendant were to say the least very suspicious, yet suspicion does not suffice for evidence. Without some proof that no one else entered the building during the interval when Glessinger was gone, or connecting the defendant in some way with the fruits of larceny, it is not possible to say that the evidence adduced is of such conclusive nature as to produce to a reasonable and moral certainty that the

defendant committed the offense beyond a reasonable doubt.

The following quotation from Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, is particularly meaningful in this case: "When circumstantial evidence is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused in such a conclusive way as to exclude any other reasonable conclusion, every element essential to the conclusion must be proved by competent evidence beyond a reasonable doubt, and the existence of a reasonable doubt as to any one of them requires an acquittal. Treppish v. State, *supra;* Lowe v. State, *supra;* Walbridge v. State, 13 Neb. 236, 13 N. W. 209; 20 Am. Jur., Evidence, § 1217, p. 1068; Vinciquerra v. State, *supra;* Harms v. State, *supra;* State v. Hooper, 222 Iowa 481, 269 N. W. 431; State v. Sigman, 220 Iowa 146, 261 N. W. 538; State v. Lewis, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913A 1203; State v. Suitor, 43 Mont. 31, 114 P. 112, Ann. Cas. 1912C 230; 23 C. J. S., Criminal Law, § 907, pp. 154 to 156.

"Caution should be exercised in drawing inferences from circumstances proved in a criminal case. Suspicion or speculation may never justify a conviction. Circumstantial evidence as a basis of a conviction of crime should be acted on and weighed cautiously, and this is especially true where the crime is heinous. A conviction should not be based on the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. In determining the sufficiency of circumstantial evidence to support a conviction, each case must be determined on its own peculiar circumstances. Bourne v. State, 116 Neb. 141, 216 N. W. 173; Lowe v. State, *supra;* O'Neil v. State, 118 Neb. 360, 224 N. W. 855; Vinciquerra v. State, *supra;* Hiner v. State, 196 Ind. 594, 149 N. W. 168; State v. Pienick, *supra;* 23 C. J. S., Criminal Law, § 907, p. 146."

The offense charged is not supported by sufficient evidence. Defendant's motion to dismiss, made at the conclusion of all of the evidence, should have been sustained. The judgment of the district court should be reversed and the cause remanded with directions to dismiss.

I am authorized to state that Justices Boslaugh and Brower join in this dissent.

WESTERN SURETY COMPANY, A CORPORATION, APPELLANT, V. KERSEY WELTY ET AL., APPELLEES.
134 N. W. 2d 288

Filed April 9, 1965. No. 35878.

1. **Pleading.** A motion for judgment on the pleadings which is in substance and content a demurrer, will be treated as such, and will be construed to admit the truth of all well-pleaded facts and all reasonable inferences to be drawn therefrom.
2. **Indemnity.** A contract of indemnity continues in force during such time as is expressly or impliedly provided in the contract. Where no time is fixed for its termination, either party may end it at his pleasure, if he acts in good faith.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Munro, Parker & Munro and Jerry J. Grossart, for appellant.

Kenneth S. Gotobed, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

Plaintiff sues defendant Lee Welty on an indemnity agreement contained in an application for a fuel user's bond. The bond issued guaranteed payment of fuel taxes to the State of Nebraska. The district court sustained a motion for judgment on the pleadings and en-

tered a judgment dismissing the action because plaintiff's petition failed to state a cause of action. The plaintiff appeals. We reverse the judgment.

Defendant Lee Welty's motion for judgment on the pleadings was in substance and content a demurrer, will be treated as such, and therefore admits the truth of all well-pleaded facts and all reasonable inferences to be drawn therefrom. Watkins Products, Inc. v. Rains, 175 Neb. 57, 120 N. W. 2d 368; International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620.

The facts, as alleged in the petition considered with the exhibits attached, are that defendants Kersey and Lee Welty, as partners doing business as Welty Brothers Service Station, on October 31, 1958, both signed and executed an application for a special dealer's or user's bond with the plaintiff. The agreement in the application contained the following applicable language: "The undersigned applicant and indemnitors hereby request the WESTERN SURETY COMPANY, a corporation * * * to become surety for and furnish such bond or bonds, undertaking or undertakings *as may now or hereafter be required* by or on behalf of the above named applicant.

"* * * the undersigned jointly and severally in consideration of the Company * * * executing or guaranteeing any bond or bonds or undertaking or undertakings, * * * jointly and severally agree to indemnify and keep indemnified the said Company from and against any liability, and all loss, cost, charges, suits, damages, * * * and expenses * * * *which said Company shall at any time sustain or incur,* for or by reason, or in consequence of said Company having become surety or entering into such bond or bonds, or undertaking or undertakings." (Emphasis supplied.)

The bond that may "hereafter be required" is attached to the petition as exhibit A. It is a continuous surety bond and binds the defendants and the plaintiff to pay the State of Nebraska "all special fuel taxes, penalties

and interest, which may be assessed or imposed against said Principal." No time limitation or termination date is set out in the bond. It does have a provision for cancellation on 30 days' notice. This bond was executed for the partnership by Kersey Welty, one of the partners, as principal, and the plaintiff, as surety, on November 3, 1958. This bond was filed with the state, was never canceled, and was in full force and effect in November and December 1962 and January 1963, when fuel taxes of the defendant became unpaid and, as a result thereof, plaintiff paid the State of Nebraska $1,506.05 on April 3, 1963. Plaintiff demanded payment from the defendants and it was refused.

It seems apparent that plaintiff has stated a case. It alleges the indemnity agreement, the issuance of a bond pursuant thereto, payment to the state under the terms thereof, and demands for reimbursement from the defendant Lee Welty. No issue is presented as to the defendant Kersey Welty, the other partner, since a default judgment was entered against him in this case.

Defendant Lee Welty's only contention seems to be that the filled-in blanks in the application form referred to a bond expiring on October 31, 1959, and that the indemnity agreement could not therefore reach beyond that date. But, plaintiff had authority as set out above to issue such bonds as requested or required by defendants, and on November 3, 1958, it did obligate itself on the continuing bond. Defendants cannot say, under the allegations of the petition, that there was no authority on their behalf to execute such a bond, or knowledge on their part, because the partnership (by Kersey Welty) executed the continuous bond as principal. No matter what term of bond was referred to or contemplated in the application of October 31, 1958, the partnership actually consented to, signed, and secured the continuing bond issued on November 3, 1958, which had no termination date. The only reasonable inference to be drawn from the defendant partnership's act in signing the con-

tinuous bond as principal is that a 1-year bond was not desired, and the bond desired was the one the partners actually signed and obligated themselves on. Consequently, their obligation is measured by that part of the indemnity agreement covering any bond that may be requested or required, and the further obligation to indemnify for loss as a consequence of the company "having become surety or entering into such bond or bonds, or undertaking or undertakings."

A contract of indemnity continues in force during such time as is expressly or impliedly provided in the contract. Where no time is fixed, either party may end it at his pleasure, if he acts in good faith. 42 C. J. S., Indemnity, § 11, p. 578; Thompson v. Murphy, 61 N. D. 134, 237 N. W. 653; American Surety Co. of New York v. Blake, 54 Idaho 1, 27 P. 2d 972, 91 A. L. R. 153. The continuing bond, signed and executed by the partnership, thus binding the defendant Lee Welty, comes clearly within the circumstances contemplated by the indemnity provision of the contract. No termination by either defendant is alleged in the petition, although defendant Lee Welty alleged termination of the agreement in his amended answer filed before the issue of the sufficiency of plaintiff's petition was raised by his motion for judgment on the pleadings.

The judgment of dismissal is reversed and the cause remanded for trial on the issues raised by the petition and the amended answer.

REVERSED AND REMANDED.

TERRY CARPENTER ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
134 N. W. 2d 272

Filed April 12, 1965. No. 35910.

1. **Constitutional Law: Taxation.** The Constitution of this state

provides that the necessary revenue for the maintenance of state government shall be raised by taxation in such a manner as the Legislature may direct.

2. ———: ———. The Constitution provides that taxes shall be levied uniformly and proportionately upon all tangible property and that the Legislature may prescribe standards and methods for the determination of the value of tangible property uniformly and proportionately.
3. **Taxation.** It is the function of the county board of equalization to determine the actual value of property for taxation purposes.
4. ———. The primary duty of the State Board of Equalization and Assessment is to establish uniformity in taxation between the various counties.
5. **Constitutional Law: Taxation.** Both the county board of equalization and the State Board of Equalization and Assessment must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property.
6. **Taxation.** The determination of each individual county as to actual value is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the State Board of Equalization and Assessment as conforming to the law.
7. ———. The State Board of Equalization and Assessment has no power to readjust individual valuations within any particular county.
8. **Taxation: Appeal and Error.** On review of the determination of the State Board of Equalization and Assessment, the proper rule is that this court may not substitute its judgment for that of the State Board of Equalization and Assessment. We review the record only to determine if the State Board of Equalization and Assessment has complied with the requirements of the statute in exercising the powers granted to it by the Legislature.
9. ———: ———. It is only in situations where the record is conclusive that the State Board of Equalization and Assessment's action was illegal, contrary to law, arbitrary, and capricious that this court has any power to interfere with its findings and orders.
10. **Taxation.** A wide latitude of judgment and discretion is vested in the State Board of Equalization and Assessment.
11. ———. The State Board of Equalization and Assessment is not bound by the actual record of the evidence taken before it and no particular method or procedure must be followed. No particular kind or standard of evidence is required and it may

act upon the knowledge of its own members as to value and on any other information satisfactory to it.

12. ———. The State Board of Equalization and Assessment is entitled to act upon the presumption that the abstracts of assessment returned by the various counties have conformed to law.

13. ———. Actual value is an intangible concept, is largely a matter of opinion, and there are no yardsticks by which it can be determined with accuracy.

14. ———. Substantial compliance with the requirements of equality and uniformity in taxation is all that is required and such provisions are satisfied when designed and manifest departures from the rule are avoided.

15. ———. The object of the law of uniformity in taxation is accomplished if all of the property within the taxing district is assessed at a uniform standard of value.

16. ———. A sales assessment ratio study, without any investigation or evaluation of the raw information according to some uniform standard of evaluation of the sales, is entitled to little, if any, probative force as evidence on the issue of equalization and valuation.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Wilson, Barlow & Neff, for appellants.

Clarence A. H. Meyer, Attorney General, Homer H. Hamilton, and William E. Peters, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

This is an appeal by Terry Carpenter, a taxpayer and owner of urban real property in Scotts Bluff County, and by Terry Carpenter, Inc., a Nebraska corporation, owning both rural and urban real property in Scotts Bluff County, from the decision of the State Board of Equalization and Assessment of the State of Nebraska, made on July 28, 1964.

The record shows that after two preliminary meetings, the State Board of Equalization and Assessment, which will hereafter be referred to as the Board, decided that it

would be necessary to call in all the counties of the state for the hearing before the Board in order to perform its official statutory function. The Board approved a statutory notice of hearing to be sent to each county and informed each county that its representatives would be given an opportunity at a scheduled time to show why the assessed valuations of urban and rural real estate in their county, as shown by the 1964 abstract of assessment rolls previously submitted to the Board, should not be increased or decreased. These notices also stated that particular attention would be focused on the sales assessment ratio for sales prepared by the state Tax Commissioner's office for each county in the years 1960, 1961, 1962, and 1963. Pursuant to these notices, the Board conducted public hearings on July 21, July 22, July 23, July 24, and July 25, 1964. On these dates representatives of all 93 counties appeared before the Board and the testimony of these representatives was incorporated into the minutes of the Board and is a part of the record before this court on appeal.

Subsequently on July 28, 1963, the Board again met. The Board acted upon a motion, which was unanimously carried, and recited that, upon consideration of the testimony of the 93 counties, the statistical data available to the Board, the personal knowledge of the members of the Board, and the requirements of section 77-112, R. R. S. 1943, and other applicable law, the Board found: "(1) *That the sales assessment ratio, as computed, is not an entirely reliable guide, even if it were possible to use a single factor in making determinations;* (2) that there is insufficient evidence to show that the various individual counties are not valuing property for taxation purposes at actual value, such actual value being defined by statute; and (3) that the abstracts of assessment as submitted by the various counties conform to law. * * * The State Board of Equalization and Assessment, therefore, accepts as conforming to law the abstracts of assessment of real and personal property

submitted by the various counties to the office of the State Tax Commissioner and approve each of the same." (Emphasis supplied.)

The appellant, Terry Carpenter, on behalf of himself and Terry Carpenter, Inc., appeared before the Board and requested the Board to equalize the assessment of property in Nebraska to make it conform to law, that is, 35 percent of actual value. From the action of the Board, heretofore recited, the appellants have taken this appeal.

The appellants' assignments of error, summarized, contend that the Board acted arbitrarily and capriciously and not within the law in failing to equalize the valuations of real property among the various counties and that its order did not conform to law in that it did not equalize the values of real property to bring them to the required statutory assessed rate of 35 percent of actual value. At this point, we examine the applicable principles of law involved so that we may proceed to an examination of the pertinent evidence in the case with the proper yardsticks in mind. The Constitution of this state provides that necessary revenue shall be raised by taxation in such a manner as the Legislature may direct. It provides also that taxes shall be levied uniformly and proportionately upon all tangible property. It further provides that the Legislature may prescribe standards and methods for the determination of the value of real and other tangible property at uniform and proportionate values. Art. VIII, § 1, Constitution. Pursuant to these provisions, the Legislature has provided the method of determining the value of tangible property for tax purposes. Section 77-112, R. R. S. 1943, provides as follows: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation;

(5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade." In our scheme of taxation, the Board acts upon the abstracts of tax assessments furnished by each of the counties. The original determination as to actual value under the statutory standard is the function of a county board of equalization. The determination of each individual county as to actual value within its county is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the Board as conforming to the law. It is fundamental that the Board has no power to readjust individual valuations within the county. It can only act to equalize the assessments between different counties in order to achieve the constitutional objective of uniform and proportionate valuations over the whole state. As we see it, the primary duty of the Board is to establish uniformity between the various counties. The basic powers and duties of the Board are set out in the applicable statute, section 77-506, R. R. S. 1943, which states in part as follows: "The State Board of Equalization and Assessment shall proceed to *examine the abstracts of real and personal property assessed for taxation in the several counties of the state,* including the railroads and pipe lines entirely within such county, and all other property, and *shall equalize such assessment so as to make the same conform to law.* For that purpose, it shall have the power to increase or decrease the assessed valuation of real or personal property of any county or tax district." (Emphasis supplied.)

The proper relationship and the distinction in powers between the county boards of equalization and the Board in this state are set out in S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N. W. 2d 569, as follows: "It is the function of the county board of equalization to determine the actual value of the property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individ-

ual taxpayers unless appealed from, such valuations are subject to the powers of the State Board of Equalization and Assessment, *which powers have been described by this court as being purely incidental to a proper equalization of the assessment of the different counties of the state as returned to that body.* Hacker v. Howe, 72 Neb. 385, 101 N. W. 255. Both the county board of equalization and the State Board of Equalization and Assessment, however, must *give effect to the constitutional requirement that taxes must be levied uniformly and proportionately* upon all tangible property. *It is evident that actual value and a uniform and proportionate value may not* always result in identical results. In dealing with such a situation arising in this state, the Supreme Court of the United States said: 'This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. *The conclusion is based on the principal that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred* as the just and ultimate purpose of the law.' Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. It could well be added that the application of this principle to the findings of the county board of equalization makes it possible for the State Board of Equalization and Assessment to fairly equalize between counties without doing injustice to individual taxpayers." (Emphasis supplied.)

We have endeavored to give a brief review of the substantive principles applicable to the Board's determination and the scope of its powers and duties. We next briefly examine the proper rules to be followed by this court in reviewing the determination of the Board. The proper rule is that we may not substitute our judgment for that of the Board. We do not pass upon the rela-

tive merits or the probative force of the evidence in the record. We review the record only to determine if the Board has complied with the requirements of the statute in exercising the powers granted to it by the Legislature. It is only where the record is clear and conclusive that the Board's action was illegal, contrary to law, arbitrary, and capricious that this court has any power to reverse the findings and the orders of the Board. Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469; County of Buffalo v. State Board of Equalization & Assessment, 158 Neb. 353, 63 N. W. 2d 468; County of Douglas v. State Board of Equalization & Assessment, 158 Neb. 325, 63 N. W. 2d 449. See, also, State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609.

We next go to the burden of proof that the appellants must meet. When a taxpayer appeals from an action of the Board, the presumption is that the Board faithfully performed its duties and the burden is upon the appellant to prove that the action of the Board was erroneous, arbitrary, capricious, and contrary to the law. County of Buffalo v. State Board of Equalization & Assessment, *supra;* Hatcher & Co. v. Gosper County, 95 Neb. 543, 145 N. W. 993.

In testing the Board's action, the ordinary rules applicable to appeals to this court do not apply. A wide latitude of judgment and discretion is vested in the Board. The Board is not bound by the actual record of the evidence taken before it. No particular method or procedure must be followed. No particular kind or standard of evidence is required. It may act upon the knowledge of its own members as to value, on any other information satisfactory to it, and it is entitled to act upon the presumption that the abstracts of assessment returned by the various counties have conformed to the law. County of Grant v. State Board of Equalization & Assessment, 158 Neb. 310, 63 N. W. 2d 459; Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332.

And, further we point out at this time that it can probably always be demonstrated that the Board, in dealing with the intangible concepts of valuation and uniformity, could never reach any mathematically precise result. Such a yardstrick or criterion of equalization can never be accomplished. Approximation, both as to value and uniformity, is all that can be accomplished. Collier v. County of Logan, 169 Neb. 1, 97 N. W. 2d 879. And, we have held that the object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a *uniform standard of value.* State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716. Actual value is an intangible concept, is largely a matter of opinion, and there are no yardsticks by which it can be determined with accuracy. S. S. Kresge Co. v. Jensen, *supra;* H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382. We note that our present statute on valuation, section 77-112, R. R. S. 1943, broadens the elements that may be considered where applicable, but places no limitations on different elements that may be considered. We recently pointed out in Union Pacific R.R. Co. v. State Board of Equalization & Assessment, 170 Neb. 139, 101 N. W. 2d 892, that the application of the new statute did not change the principle that the judgment as to valuation is largely a matter of opinion and is committed to the sound discretion and judgment of the Board. We have held that substantial compliance with the requirements of equality and uniformity in taxation laid down by the federal and state Constitutions is all that is required and that *such provisions are satisfied when designed and manifest departures from the rule are avoided.* LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455; 51 Am. Jur., Taxation, § 152, p. 202.

In light of the above principles, have the appellants sustained their burden of proof to show that the Board acted arbitrarily and capriciously and outside of the law, or that its action was a designed and manifest departure

from the permissible discretion allowed it under the statute and the applicable law thereto? We think not.

To meet the burden imposed upon them, the appellants rely almost entirely upon the sales assessment ratio compiled by the state Tax Commissioner as a criterion of valuation and uniformity. Section 77-1320, R. S. Supp., 1963, first enacted in 1945, provides that the register of deeds of each county shall submit to the state Tax Commissioner a report each year showing all sales or transfers of farm lands and town property. It excluded judicial sales until 1963 when an amendment was passed including them. Although not required by statute, the state Tax Commissioner, Forrest A. Johnson, based on these reports, computed the ratio of sales prices of urban and rural real estate to the assessed values of the same real estate for the years 1960, 1961, 1962, and 1963 in each county. In 1963, the Tax Commissioner prepared a 4-year average ratio of sales prices of rural and urban property to assessed values in each county. It should be explained that if the total prices of all property sold in any county were equal to the total and actual values of those properties for assessment purposes, the sales assessment ratio would equal 35 percent which corresponds to the legal requirement under the applicable statutes that all property be assessed at 35 percent of actual value. As sales prices exceed the assessed values, the sales assessment ratio goes down from 35 percent and conversely sale prices lessen the values for assessment purposes and cause the sales assessment ratio to go up from 35 percent. It is true that the state Tax Commissioner prepared the sales assessment ratio. It is also true that the Board summoned the counties in for a hearing with respect to equalizing their assessments according to this standard. The major portion of the appellants' argument is the great disparity between the different counties as to these ratio figures. They give us an extensive statistical analysis. For example, they first take the 4-year average sales ratio on rural land

which is 27.35 percent. They point out that there is a variation on the sales assessment ratio from a high of 36.20 percent in Gage County to a low of 14.83 percent in Thomas County. On urban property, the proportions range from a high of 41.99 percent in Pawnee County to a low of 21.44 percent in Loup County. The urban percentages are based on a statewide average of 28.91 percent. Then, using the 1963 sales alone, appellants again point out a similar disparity between the counties.

This argument is forceful and plausibly persuasive. We note, however, that according to the appellants' own figures as presented in their brief that based upon the 4-year average rural real estate sales assessment ratio, there were 83 counties in the state that ranged from a 20 percent sales assessment ratio to a 35 percent sales assessment ratio. The state average for these 4 years was 27.35 percent which brings all 83 counties within a 7 or 8 percent range of the average ratio. This same general range is present with reference to the sales assessment ratio for urban real estate. After pointing out the disparity in these sales assessment ratios between the various counties, the appellants immediately argue the applicability of Laflin v. State Board of Equalization & Assessment, *supra*. They then state that the Board's determination not to take action on these sales assessment ratios show conclusively to this court that the Board's action was arbitrary and capricious and must be found to not conform to the law.

The Board took five days in the reception of evidence. In each instance, the counties were confronted with their sales assessment ratio for the 4 years mentioned. Most of the testimony of the counties was directed to an attack upon the validity of the sales assessment ratio as a basis for finding actual value or as a standard of equalization. We cannot review this evidence in detail. We can only generalize. A great number of gross errors in the reports of sales was presented to the Board. For example, in one instance two sales of

$24,000 were reported to the Board when there was only one. The scarcity and infrequency of sales in many of the counties were noted. It is a reasonable conclusion that sales of small urban properties for amounts below assessed valuation were not reported. It appears that in Lancaster County only 18 percent of the sales which should have been reported were actually sent to the Tax Commissioner for use. The evidence is overwhelming that a great portion of these sales in the various counties were reported at inflated and premium prices due to a variety of factors. It appears that many of the sales reported included large amounts of personal property in a reported consideration that could not properly be related to the actual value of the real estate itself. In some individual cases, it appears that the Tax Commissioner did withdraw some sales because of information furnished him, but it is a fair conclusion from the record that there was no checking of the raw information in any substantial sense; nor was there the application of any uniform standard of evaluation to determine the number of bona fide sales and the amount thereof. The evidence shows that premium prices, sometimes as much as three times the actual value of the property, were paid for some properties for the purposes of completing units. For example, there was an instance where a sale was made in order to complete a seven-section ranch unit at a price of almost double the conceded actual value of the surrounding property. Many sales at premium prices were reported that were the result of an anticipated development in a certain small area on the edge of a town or community. Premium prices, in some counties, were paid for pasture land and for irrigated land that did not reflect the overall average value of the surrounding land in the county. No consideration was given to the fact that time sales contracts on real estate usually reflect an inflated price. No consideration was given for sales resulting from family situations where property was bought by a farmer desiring to pur-

chase extra adjoining land for some member of his family. Testimony shows that premium prices, much above actual value, were paid in many instances by people who take income tax advantage because they are in the higher income tax brackets. In many cases premium prices were paid as a hedge against inflation. It was pointed out in the testimony that no consideration was given to large sales where there is a crop base, such as wheat, and the purchase price often reflects the price of the crops thereon for the current year as well as the actual value of the real estate. In one case, premium prices were paid for approximately eleven parcels of real estate in an estate, because the tenants thereon had lived on the property for a long period of time and their peculiar necessity and desire for the property inflated the price way above the average actual value of the same or similar land in the community. There was considerable evidence as to spite sales. There was evidence that inferior land was purchased at much above its actual value because of a plan for retiring it in the soil bank program. A large number of the county assessors gave a detailed analysis of many individual sales reported to the state Tax Commissioner. Their evidence is persuasive that these reports furnished no adequate basis for determination of actual bona fide sales and market prices in the ordinary course of trade. Any conclusion drawn from these reports would be uncertain, conjectural, and speculative.

We point out that the Board and this court have no way of knowing what the comparative and relative impact these inequities, errors, and imperfections in the reports of sales had as between the various counties. It was obvious that they would be magnified in the counties where there were reports of very few sales. One percent of the land was reported as sold in some counties. It seems to us apparent that these factors would have a different impact or influence on a purported sales assessment ratio as to different sections of the state and as

between counties. What the difference is and how it would affect the percentage ratio, the Board and this court have no way of knowing. It is a reasonable assumption, and one upon which the Board could reasonably have acted, that the above factors, inequities, or imperfections in the sales assessment ratio vary in their effect from one county to another and from one part of the state to another. Again we point out that unreliable as the raw information was, sales are only one factor under the statutory formula to be considered in testing the presumption of the validity of county valuations.

As we see it, the sales assessment ratio as compiled in this case was nothing more than the application of a statistical method to a mass of raw, unchecked, and uncertain information. It is clear to us that it does not reflect the truth and could not be used for the basis of any calculation as to disproportionate valuations between the counties. Moreover, it is not even suggested that any uniform standard of evaluation of this data was applied to it. There was neither any effort made nor any method used to pierce and examine the raw information to determine the bona fide sales and the actual consideration as between the parties.

In determining whether the Board acted arbitrarily and capriciously, we note that the state Tax Commissioner, a member of the Board, after hearing all of the evidence, voted to reject this purported sales assessment ratio as being a proper standard of equalization and valuation. When the official who compiled and presented this study to the Board rejected it himself as a standard for equalization and valuation, we fail to see how this court is in a position to declare that it was arbitrary and unreasonable on the part of the Board to reject it as a proper standard for performing its duty.

As far as we have been able to discover this court has never accepted a sales assessment ratio of this nature as a valid base for the equalization of assessments. In Laflin v. State Board of Equalization & Assessment,

supra; H/K Company v. Board of Equalization, *supra;* and County of Grant v. State Board of Equalization & Assessment, *supra,* similar sales assessment ratios were rejected by this court as being invalid. We point out that in the County of Grant case, *supra,* the county attempted to use the state sales assessment ratio that was prepared on a 5-year basis. Said the court: "From an examination of the exhibit and the comparisons therein shown as above indicated, it is conclusive that the exhibit has no value as evidence." In Sioux City Bridge Co. v. Dakota County, 110 Neb. 597, 194 N. W. 729, the Dakota County assessor chose transactions, "* * * which in his judgment presented a reasonable proportion between the consideration named and the assessed value." We point out that apparently in this case a local county assessor, not only chose a group of sales within the county, but analyzed them to determine which ones were bona fide sales. Nevertheless, appellants said in passing upon this method of valuation as follows: "While this method, no doubt, is entitled to probative force, it is manifest that it is not conclusive and is subject to many imperfections. It is a matter of common knowledge that many sales are based on trades in which the consideration is inflated. The true test in all cases is to arrive at the fair value of the property."

Nevertheless, appellants rely upon our holding in Laflin v. State Board of Equalization & Assessment, *supra.* In that case, a 20-year sales assessment was rejected as being too remote, but as we read this case we did not hold that a sales assessment ratio for a shorter period of time and prepared and offered in the manner as present in this case would be a valid basis for equalization. In the Laflin case, the court specifically held that the sales assessment ratio was invalid but held that the Board was arbitrary in using it for making an adjustment for 19 counties and not making a requisite comparable adjustment in Johnson County. There is no indication in the present case of such an arbitrary decision. But, on

the contrary, there is an entirely consistent refusal to act upon such an invalid basis. We would have the Laflin case here if the Board had accepted the sales assessment ratio for some of the counties and rejected it in its application to the others. The Board, in this case, was faced with the dilemma of applying, in the light of Laflin v. State Board of Equalization & Assessment, *supra,* a sales assessment ratio on a statewide basis or rejecting it in toto. Nothing less would be accepted under the holding in the Laflin case. It would seem obvious under these circumstances that the Board was not arbitrary or unreasonable in rejecting such a false standard as the evidence demonstrated it to be.

Appellants cite no cases sustaining the validity of the application of a sales assessment ratio to the equalization process before any state board. Our research has revealed a few cases passing on the subject. In Coulter v. Louisville & Nashville R.R. Co., 196 U. S. 599, 25 S. Ct. 342, 49 L. Ed. 615, the results of a study of real estate sales in Kentucky was used in an attempt to show relationship of assessment to full value. The facts in the case do not fully disclose the nature of the study but it could hardly have been any less evaluated as to bona fide sales than the one in the case before us. The court rejected the figures. Justice Holmes of the United States Supreme Court said: "It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some at least of the conveyances did not report true prices, yet they furnished the chief weapon of attack." In May Department Stores Co. v. State Tax Commission (Mo.), 308 S. W. 2d 748, the court rejected a ratio study saying: "This is only mentioned to show further that the ratio study and the order of the Commission can in nowise be conclusive on matters of individual valuation. We are convinced that plaintiff did not establish a discrimination in this regard; it had the burden." In People ex rel. Hillison v. Chicago, B. & Q. R.R. Co., 22 Ill. 2d

88, 174 N. E. 2d 175, the Illinois Department of Revenue annually determined the percentage relationship between assessed value and full fair cash value transactions shown to be bona fide sales as established through an analysis of property transfers and other means. This case and the others that we have examined sustaining the use of a sales assessment ratio reflect a situation far different than we have here. In all of these cases there was a scientific evaluation of the raw information or data from the original sales, and there was an application of a uniform standard of evaluation in order to determine the fair value of the land involved in transactions shown to be bona fide sales.

The Legislature has required these reports of sales since 1945 but has failed to recognize them as a suitable method for valuation or equalization. Instead, the Legislature has moved to set up a uniform standard for this basis. The 1963 session of the Legislature adopted a program of statewide appraisal contained in sections 77-1301 to 77-1301.08, R. S. Supp., 1963. The objective is a comprehensive and uniform system of scientific reappraisal of real property and improvements in the State of Nebraska. This is the standard that the Legislature has set up and adopted on a statewide basis. In the light of this situation, can it be said that the Board acted unreasonably and capriciously and outside of the mandate of the law when it refused to accept a sales assessment ratio and instead acted upon the various presumptions applicable to the abstracts of assessments that were furnished it, the testimony of almost all of the county assessors, and the other information and knowledge that was available to it? We think not.

Appellants argue that some of the counties have not changed their assessments for a number of years. They argue that various counties adjusted their values according to different percentages of appraisal reports. But, the personnel, methods, and standard used by different boards appointed by the various counties vary

widely. The appraisal reports were only one of the factors to be considered. The judgment as to valuation and equalization within each county is committed to the sound discretion of the Board. The various county officials appeared before the Board and explained to it why their various appraisals were accepted or rejected in part and gave the reasons therefor. Since there was no common uniform appraisal standard adopted on a statewide basis, we cannot say that the Board was capricious or arbitrary in accepting the various explanations by the different counties as to the weight they gave their appraisals. It is argued that several counties took into consideration the valuations on similar lands in surrounding counties. Actual value is largely a matter of opinion, and we cannot say that the Board was arbitrary and capricious in failing to adjust these counties because of this factor.

Appellants argue that several county assessors admitted that their valuations were below the "actual value" level, but approximation is all that is required. A range above or below 35 percent of actual value was permissible. And, as we interpret these isolated statements, they constitute nothing more than an admission of the impossibility, under our present system, of arriving at any precise and definite value. The Board, by its action, did not indict them for their candor. And, on review, we do not feel that we could find that the Board was arbitrary and capricious in refusing to take these isolated statements and proceed to equalize all county valuations on a statewide basis. Furthermore, we can find nothing in their testimony that would indicate any concession that their values were unequal or disproportionate with the other counties. The great majority of the other counties did testify that their valuations were at 35 percent of actual value. Even using the sales assessment ratio as a basis of comparison, little if any difference is shown between these counties and the ones testifying that their property was at actual value.

In closing we feel that this record does not disclose on its face, as it did in Laflin v. State Board of Equalization & Assessment, *supra,* that the action of the Board was arbitrary, capricious, unreasonable, and constituted a manifest and designed departure from the law. Basically, the appellants' case rests upon an invalid sales assessment ratio, rejected as being unreliable by the member of the Board who prepared it and the equivocal admissions of a few county assessors. We cannot say that the Board was arbitrary and capricious in not permitting this type of evidence to prevail. Against it, the Board weighed the presumptions applicable to the various abstracts of assessment, the positive evidence before it by the various county officials, the knowledge of members of the Board as to value, and their right to consider any other information satisfactory to them.

We do not mean to say that there was not some evidence of probative force upon which the Board could have acted. Perhaps, this court sitting as a super board of equalization would have evaluated the evidence differently and made some adjustments, but we may not, as was said in Laflin v. State Board of Equalization & Assessment, *supra,* sit as a super board of equalization and pass upon the merits of the evidence. The Board alone is vested with this power and may exercise a wide latitude of judgment and discretion. In order to reverse the order of the Board, we would be required to hold the Board utterly failed to follow a reasonable course of action and that its decision was illegal, arbitrary, and capricious. We would be required to hold, in effect, that it followed a course of action that was a designed and manifest departure from the law. The Board followed a reasonable procedure, heard all of the evidence, and reached its conclusion that the appellants had failed to meet their burden. We cannot say that it was arbitrary and capricious in doing so, and in rejecting as unreliable a demonstrably false guide for equalization.

We conclude that the assignments of error predicated

by the appellants herein cannot be sustained. It is ordered that the decision and final order of the State Board of Equalization and Assessment be and is hereby affirmed.

AFFIRMED.

McCOWN, J., dissenting.

We respectfully dissent. A thorough examination of the record produced from scores of official witnesses reveals such confusion in the interpretation of the constitutional and statutory terms of "valuation" and "actual value" as applied to a tax on real property, that we deem it essential to review some fundamental principles involved.

The constitutional provision, insofar as applicable, is: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property." Art. VIII, § 1, Constitution of Nebraska.

The basic rule of property taxation is that the value of the property is the basis of taxation, and the fundamental rule or standard of value is actual, market, full, true, or fair cash value. Ordinarily these are all defined as being one and the same and are encompassed in the term "fair market value." See, 51 Am. Jur., Taxation, § 696, p. 648, § 701, p. 652; 84 C. J. S., Taxation, § 410, p. 780, § 411, p, 791; Richards v. Board of Equalization, *ante* p. 537, 134 N. W. 2d 56.

Our former statutes defined "actual value" as "value in the market in the ordinary course of trade." § 77-201, Comp. St. 1929; § 77-112, R. S. 1943.

"Fair market value" is a well-defined legal term even though it "is an intangible concept, is largely a matter of opinion, and there are no yardsticks with which it can be determined with accuracy" as stated in the majority opinion. "Fair market value" means the price property will bring when offered for sale by one who desires, but is not obliged to sell, and purchased by one who is under no necessity of buying, both having reasonable knowledge of the facts.

The principles governing the ascertainment of value for the purpose of taxation are the same as those that control in condemnation cases, confiscation cases, and generally in controversies involving the establishment of just compensation. 51 Am. Jur., Taxation, § 701, p. 653.

Many elements enter into the determination of actual value. No one element of value is controlling and all elements entering into a determination of actual value must be taken into consideration where applicable. Richards v. Board of Equalization, *supra.*

Section 77-112, R. R. S. 1943, as amended in 1957, states: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade." The first five elements of the formula are clearly proper elements of "actual value." The sixth is actually not an element but essentially the same as the "actual value" which is to be determined. Obviously, number (6) has been treated or interpreted by many officials as meaning "market price" rather than "market value" as it is stated. "Market price" is only an element in determining "actual value" or "market value," but "market price" and "market value" are not the same. "Market price" is generally accepted as one of the best tests of the "market value" of land, but is only one element. Nowhere in the statute as now constituted does the word "price" appear. This, of course, does not mean that "market price," either of the particular land or of similar property, cannot be taken into account; because clearly it must be. It does, however, demonstrate the basic confusion which has arisen in the interpretation of constitutional and statutory language as to value for purposes of taxation.

No specific percentage can be assigned to any one element of value, nor are they necessarily equal. In our opinion, the Legislature cannot set an arbitrary formula or standard which does not reasonably reflect "actual value" or "fair market value."

We turn now to a consideration of the particular case before us. We agree with the majority opinion that the record established that the sales assessment ratio, as it was prepared, compiled, and used here, was not proper. In our opinion, this does not mean, however, that a sales price assessment ratio study, properly and uniformly compiled, and properly and expertly weighed, analyzed, tested, compared, and sampled, could not be an effective instrument of equalization.

The majority opinion proceeds on the assumption that since the sales assessment ratio as presented was ineffective, the State Board of Equalization and Assessment, hereinafter called the Board, was entitled to act upon the presumption that the abstracts of assessment returned by the various counties have conformed to law, and that the object of the law of uniformity is accomplished if all of the property within the taxing district is assessed at a uniform standard of value; impliedly, even if less than 35 percent of the actual value which the statute requires. In this respect, the majority opinion relies upon the case of Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. That case involved an individual taxpayer whose property was taxed at 100 percent of its true value while all other property in the county was taxed at 55 percent of that value. That case, however, is specifically based on the principle that where it is impossible to equalize both the standard of true value and the uniformity and equality required by law, the latter requirement is to be preferred. The United States Supreme Court pointed out that to require all other taxpayers to be increased, "is to deny the injured taxpayer any remedy at all because it is utterly im-

possible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district." The majority opinion here applies the principle of that case to this one. But here the action involves the Board, required by law to equalize all county assessments at 35 percent of actual value, and authorized to increase or decrease any or all. In fact, the transcript specifically shows that the Attorney General had advised the Board before the hearings that it probably could not legally set the valuations in the various counties at an average figure which would be below 35 percent of actual value. The result of the majority opinion here, on the basis of an incorrect application of the principles of a case involving the assessment of an individual taxpayer, is that the Board may disregard the specific requirement of the statute. It also determines, in effect, that it is impossible for the Board to assess at 35 percent of value, and at the same time accomplish equalization and uniformity. We do not know how it is possible to have uniformity at some percentage of actual value less than 35 percent, but impossible to have uniformity at 35 percent of actual value. The Board itself has the power to increase or decrease the valuations of each county, and we cannot agree that a simple mathematical computation can make the possible impossible when dealing with the same actual value. We believe that the effect of this portion of the majority opinion is in direct conflict with section 77-201, R. S. Supp., 1963, and with the holding in Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

Passing the question of whether the Sioux City Bridge Co. case applies to this situation, and even assuming that it does, then, since uniformity is the primary objective, there is still a constitutional and statutory obligation on the Board to decrease as well as increase the valuations of individual counties to secure the uniformity and equality required by law. How can it be said

that there is equality or uniformity of any sort except in relationship to a uniform standard of value? As it was philosophically expressed by one of the witnesses: "If you start with a wrong number, you are going to come up with 35% of the wrong number."

Apparently the majority opinion accepts the statements of representatives of the counties that they had placed their values at 35 percent of what they thought actual value was, as being proof of the fact, at least where coupled with the presumption of validity. This ignores the other evidence in the record which we think established the fact that a uniform standard of value was not used by the counties. At this point also, we should state that we disagree with the holding that the Board is not bound by the record, but may act upon the knowledge of its own members as to value and on any other information satisfactory to it. If this be the rule, as applied to this case, it would be virtually impossible to successfully contest any action of the Board. Nevertheless, the record itself establishes the failure to use or apply a uniform standard of value among the various counties and a consequent lack of equality and uniformity of assessment.

The record shows that over 40 counties apparently had had professional appraisals of actual value in the period from 1950 through 1962. Professional scientific appraisals are, we think, a proper method of determining actual value. The Legislature, by enactment of sections 77-1301 to 77-1301.08, R. S. Supp., 1963, has now specified that all counties must have professional scientific appraisals within the next few years. The record is replete with expressions of official opinion that such scientific professional appraisals or reappraisals will provide a much improved standard of uniformity. This can only be true, however, if these professional scientific reappraisals are required to be applied uniformly. The record indicates that for the year involved here, at least 18 counties which had had professional appraisals between 1950 and 1962, applied them 100 percent and took

35 percent of those appraisals as the assessment. At least two other counties had done likewise with respect to urban or rural property, one or the other. Twenty-two counties, however, had reduced their appraisals by various arbitrary percentages. The percentages of the appraisals which were used ranged from approximately 60 percent to 95½ percent, and in two instances, the exact amount of the reduction is not shown by the record. There were many other counties which had had professional appraisals as to which the record does not show what percentages of them were used. There is nothing in the record as to eight counties because the recording equipment broke down.

Of the counties which had appraisals in 1961 and 1962, three were using 100 percent of the appraisal figures; three arbitrarily reduced the appraisal figures to 75 percent, 76 percent, and 80 percent respectively; and one county was using 100 percent on its urban property and 80 percent on its rural property. Of counties completing appraisals in 1959 and 1960, two were using 100 percent and three used percentages of 82 percent, 90 percent, and 94 percent respectively. Of counties completing appraisals in 1957 and 1958, three used them 100 percent and five reduced them to percentages varying from 80 percent to 93 percent. One county used an interesting and revealing method of arbitrary reduction. It first reduced the professional appraisal values by 29.575 percent and then took 28.57 percent of that. The reason for this involved computation was to reach the same total valuation as the county had reported in prior years. This resulted in an apparent actual value of approximately 60 percent of the appraisal. For counties completing appraisals in the years 1955 and 1956, five counties were using 100 percent of their appraisal figures and five reduced them, one to 67 percent, one to 70 percent, one to 75 percent, one to 80 percent, and one to 95.5 percent. However, the county which reduced to 70 percent, used 37 percent of that rather than 35 per-

cent. Of counties completing professional appraisals in 1953 and 1954, three of them were using 100 percent, one used 85 percent, and one 92.5 percent. It seems clear to us from the record that at least some counties arbitrarily reduced their actual values, and that a lack of uniformity and equality is clearly apparent. Of what use to the state are appraisals, past or future, if some counties are permitted to arbitrarily reduce their values for state assessment purposes?

We agree with the majority opinion that in dealing with the intangible concepts of valuation and uniformity, a mathematically precise result can never be reached, nor perfect equalization ever accomplished. However, we cannot agree that equality and constitutional uniformity are even reasonably approximated where one county may be assessed for state tax purposes on a basis 50 percent higher than some other county, or where one county may be assessed at two-thirds of the basis applied to another county. Such disparities, in our opinion, exceed the bounds of approximation or reasonableness.

We entirely agree with the opinion of the majority that this court cannot act as a super board of equalization, nor substitute its judgment for that of the Board. We are convinced, however, that on the record here, regardless of the enormity of the task, the failure of the Board to do anything was illegal, contrary to law, and arbitrary. Anyone reading the record in this case will be overwhelmed by the problems and conflicts discussed. They run the gamut of the problems involved in Nebraska in the field of property taxation. We recognize the extreme difficulty, as well as the complexity, of the decisions facing the Board, as well as the fact that it has been given few tools with which to work. Nevertheless, we cannot escape the conclusion that the constitutional and statutory requirements were not met.

I am authorized to state that Justice Carter and Justice Brower concur in this dissent.

SPENCER, J., concurring.

I concur with the majority opinion herein because I do not believe the type of record before us is one on which we can say that the action of the State Board of Equalization and Assessment, hereinafter referred to as Board, was arbitrary and capricious.

The record before us is a reproduction of a tape recording of the proceedings before the Board. Because the recording device was faulty, there is no record for eight of the counties which appeared. Throughout the record, the words "not understandable" appear because the device did not pick up the conversation. I refer to it as conversation for it is no more than unsworn statements because none of those appearing were placed under oath, although the statute contemplates that the secretary of the Board will administer an oath. § 77-503, R. R. S. 1943. Further, the record abounds with statements from persons unknown, identified only by the description "voice." The appellant Terry Carpenter appeared before the Board and requested it to equalize assessments according to law, but offered no evidence of any nature.

The appearances before the Board were in response to a notice sent pursuant to section 77-508, R. R. S. 1943, to the county clerk, assessor, and chairman of the county board of the 93 counties, ordering the county to appear for hearing to show why the assessed valuation of urban and rural real estate should not be increased or decreased in order to equalize the assessments in all counties. The notice stated that particular attention would be focused upon the sales-assessment ratio for 1960, 1961, 1962, and 1963.

I am in complete accord that the sales-assessment ratio as it is prepared and used is not a proper criteria for any purpose. There are too many variables which are not covered and even if it were properly used and fully analyzed it could only be a factor in testing the assessment of the type of property actually sold. I do not

see how we can reject it and then use it for any purpose, as we would be required to do if we were to sustain appellants' appeal.

I fully agree it is the duty of the Board to equalize as nearly as possible the assessed value of all classes of real and personal property among the several counties and for that purpose to see that all tangible and real property is assessed at 35 percent of actual value so far as that may be possible. I realize that under present conditions, this is difficult to accomplish. That fact, however, does not relieve the Board of its responsibility. I further observe that there are a few statements in the record which if properly adduced as evidence might raise a question requiring Board action. I am not prepared to hold, however, that the Board is bound by other than competent evidence. In the absence of competent evidence of probative force otherwise, the Board is entitled to indulge the presumption that the public officials involved have conformed to law.

Briefly reviewing the unsworn statements appearing in the record, I make the following observations. There is no record on eight counties. Representatives of 66 counties stated substantially that their counties were assessed as close to 35 percent of actual value as possible. Twelve counties not included in that figure, along with many who are included, are now in the process of having scientific appraisals made in compliance with the Comprehensive Real Estate Appraisal Law. This law will permit the Board to achieve a degree of uniformity of assessments between counties because the act places central supervision and a substantial degree of control with the state Tax Commissioner and the State Board of Equalization and Assessment.

Of the seven others, Gosper County cut its 1962 appraisal 10 percent after a hearing on many complaints, and accepted 90 percent as the actual value. Scotts Bluff and Banner counties used 90 percent of the appraised figures furnished them by the appraisal com-

pany as actual value, with no explanation appearing in the statement. Boone County used 87.1 percent and Greeley County cut its 1962 appraisal by 20 percent. Sioux County used 75 percent of its appraisal figure because the board felt the properties were appraised too high and assessed accordingly. Platte County used the appraisal furnished but assessed at 32 percent for urban and 28 percent for rural property.

These appraisals and all the others referred to in the statements in the record were made previous to the new law. They were made by local committees and several different appraisal companies, and no attempt was made to standardize the criteria used by them. So, ignoring the human factor, there were bound to be variations, as there were, between counties and different appraisal reports. As I see it, at best the appraisal under those conditions was merely an opinion of the committee or company employee as to the actual value to be used by the assessor to help him in determining actual value.

The assessor, as I interpret the law, was expected in each instance to determine the actual value. This was subject to review on objection by the county board of equalization. In the absence of some evidence that the values fixed by the assessor were not the actual values, the fact that they are below the figure recommended by the appraiser is not controlling. Merely the statement, therefore, that the Sioux County assessor set the value at 75 percent of the value fixed by an appraisal firm does not shift the burden to Sioux County to prove that figure to be the correct one. The burden is the other way. Under the new law, powers are given to the Board to review any changes made by the county boards of equalization in valuations made by any general reappraisal and to make such adjustments as are necessary to see that there is full compliance with the law.

IN RE APPLICATION OF UNITED MINERAL PRODUCTS COMPANY.

UNITED MINERAL PRODUCTS COMPANY, APPELLANT, V. NEBRASKA RAILROADS OF WESTERN TRUNK LINES COMMITTEE, APPELLEE.

134 N. W. 2d 598

Filed April 16, 1965. No. 35727.

1. **Carriers.** Unequal charges for transportation of property by a common carrier are not unjustly discriminatory if they are legitimately referable to transportation conditions.
2. ———. Relative costs of service for different hauls of a commodity are a basic determinant of the reasonableness of rate relationships.
3. ———. Railroads may not reduce rates to meet competition at one point and refuse to meet it at another where the circumstances are substantially similar.

Appeal from the Nebraska State Railway Commission. On rehearing. See 177 Neb. 802, 131 N. W. 2d 388, for original opinion. Reversed.

Nelson, Harding & Acklie and Richard A. Peterson, for appellant.

Mason, Knudsen, Berkheimer & Endacott, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

A shipper has complained of unjust discrimination in rail rates. The objection involves the relationship between scales of distance rates for single-line and joint-line hauls of a commodity from different points of origin to common destinations up to 200 miles away.

The Nebraska State Railway Commission authorized joint-line rates for intrastate transportation of highway construction material described as a filler consisting of ground limestone or limestone dust with a minimum weight of 100,000 pounds per car in closed cars. The shipper has appealed.

In a former opinion, 177 Neb. 802, 131 N. W. 2d 388, we reversed the order on the ground that the commission had exceeded its jurisdiction. Our reasons were a defective notice of hearing and the absence of an application for authority.

After reargument we now withdraw the former opinion because any procedural irregularities were not jurisdictional. The Nebraska Railroads of Western Trunk Lines Committee appeared generally at the hearing. It represented the necessary carriers. It later obtained an extension of the termination date of the authority. It requested us to affirm the order. The notice was ample and the application adequate.

We proceed to the merits. Appellant and Ashland Stone Company are competitors in markets located west of their quarries and along routes of the Chicago, Burlington & Quincy Railroad Company. Shipments of the rivals originate at Weeping Water and Ashland. Appellant is served exclusively by the Missouri Pacific Railroad Company whereas Ashland is served exclusively by the Burlington.

Injury to appellant is undisputed. The market is sensitive to freight rates, which constitute a large part of the total price. Under the joint-line scale charges rise from $1.85 per ton for 40 miles to $3.93 for 200 miles. The commodity price f.o.b. fluctuates between $4.50 and $4.75 per ton.

More than injury is required. Unequal charges legitimately referable to transportation conditions are not unjustly discriminatory. See Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331.

Relative costs of service are a basic determinant of symmetry. Sharfman, The Interstate Commerce Commission, III-B, pp. 566, 567. By this standard the relationship under attack is disordered. The joint-line scale was constructed upon a single-line scale which is no longer in use for distances up to 200 miles. Appellant

has accepted the increment of 54 cents per ton, an addition representing the differential under earlier commission orders, but it has objected to the paper scale as a base.

A comparison between the truck-competitive rates charged Ashland for distances up to 200 miles and the joint-line rates charged appellant reveals the extent of discrimination. The differential per ton mounts from 66 cents for 40 miles to 99 cents for 200 miles. In contrast the differential for greater distances remains between 34 cents and 37 cents.

The variation has been attributed to competition by motor carriers. In 1938 the railroads depressed their rates for single-line hauls up to 200 miles, but they established no truck-competitive rates for joint-line hauls.

In some cases, but not in this one, carrier competition is a transportation condition justifying unequal charges. Basic determinants of reasonable rate relationships are not to be diluted by a policy of competition in itself unreasonable. "Railroads may not reduce rates to meet competition at one point and refuse to meet it at another where the circumstances are substantially similar." United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492.

Arguments of the parties invite amplification of our conclusion. The railroads have pointed out that a scale constructed upon the truck-competitive one would disrupt the scale for open cars. The shipper has insisted upon the truck-competitive base.

This dispute must be presented to the commission. Our inquiry has been directed to the reasonableness of rate relationships—not to the reasonableness of any scale in a different context. Adjustment must be made by the commission. See L. E. Whitlock Truck Service, Inc. v. Shippers Oil Field Traffic Assn., 171 Neb. 78, 105 N. W. 2d 588.

Only one conclusion may be drawn properly. The

two scales work an unjust discrimination against appellant.

The order of the commission is reversed.

REVERSED.

KENNETH D. LIPPIRE ET AL., APPELLANTS, V. HENRY ECKEL ET AL., APPELLEES.

134 N. W. 2d 802

Filed April 16, 1965. No. 35780.

1. **Pleading.** This court may, in furtherance of justice, make or permit amendment of any pleading to conform to the facts proved, when such amendment does not change substantially the claim or defense.
2. ———. The power of this court to make or permit amendment of a pleading to conform to the facts proved is ordinarily only exercised to sustain and not to reverse a judgment, unless it appears that a miscarriage of justice would otherwise result.
3. **Deeds: Boundaries.** Where all parties to a deed intended that it convey a certain property with a designated boundary, and there was no mistake about the identity of the property to be conveyed, but in drafting the deed the boundary was incorrectly described and more land was included than the parties intended, and for 6 years the grantors continued to occupy the land mistakenly conveyed, and the grantees asserted no title to or right to possession of it, and all parties labored under the same misapprehension that the deed only described the land they intended to be conveyed, there was a mutual mistake of the parties, and reformation may be granted so that each party will have what in equity and good conscience he should have.
4. **Reformation of Instruments.** Mere negligence in executing a written instrument without reading and understanding its provisions is not a bar to reformation where the ground for relief is a mutual mistake of the parties.
5. **Pleading.** It is the facts well pleaded and not the conclusions of the pleader that determine the nature of the action and the relief to be granted.
6. **Equity: Pleading.** A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellants.

Kenneth H. Dryden, for appellees.

Heard before WHITE, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK, District Judge.

POLLOCK, District Judge.

This is an action in ejectment to recover possession of an 11-foot strip of land in the city of Kearney. The defendants claim that because of a mutual mistake of the parties the south 10 feet of said strip of land was erroneously included in the description of land conveyed to plaintiffs by deed, and they seek reformation of the instrument to conform to the true intention of the parties.

The plaintiffs Kenneth D. Lippire and Leona C. Lippire, husband and wife, alleged in their amended petition that they had a legal estate in and were entitled to the possession of said strip of land, that the defendants had unlawfully withheld possession thereof since about June 15, 1957, and they prayed for delivery of possession.

The property was described as follows: "North Eleven (11) feet of Lot Eleven, Block Nine (9) and the North Eleven (11) feet of Lot Two (2), Block Nine (9) except East Sixty Nine (69) feet, together with all that part of 23rd Street which is now vacated and immediately abutting on the premises herein described, all in Kearney Land and Investment Company's second Addition to the City of Kearney, Buffalo County, Nebraska."

In their amended answer and cross-petition the defendants Henry Eckel and Verna Eckel alleged that they together with Opal Siebenaler and Ben Siebenaler owned a motel property; that they contracted on April 18, 1957, to sell it to the plaintiffs; and that they thereafter conveyed it to the plaintiffs by a deed. They alleged that all parties to the deed intended that it should convey

the motel property described as follows: "Lots 3 and 4, Block 4, and Lot 12 in Block 9, the north one foot of Lot 11 in Block 9, Lot 1 and 2 in Block 4 except the east 69 feet, Lot 1 in Block 9, except the east 69 feet, the north one foot of Lot 2 in Block 9 except the east 69 feet, together with all that part of 23rd Street which is now vacated abutting on the premises all in Kearney Land and Investment Company's Second Addition in the City of Kearney."

The defendants alleged that through mistake and inadvertence the deed erroneously described the land in Lots 2 and 11 of Block 9 as the north 11 feet thereof, rather than the north 1 foot, as intended. They alleged that they remained in possession of the 10-foot strip mistakenly conveyed to plaintiffs; and that it was a part of an abutting improved trailer court property then owned by defendants and the Siebenalers and now owned by the defendants.

The prayer of their cross-petition was that they be adjudged to have title to the south 10 feet of the land described in plaintiffs' petition, that title be quieted in defendants, that the deed thereof to plaintiffs be canceled, and for general equitable relief.

There was trial to the court, and judgment was entered ordering the defendants ejected from the north 1 foot of said Lots 2 and 11, and denying plaintiffs relief as to the 10-foot strip claimed by defendants. The plaintiffs appeal.

We give first consideration to a written motion of defendants for leave to amend their amended answer and cross-petition in two respects: (1) By alleging that it was a "mutual" mistake of the parties that resulted in an erroneous description of the premises conveyed by deed; and (2) by praying specifically for the reformation of the deed.

Section 25-852, R. R. S. 1943, provides that the court may, in furtherance of justice, amend any pleading to conform to the facts proved, when the amendment does

not change substantially the claim or defense. Such amendments may be made by this court on appeal. Zwink v. Ahlman, 177 Neb. 15, 128 N. W. 2d 121. This court may consider that pleadings are so amended. Luthy v. Farmers Mutual Hail Ins. Assn., 129 Neb. 579, 262 N. W. 490.

Likewise, this court is empowered to permit a pleading to be so amended, although such power is ordinarily only exercised to sustain and not to reverse a judgment, unless it appears that a miscarriage of justice would otherwise result. Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336.

In their allegation of a mistake of the parties, defendants did not use the word "mutual," but they alleged facts constituting a mutual mistake.

We sustain the motion of defendants for leave to amend by alleging that the mistake asserted was a "mutual" mistake, and we will consider it so amended. Having reached the conclusions hereinafter announced, we deem it immaterial whether their prayer for general equitable relief is amplified by a specific prayer for reformation of the deed.

Plaintiffs assert that the trial court erred in two respects: (1) In reforming a deed when there was no mutual mistake of the parties; and (2) in reforming a deed when the issue of reformation was not raised by the pleadings.

There is little dispute in the evidence. Plaintiffs contracted to buy the motel for $45,000. The sale was effected by the Bacon Realty Company of Grand Island. The contract of sale was prepared in its office on a short printed form. The following was typed in the blank space provided for description of the property sold: "The Ideal Motel west of Kearney on #30 Hiway, boundry (sic) lines as pointed out by Mr. Eckel." Subsequently, in different typing, there was an "attachment" by stapler, with a description identical to the one later used in the deed. Mr. Lippire says it was attached

when he signed the contract. Others say it was not. The contract was dated April 18, 1957.

Ward W. Minor, Kearney attorney, testified that he was the scrivener who prepared the deed. He said that at the time he prepared it he had a copy of the contract of sale and there was no description attached thereto. He produced the copy, and it had no such attachment and no stapler holes. He testified, without dispute, that he got the description by trying to correct a description handed him by defendants' attorney, that he found errors in the description handed to him, and that at the suggestion of defendants' attorney he attempted to correct the errors. The deed was executed June 14, 1957.

The defendant Henry Eckel testified that about 2 weeks before plaintiffs contracted to buy the motel he pointed out the boundaries to Mr. Lippire, and at the south boundary, about which this controversy arises, he said: "Mr. Lippire, this is approximately the south line, within a foot of this row of trees." Ward W. Minor identified the deed by which the Siebenalers conveyed to defendants their interest in the trailer court.

Frank J. Green, Buffalo county surveyor, testified that he surveyed the premises for plaintiffs in the summer of 1963, and prepared a map of the area. This was prior to the commencement of this action on August 13, 1963. It was through his survey that the parties discovered the deed to plaintiffs described more land than they thought it did. Mr. Lippire says the Green survey was in 1962.

Green testified that the row of trees mentioned by the witnesses, and reflected in photographs received in evidence, was approximately on the north line of Lots 11 and 2. He said that the south line of the property described in the deed to plaintiffs ran approximately through the middle of a concrete block building used as a laundry for the trailer court, and that said line also

"touched" another trailer court building by a fraction of a foot.

Mr. Lippire testified that about April 1, 1957, a couple of weeks before he and his wife contracted to buy the motel, the boundaries were pointed out to him, either by Mr. Eckel or by Mrs. Bacon of the Bacon Realty Company. He said that he was told the south line would run south of the trees, "somewhere south of those trees."

There was no evidence that anyone ever said that the south boundary line was more than 1 foot from the row of trees, nor that either of the plaintiffs had any reason to believe that they were buying any land more than 1 foot south of the trees. Plaintiffs did not think they were buying any part of the trailer court buildings. The trailer court laundry building was very close to the lot line. In fact, the concrete walk around the building was partially on the north side of the lot line.

The defendants occupied the mistakenly conveyed land for 6 years. Meanwhile the plaintiffs asserted no title to or right to possession of it. The misdescription contained in the deed was not discovered until Mr. Green made his survey.

We think that proof of a mutual mistake of the parties was clear, satisfactory, and convincing. In Betz v. Swanson, 200 Iowa 824, 205 N. W. 507, it is said: "If the clause was inserted in the deed by mistake on the part of the appellant or of the scrivener who drew it, then the mistake was mutual, because it was contrary to the real intention and agreement of the parties."

In Austin v. Brown, 75 Neb. 345, 106 N. W. 30, a deed erroneously described the south boundary line 6 rods north of the point actually designated and agreed upon by the parties, and no dispute arose until after a survey. Equity granted relief correcting the deed to conform to the intention of the parties.

In Burke v. Welch, 92 Neb. 773, 139 N. W. 684, it appears that a tree had been planted on a property line, and the boundaries were pointed out to an intending

purchaser who afterwards received a deed erroneously describing the property as 8 feet wider than the tract intended to be conveyed. The purchaser took possession and exercised ownership only as far as the intended boundary, and made no claim to the 8-foot strip for several years thereafter, the grantor retaining possession and control over it. The court held there was a mutual mistake of the parties, and granted reformation to conform to the true intention of the parties.

Where a mistake of the parties relates to the identity of the property itself, reformation may not be had. However, where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties. Lane v. Neifert, 240 Mich. 475, 215 N. W. 302; 76 C. J. S., Reformation of Instruments, § 26b(2), p. 355; 45 Am. Jur., Reformation of Instruments, § 38, p. 604.

We conclude in the instant case that the defendants are entitled to reformation of the deed to conform to the very obvious intention of the parties.

Plaintiffs contend that the defendants are not entitled to reformation because they were negligent in not reading and ascertaining the effect of what they were signing. The rule that carelessness or negligence of a person in signing an instrument estops him from asserting that it does not truly express the agreement of the parties does not apply where relief is sought on the ground the instrument was obtained by fraud, or entered into by mutual mistake of the parties. Story v. Gammell, 68 Neb. 709, 94 N. W. 982.

In Restatement, Contracts, § 508, p. 977, it is stated: "The negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof."

In Neary v. General American Life Ins. Co., 140 Neb. 756, 1 N. W. 2d 908, it appeared that the insured ob-

tained a 20-payment life insurance policy in the face amount of $2,000 which was to have a loan and cash value of $1,000 at the end of 20 years, and a paid-up insurance value of $1,452 at that time. By mistake of an employee of the insurer in drafting the policy, a blank space was filled so that it recited that the cash value at the end of 20 years would be $2,000 rather than $1,000 as it should have provided. The court held that the negligence of the insurer did not bar reformation after the lapse of 20 years, and the policy was reformed.

If there was any carelessness or negligence in failing to read and ascertain the full import of the deed, the grantors and grantees were equally at fault. Neither is in a position to take any advantage of the other.

It is understandable that lay persons could read such a legal description of realty and not know whether the property was accurately described. Their failure to ascertain that the property was incorrectly described is not a bar to reformation where the ground for relief is mutual mistake of the parties.

Lastly, plaintiffs assert that reformation may not be granted when the defendants have not raised the issue by the pleadings. The defendants pleaded all facts essential to reformation for a mutual mistake. Whether they alleged the conclusion that they are entitled to such relief is unimportant because the nature and character of an action is primarily determined by the allegations of fact, and is not controlled by the conclusions of the pleader. It is stated in United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174: "It is the facts well pleaded that determine the nature of the action and the relief to be granted."

Plaintiffs cannot complain because defendants did not specifically pray for reformation. They prayed for various forms of relief, including "such other and further relief as may be just and equitable." A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under

the pleadings and the evidence. Standard Reliance Ins. Co. v. Schoenthal, 171 Neb. 490, 106 N. W. 2d 704.

We conclude that reformation should be granted for mutual mistake of the parties, so that each will have what in equity and good conscience he should have. The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., not participating.

IN RE ESTATE OF HENRY SCHUTTE, DECEASED.
WALTER EDEN ET AL., APPELLANTS, V. CECIL ASA, ALLEGED CONSERVATOR, APPELLEE.
CONSOLIDATED FOR TRIAL WITH IN RE CONSERVATORSHIP OF WILHELMINE SCHUTTE.
WALTER EDEN, AS AGENT OF WILHELMINE SCHUTTE, ET AL., APPELLANTS, V. CECIL ASA, APPELLEE.
134 N. W. 2d 600

Filed April 16, 1965. No. 35879.

1. **Appearances.** A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing.
2. **Appearances: Appeal and Error.** Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld.
3. **Courts.** A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto.
4. **Courts: Executors and Administrators.** The county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves.
5. **Guardian and Ward.** A proceeding for the appointment of a guardian is in this state a probate matter.

6. **Executors and Administrators: Appeal and Error.** Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted.
7. ———: ———. Appeals to this court in such matters are heard and determined de novo.
8. **Conservators.** Chapter 38, article 9, R. R. S. 1943, providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent, but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate.
9. **Courts: Conservators.** The county court has original jurisdiction with respect to the appointment and settlement of accounts of conservators and it may apply equitable principles to matters within that jurisdiction when necessary.
10. ———: ———. The county court has power to adjudicate the authority of the conservator as against the claims of another who has appeared in the proceeding and challenged it.

Appeal from the district court for Otoe County: JOHN M. DIERKS, Judge. Affirmed.

Harvey A. Neumeister, William L. Walker, and Earl Ludlam, for appellants.

Moran & James, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This appeal concerns two separate orders made by the county court of Otoe County, Nebraska. Both orders were entered on September 11, 1963, but they were made in separate proceedings. One was entered in "In the Matter of the Estate of Henry Schutte, Deceased." It was an order directing Walter Eden, administrator with the will annexed of the estate of Henry Schutte, to forthwith turn over any and all assets belonging to Wilhelmine Schutte to Cecil Asa, conservator of her estate, and take his receipt therefor. From this order Walter Eden appealed to the district court for Otoe County, Nebraska, where it was designated as case No. 15504.

The other order was entered in "In the Matter of the Conservatorship of Wilhelmine Schutte," directing Harvey A. Neumeister and Walter Eden to surrender any assets belonging to Wilhelmine Schutte by virtue of the estate of Henry Schutte or belonging to Wilhelmine Schutte personally, to Cecil Asa, conservator, and take his receipt therefor. From this order Walter Eden and Harvey A. Neumeister appealed to the district court for Otoe County, Nebraska, where the case was docketed as No. 15505. At times the various parties will be designated by their last names.

The district court in case No. 15504 with respect to the order in the matter of the estate of Henry Schutte, Walter Eden, individually and as agent and administrator, and Wilhelmine Schutte joined as plaintiffs in a petition. It set out the appointment of Cecil Asa as conservator; alleged his dismissal and the termination of his appointment by Wilhelmine Schutte of which he had notice; and that he was possessed of some of the property of Mrs. Schutte for which he failed to account to the county court, to Mrs. Schutte, or to her agent, Walter Eden. Its prayer was that the order of the county court be vacated; that the court determine Asa is not conservator; that all of the property of Mrs. Schutte in his possession be accounted for and delivered to Eden, her agent; and for other just relief.

In district court in case No. 15505 concerning the order made in the conservatorship, Wilhelmine Schutte, Walter Eden as agent, and Harvey A. Neumeister joined in a petition as plaintiffs with substantially the same allegations with respect to the appointment and alleged removal by Mrs. Schutte of Asa as conservator. It further alleged that the order of the county court directing Neumeister and Eden to surrender the property belonging to Mrs. Schutte was made without a hearing or notice to them. The prayer asked the same relief as against Asa and such other relief as the petitioners were entitled to.

In both proceedings Cecil Asa answered, alleging his appointment and his taking possession of certain property of Mrs. Schutte as it became available to him; that he has been ready, willing, and able to account to the county court and has never refused to do so; and that the order of the court in the estate proceedings was made in response to the application of the administrator for direction as to disposition of the assets made January 7, 1963. The other allegations were traversed by denial.

The two cases were consolidated for trial in the district court for Otoe County. At the conclusion thereof the district court found that the orders in both proceedings in the county court were proper orders and approved and affirmed them in each case. Separate motions for new trial being overruled, those joining as plaintiffs in the district court have appealed to this court where again the cases have been consolidated.

There is little dispute as to the facts that are essential to our determination of the case.

In the estate of Henry Schutte, deceased, which pended in the county court of Otoe County, Walter Eden was appointed administrator with the will annexed, letters being issued to him on December 17, 1957. He filed an inventory in the county court showing personal assets in the sum of $17,220 and no real estate. The decree on inheritance tax, however, shows there was jointly held real estate valued at $59,855. This real estate came to Mrs. Schutte as surviving joint tenant. On December 27, 1962, the county court entered a final decree finding that the claims and taxes were paid; that all the property of the estate passed under the decedent's will to Wilhelmine Schutte to whom distribution was ordered; and that upon filing proper receipts, the administrator be discharged. On January 3, 1963, the administrator filed an application reciting that the widow and legatee was now of old age and under an inability to handle property and necessary affairs and that depositions of the doctors were to the effect that she was incompetent.

He requested an order as to disposition. At that time an application to appoint a guardian for Mrs. Schutte was pending which was later dismissed. Later the administrator filed a report sworn to July 29, 1963, the filing date not being shown. It stated that he had been appointed in writing agent of Wilhelmine Schutte, that he was filing receipts for the cash balance and personal property, and asked to be relieved of further liability on his bond. On September 6, 1963, receipts were filed by Eden as agent for Mrs. Schutte. On September 11, 1963, the county judge entered and filed the order hitherto mentioned directing the administrator to transfer the assets of the estate to Cecil Asa, conservator.

In the proceedings involving the conservatorship of Wilhelmine Schutte, an application was filed by Mrs. Schutte dated January 8, 1963, which stated that because of old age and general infirmities she was unable and unfit to manage her estate, nominating and requesting Walter Eden to be appointed conservator of her estate. On January 16, 1963, Mrs. Schutte filed a statement which nominated Cecil M. Asa as such conservator. On January 16, 1963, Asa was appointed conservator. He subsequently filed his oath and bond, and later an inventory of assets collected by him in which it was alleged that he believed Harvey A. Neumeister, as agent, and Walter Eden, as administrator of the estate of Henry Schutte, had property belonging to Mrs. Schutte which was not accounted for in the inventory. On July 8, 1963, a document dated June 29, 1963, and signed by Mrs. Schutte was filed in which she stated that she dismissed and discharged Cecil Asa as her conservator and requested he account for all her property in his possession to Walter Eden whom she appointed as her agent to act with respect to all her property. On July 26, 1963, another document was filed, likewise signed and acknowledged by Mrs. Schutte, requesting the court to disregard the dismissal of Asa as conservator. It confirmed his appointment and revoked the appointment of Eden as

her agent. On August 23, 1963, a third document signed by Mrs. Schutte, dated August 20, 1963, was filed in which she stated she did not understand the document signed July 26, 1963, reappointing Asa. This again dismissed Asa and reappointed Eden as her agent. On September 11, 1963, the county court, without giving notice to either of them, entered the order hereinbefore mentioned directing Neumeister and Eden to surrender any assets or property belonging to Mrs. Schutte to Cecil Asa, conservator.

It was stipulated that Cecil Asa had never been discharged as conservator by the court. Asa had received notification of the purported discharge by Mrs. Schutte in each instance after she had executed them and demands had been made upon him to turn the assets over to Eden as agent. In turn Asa had notified Neumeister and Eden to deliver the assets to him as conservator. It was further stipulated that Mrs. Schutte had made no request to the county judge to direct Asa to make an accounting or report and the court had made no such request to Asa. It is shown that Mrs. Schutte, by letters signed by herself and Neumeister, had directed bills for certain current expenses be sent to Eden as her agent, and that directions were sent by her and Neumeister as her attorney to certain elevators and the A.S.C. office to pay any and all checks derived from crops on her farms to Eden.

Those appealing from the orders of the county court filed petitions in district court, designating themselves as plaintiffs. Cecil Asa, as conservator, answered as a defendant. The parties will be referred to hereafter in the same manner.

The errors asigned to the trial court that are required to be considered will be stated as they are discussed.

Plaintiffs contend the trial court erred in affirming the orders of the county court since the orders were entered against them without notice to them and without a hearing. It is argued by the plaintiffs that the county court had no jurisdiction over the persons of the plain-

tiffs because of the lack of such notice. We think it is only necessary to point out that the plaintiffs in each proceeding in district court filed petitions in which they asked that court to determine that Cecil Asa was not a conservator of the estate of Mrs. Schutte and that the property in his possession be ordered delivered to Walter Eden as her agent. "A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing. * * * Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld." Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630. See, also, Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

Concerning the order made in the matter of the estate of Henry Schutte, the plaintiffs therein seem to contend that the court had no power or authority to enter an order directing the administrator to transfer the assets to the conservator although they also again assert the lack of notice or order to show cause. It appears from the record that a final decree was entered in said estate on December 27, 1962, which recites the giving of all proper notices. It found Wilhelmine Schutte to be the sole beneficiary under the decedent's will and that upon filing proper receipts the administrator was to be discharged. Without having filed receipts, the administrator on the 3rd of January 1963, executed and thereafter filed an application for direction as to the disposition of the assets because of Mrs. Schutte's possible incompetence there alleged. Meanwhile, a conservator of her estate had been appointed by the county court. The conservator requested the administrator to deliver the assets of the estate to him. Eden, as administrator, thereafter without having received any direction which he had requested from the county court, filed receipts for the assets of the estate on September 6, 1963.

They were signed Walter Eden as agent for Wilhelmine Schutte. On September 11, 1963, the county court entered the order directing the transfer of the assets to the conservator of Mrs. Schutte's estate. In the case of In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829, this court said: "* * * the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. * * * Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. In re Estate of Wilson, 98 Neb. 852, 154 N. W. 717; In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694; * * *." Also, it has been held: "A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto." In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675. The contentions of the plaintiffs that would deny the power of the probate court under the circumstances to review and direct the final disposition of the assets of the estate by the administator are without merit.

The plaintiffs in the appeal from the order in the conservatorship assert the district court erred in affirming the order and judgment of the county court. Their objection as to the jurisdiction over the persons of the plaintiffs was again asserted and has hitherto been considered and decided adversely to their contentions. They do not expressly raise the question of the jurisdiction of the county court over the subject matter but the question may be inferred from the briefs of the parties. Inasmuch as this court itself examines the record to justify its jurisdiction, we will consider this question in the light of the record and the order made. In county court Wilhelmine Schutte filed documents purporting to discharge the conservator and directing him to account for and deliver her property to her agent, Walter Eden, appointed therein. The county court was directly con-

fronted with a challenge to the power and authority both of the court and the conservator whom it had appointed. It made an order directing Neumeister and Eden to surrender any property or assets belonging to Wilhelmine Schutte by virtue of the estate of Henry Schutte or belonging to her otherwise. The ownership of the property was not in dispute. The whole dispute was with respect to whether the agent or the conservator was the proper fiduciary to handle the property of Mrs. Schutte. No money judgment, or order for the payment of money, or the delivery of particularly described assets was entered. It would seem the order was in the nature of a declaratory judgment which adjudicated the rights of the conservator as against those claiming to be the agents of Mrs. Schutte with respect to the management of her property. It was precipitated by the appearance of Mrs. Schutte and her asserted dismissal of the conservator and the appointment of Eden as her agent. In the case of In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233, this court said: "By the terms of the Constitution, county courts are constituted 'courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons,' etc. Const. art. V, sec. 16. See Weeke v. Wortmann, 77 Neb. 407, 109 N. W. 503; State v. O'Connor, 102 Neb. 187, 166 N. W. 556; Genau v. Roderick, 4 Neb. (Unof.) 436, 94 N. W. 523.

"Under this constitutional provision we are committed to the view: 'Under the Constitution (art. V, sec. 16) and statutes of Nebraska (Comp. St. 1929, sec. 27-503) the county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons.' Starr v. Fidelity & Deposit Co., 134 Neb. 240, 278 N. W. 478.

"By statute it is further provided: 'The county court shall have power: * * * Fifth. To require executors, administrators and guardians to exhibit and settle their accounts, and account for the estates and property that

have come into their possession as such.' Comp. St. 1929, sec. 27-504.

"In carrying out this statutory authorization, it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456; In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316." See, also, In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483. The same constitutional and statutory provisions apply to the appointment of guardians and the settlement of their estates. In view of our determination herein, the jurisdiction of the county court over estates to which it has appointed a conservator is substantially the same as that where a guardian has been appointed. It follows that the county court has original jurisdiction with respect to the appointment and settlement of accounts of conservators and it may apply equitable principles to matters within that jurisdiction when necessary. The county court has power to adjudicate the authority of the conservator as against the claims of another who has appeared in the proceeding and challenged it.

In the trial in district court in which Wilhelmine Schutte, Walter Eden as agent, and Harvey A. Neumeister joined as plaintiffs asking affirmative relief, the evidence shows clearly that Eden and Neumeister had denied that Asa was a conservator. They had both urged tenants on the land of Mrs. Schutte not to enter into leases with Asa. Neumeister had joined in letters with Mrs. Schutte instructing elevators and the A.S.C. to pay the rentals and other income from her farms to Eden as agent. Neumeister and Eden each had assets of Mrs. Schutte in his possession as her agent. Neumeister had bank accounts in his name as agent of Mrs. Schutte which were transferred by him to Walter Eden as agent after the order of the county court. Eden continues to hold Mrs. Schutte's property as agent. Under this evi-

dence it would appear proper to determine whether they, or either of them, or the conservator were the fiduciaries entitled to the possession and control of the property comprising the estate of Mrs. Schutte.

The plaintiffs further assign error to the district court stating its judgment was contrary to the law and the evidence. The principal basis of this contention plainly appears to be that Mrs. Schutte had the power and authority to discharge Asa as conservator at any time and require him to account either to the court or to Eden. It may here be mentioned that she at no time asked for an accounting through the court. The plaintiffs premise their arguments on their interpretation of sections 38-901 to 38-903, R. R. S. 1943. They call attention to the fact that the statute provides that a conservator is appointed on application of the person whose estate is to be conserved. They point out the applicant cannot be an idiot or lunatic and need not be mentally incompetent as is required for the appointment of a guardian under section 38-201, R. R. S. 1943, and that the applicant is not disfranchised. They argue that the authority to appoint implies the power to discharge.

A study of the statutes cited shows plainly that the necessary allegations of the applicant are that he is unfit *by reason of the infirmities of age or physical disability to manage his estate with prudence and understanding.* Because of this he may apply for a conservator of his estate. Section 38-903, R. R. S. 1943, provides as follows: "Every conservator shall give bond as provided in section 38-110, and all provisions of law for the managing of estates as provided in articles 5, 6 and 7, Chapter 38, shall apply to such conservator." The articles of the statute in the section mentioned are the same as those which govern other guardians. They provide for the general management of the ward's estate and the payment of his just debts. They provide in certain cases for the sale or mortgaging of real estate. It is obvious these duties involving procedures of some

length could not be performed if the conservator could be removed at any time at the pleasure of the ward. Finally, section 38-507, R. R. S. 1943, provides for the removal of guardians in certain instances including as one ground when the guardian becomes unsuitable therefor.

The only case of this court construing sections 38-901 to 38-903, R. R. S. 1943, is Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68, where this court held: "Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted.

"Appeals to this court in such matters are heard and determined de novo.

"A proceeding for the apointment of a guardian is in this state a probate matter. * * *

"Chapter 38, article 9, R. S. Supp., 1951, providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent, but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate." In that case the county court had appointed a guardian but on appeal to the district court a conservator was appointed at the instance of the applicant. The differences in the requirements as to the appointment of a guardian and conservator dependent upon the mental and physical condition of the ward are discussed. There is nothing in the decision, however, that indicates the powers of a conservator after his appointment are different from that of a guardian. We conclude that where one has voluntarily consented to the appointment of a conservator under statutes providing for such appointment and the court has acted upon the matter and made the appointment, the ward by merely withdrawing his consent cannot either terminate

the conservatorship or take away the jurisdiction of the county court in the proceedings.

After carefully reviewing the evidence and the proceedings generally, we have determined the judgment of the district court was right and should be and is affirmed.

AFFIRMED.

ARTHUR W. CAMPBELL ET AL., APPELLANTS, V. THE CITY OF OGALLALA, NEBRASKA, ET AL., APPELLEES.
134 N. W. 2d 597

Filed April 16, 1965. No. 35885.

Appeal and Error. Jurisdiction of a proceeding in error is not defeated by an omission of the phrase "in error" from the reference in the summons to the petition.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Reversed and remanded.

J. Cedric Conover and W. C. Conover, for appellants.

Firmin Q. Feltz, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

A summons failed to notify defendants that the petition which had been filed against them was a petition in error. The phrase "in error" was also omitted from the praecipe. The district court sustained a special appearance and dismissed the proceeding in error.

The phrase is said to be a jurisdictional feature of the statutes. "* * * The summons shall notify the adverse party that a petition in error has been filed * * *." § 25-1903, R. R. S. 1943. "The summons * * * shall, upon * * * written praecipe * * *, be issued * * *." § 25-1904, R. R. S. 1943.

The omission was a noncompliance with a directory

provision; i. e., the jurisdictional requirements do not include this phrase. See, From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441; cf. Keil v. Farmers Irr. Dist., 119 Neb. 503, 229 N. W. 898. The defect was formal.

The judgment should be and is reversed, and the cause is remanded.

REVERSED AND REMANDED.

MARY FULMER, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

134 N. W. 2d 798

Filed April 23, 1965. No. 35715.

1. **Appeal and Error.** Where a case is tried in the district court on a mutual theory of the parties, this court will dispose of it on appeal on the same theory whether correct or not.
2. **Eminent Domain: Easements.** The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement.
3. ———: ———. When an easement is taken, which leaves the landowner with property rights of material and measurable value, the compensation due the landowner is the damage to the entire property which is attributable to the taking of the easement and not the separate value of the easement.
4. ———: ———. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking, and not by separately valuing the easement or right that is taken.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. On motion for rehearing. See *ante* p. 20, 131 N. W. 2d 657, for original opinion. Original opinion withdrawn. Affirmed.

Carl D. Ganz and Flansburg, Mattson, Field, Ricketts & Sorensen, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., James J. Duggan, and James M. Winter, for appellee.

Clarence A. Davis, for amici curiae.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is a proceeding by the State of Nebraska to secure control of outside advertising on land owned by Mary Fulmer which is adjacent to the Interstate Highway in Cass County, Nebraska. The action was instituted as a proceeding in eminent domain under section 39-1320, R. S. Supp., 1963, to secure a permanent easement for the control of advertising. The landowner refused to accept the award of the appraisers appointed by the county judge and appealed to the district court.

In the district court the action was tried upon the theory that it was a proceeding by the State to condemn a permanent easement upon the land of the plaintiff. Neither party has raised any issue in this court concerning the form of the proceeding or the nature of the right acquired by the State in the proceeding. We dispose of the case on the mutual theory upon which it was tried in the district court.

The jury returned a verdict in favor of the plaintiff landowner in the amount of $25. Her motion for new trial was overruled and she has appealed to this court.

An opinion of this court filed on December 11, 1964, determined that the judgment of the district court should be reversed and the cause remanded for a new trial. Fulmer v. State, *ante* p. 20, 131 N. W. 2d 657. Thereafter, reargument was granted.

The parties stipulated and agreed that the fair and reasonable cost of abstracting the proceeding was $25. The plaintiff was entitled to recover this expense under section 76-710.01, R. S. Supp., 1963, and the jury was so instructed. Thus, the verdict of the jury which limited the plaintiff's recovery to the $25 "abstract cost" was in effect a finding that the plaintiff had sustained no other

damages as a result of the taking of the easement to control advertising adjacent to the highway.

The plaintiff contends that the verdict and judgment are not supported by the evidence and that the instructions of the court which permitted the jury to return such a verdict were erroneous. The plaintiff argues that the verdict cannot be sustained because the evidence shows that she could have received a gross income of $40 per year from an advertising lease.

Instruction No. 5 advised the jury that the measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. This was a correct statement of the law. When an easement is taken, which leaves the landowner with property rights of material and measurable value, the compensation due the landowner is the damage to the entire property which is attributable to the taking of the easement and not the separate value of the easement. Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400; Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833; Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Johnon v. Airport Authority, 173 Neb. 801, 115 N. W. 2d 426; Connor v. State, 175 Neb. 140, 120 N. W. 2d 916. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking, and not by separately valuing the easement or right that is taken.

In a particular case, the rule may result in a determination that the landowner is entitled to no compensation for the taking of an easement. In principle, the result is similar to that which may occur when the right of access to property is taken or destroyed. Ordinarily, it is a question for the jury whether the taking of the right of access has affected the value of the property, and this court cannot determine as a matter of law that the value of the property was diminished thereby.

Frank v. State, 176 Neb. 759, 127 N. W. 2d 300. See, also, Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291; Balog v. State, 177 Neb. 826, 131 N. W. 2d 402.

Although there was evidence to the contrary, the State produced evidence that there was no difference in the value of the land before and after the taking of the easement; that the use of the land for advertising purposes would interfere with its use for agricultural purposes to some extent; and that the income produced from advertising use would be so small in comparison to the income received from agricultural use that in the negotiation of a sale of the land the income from the advertising use would be disregarded. This evidence supports the finding that the landowner was not damaged by the taking of the easement and is sufficient to sustain the verdict and judgment.

Our former opinion is withdrawn. The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion because I do not believe it should be possible to have a zero verdict in a condemnation action. It seems elementary to me that whenever private rights are taken for public use, there must be some compensation, nominal or otherwise, depending on the proof. To hold otherwise is to make condemnation nothing more than legal confiscation. To permit a zero verdict in a condemnation action is to make a mockery of our national and state constitutional provisions: "* * * nor shall private property be taken for public use, without just compensation." Fifth Amendment, Constitution of the United States. "The property of no person shall be taken or damaged for public use without just compensation therefor." Art. I, sec. 21, Constitution of Nebraska.

There is no question in my mind that regardless of the language we use, we have a complete taking of an interest in property in this action, but I will not prolong

this dissent with a discussion of the nature of the property right taken from the plaintiff. The statute under which the condemnation action is brought recognizes that a property right is being taken. Section 39-1320, R. S. Supp., 1963, reads, so far as material herein: "(1) The department is hereby authorized to acquire, either temporarily or permanently, lands, real or personal property or any interests therein, or any easements deemed to be necessary or desirable for present or future state highway purposes by * * * condemnation * * *. *Such lands or real property may be acquired in fee simple or in any lesser estate.* It is the intention of the Legislature that all property leased or purchased from the owner shall receive a fair price.

"(2) State highway purposes, as referred to in subsection (1) of this section * * * shall include provision for, * * *:

"(m) The control of outside advertising within the area adjacent to and within six hundred sixty feet of the edge of the right-of-way of the National System of Interstate and Defense Highways constructed upon any part of right-of-way the entire width of which is acquired subsequent to July 1, 1956, to the end that this state may qualify for and accept the provisions of 23 United States Code 131, as amended." (Emphasis supplied.)

Section 39-1320.03, R. S. Supp., 1963, makes clear that the State is actually acquiring rights. It reads, so far as material herein: *"Whenever advertising rights are acquired by the department pursuant to subdivision (m) of subsection (2) of section 39-1320, * * *."* (Emphasis supplied.)

While the petition of the State does not follow the language of the statute, if this statute means what it says, the State is actually acquiring rights which it *can use* for any public purpose. This is not the mere negative restrictive easement the State seeks to have us believe. In passing, I also observe that the State is

not acquiring all advertising rights along the Interstate Highway, but only those for which the federal government will reimburse it.

From the majority opinion, the problem is one of the measure of damages. The rule applied by the majority opinion, compensation is determined by the difference in the reasonable market value of the entire tract before taking and the reasonable market value of the portion remaining after taking, is the rule we have uniformly applied in the taking of land. It is no more than a rule of evidence applied to provide a measure of compensation to comply with the constitutional directive. Where it does not do so, a new rule should be adopted. It is the Constitution which governs and not rules we have adopted to effectuate the constitutional directive.

In the past, where the court was confronted with a situation where the rule could not accurately measure the damages in the taking and damaging of land, we have had no hesitancy in applying a rule which would fairly compensate the owner. See Graceland Park Cemetery Co. v. City of Omaha, 173 Neb. 608, 114 N. W. 2d 29.

In an eminent domain proceeding, we should adopt a working rule in an attempt to do substantial justice. I suggest no less is necessary here. To adopt a working rule will comply with the constitutional mandate. As Justice Holmes said in Boston Chamber of Commerce v. City of Boston, 217 U. S. 189, 30 S. Ct. 459, 54 L. Ed. 725: "* * * the Constitution * * * requires that an owner of property taken should be paid for what is taken from him. * * * And the question is what has the owner lost, not what has the taker gained." Here obviously the owner has lost the right to sell or lease advertising rights. This condemnation action completely extinguishes his right to control advertising on the strip embraced in the condemnation.

The fact that no physical property is taken creates the problem under the rule applied in the majority opinion.

To a jury where the State contends the dominant purpose of the land is agriculture, there is no "before and after." There is here a taking of certain rights which, quite distinct from the land or its value, have a definite commercial value of their own. I submit that where the rule of evidence applied is of such nature as to preclude the allowance of damages in a condemnation action, there is a perversion of the fundamental principles of justice. To deny relief to the owner of property under such circumstances is to permit the State to confiscate property piecemeal and thus permit the very thing our constitutional provisions were intended to prevent.

DUANE RUSE, ADMINISTRATOR OF THE ESTATE OF MARGARET RUSE, DECEASED, APPELLANT, V. NAVAJO FREIGHT LINES, INC., A CORPORATION, ET AL., APPELLEES.
134 N. W. 2d 807

Filed April 23, 1965. No. 35887.

Appearances: Appeal and Error. An order sustaining a special appearance is not an appealable order.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Appeal dismissed.

Everett A. Anderson and Michael V. Smith, for appellant.

Baylor, Evnen, Baylor & Urbom, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

Plaintiff has appealed from the sustaining of the special appearance of Navajo Freight Lines, Inc.

The basic objection involved in the special appearance is whether service is permitted in Nebraska on a regis-

tered agent of a foreign corporation on a tort action arising in another state. We do not decide this issue because the appeal is premature and the issue is not now before us.

We dismiss the appeal for the lack of an appealable order. An order sustaining a special appearance is not an appealable order. See Erdman v. National Indemnity Co., *ante* p. 312, 133 N. W. 2d 472. Although the district court did sustain the special appearance, until a final order is entered it has an opportunity to change its mind and to correct its error if one has been made. Until a final order is entered, there is nothing from which to appeal.

For the reason given, plaintiff's appeal is dismissed at plaintiff's cost.

APPEAL DISMISSED.

FRED C. SWANSON ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

134 N. W. 2d 810

Filed April 30, 1965. No. 35840.

1. **Eminent Domain: Damages.** The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
2. ———: ———. Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property.
3. ———: ———. Where the testimony of all the witnesses in a condemnation case showed some consequential damage to the remainder of the land, a special finding by the jury that there was no such damage was not sustained by the evidence and a new trial should have been granted for that reason.
4. **Constitutional Law: Eminent Domain.** The right of an owner of property abutting on a street or highway to ingress and

egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.

5. **Eminent Domain: Damages.** An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway.
6. **Eminent Domain: Streets.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
7. **Eminent Domain: Trial.** Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case.
8. **Eminent Domain: Evidence.** The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value.
9. ———: ———. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership.
10. **Eminent Domain: Trial.** In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value.

Appeal from the district court for Red Willow County: VICTOR WESTERMARK, Judge. Reversed and remanded.

Bosley & Bosley, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., W. L. Strong, and James J. Duggan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

This is an action in eminent domain brought by the State of Nebraska to condemn a strip of land to widen

U. S. Highway Nos. 6 and 34 as it crossed the farmland belonging to the condemnees Fred C. Swanson and Clarence K. Swanson. Ruth L. Swanson and Donna A. Swanson are the respective spouses of the other condemnees and have no interest in the property except as such.

The condemnees appealed from the award of the appraisers appointed by the county judge to the district court for Red Willow County. There the condemnees were designated as plaintiffs and the condemner as defendant and they will be referred to herein in the same manner.

A trial in district court resulted in a general verdict for the plaintiffs in the sum of $1,190. The trial court, however, submitted special findings to the jury which returned a verdict of $1,190 as the value of the land taken and nothing for consequential damages to the remaining land of the plaintiffs.

Plaintiffs' motion for a new trial being overruled, they have brought the case to this court by an appeal.

The plaintiffs' land which was taken by condemnation consisted of 2.38 acres on the north and adjoining U. S. Highway Nos. 6 and 34 that passes through the lands of the plaintiffs located in the southwest quarter of Section 21, Township 3 North, Range 30 West of the 6th P.M. The land lies 4½ miles west of McCook, Nebraska. The highway before the taking was immediately north of the right-of-way of the Chicago, B. & Q. Railroad. There is some discrepancy in the exact acreage of the plaintiffs' land before the taking but it consisted of approximately 161.62 acres in all. The land was traversed by a drainage ditch which had been built by the railroad. It extended from the north in a southeasterly direction across the premises. Two fields laid north of the highway as it passed through the premises before the taking. One on the east of the drainage ditch contained 57.13 acres. That west of the drainage ditch contained 10.23 acres, less, however, 3.36 acres sold to

the Perry Grain Company on the west end thereof for storage in connection with its elevator across the road on the railroad right-of-way.

In addition to the 2.38 acres actually taken, access from the lands on the north was limited to the reconstructed highway. After the taking the only entrance provided on the highway was one entrance at the extreme east end of the property as the highway passed through the premises. This entrance was built by the defendant and was 20 feet wide. An entrance was maintained at this same location before the taking. Access to the highway had been possible at all points previously and plaintiffs had used two entrances, one at either side of the drainage ditch. Access remained available, however, from the county road along the east line of the premises and to the field west of the drainage ditch by an easement reserved by plaintiffs through the land conveyed by them to the Perry Grain Company. The greater portion of the plaintiffs' land lay south of the railroad right-of-way and from the evidence it would appear there was no claim of consequential damage to it. The residence and farmstead buildings were located on the south side of the railroad right-of-way bordering on the east line on a tract of 3.9 acres. A lane led from the building spot north along the line across the railroad tracks onto the highway directly across from the new entrance provided by the State. The premises were irrigated, that on the north of the highway from an irrigation ditch by private wells and gravitation. South of the highway water was pumped for irrigation either by gravity or by a sprinkling system from ponds formed from gravel pits.

The errors assigned by the plaintiffs so far as are pertinent will be stated as discussed.

The plaintiffs contend the verdict was contrary to the law and the evidence and for that reason a new trial should have been granted. They urge the jury was required to find some consequential damages and under

the special finding they found none. Testimony on behalf of the plaintiffs indicated consequential damages to the remainder of the premises based on its value before and after its taking in a large amount. Only one witness testified for the defendant concerning value. He testified the value of the remainder of the premises after the taking had depreciated only $48. He attributed this to the necessity of moving an electric fence running along the north line of the old highway. The plaintiff Clarence K. Swanson testified that he moved the electric fence and 8 rods of woven wire fence which crossed the drainage ditch involved and stated the cost of their removal was $54.60. "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. * * * Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property." Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682. In the case before us, not only was testimony received concerning the costs of moving the fences of the plaintiffs, but such cost was directly related to the consequential damage to the remainder of the premises after the taking by the State's witness. All of the other witnesses testified that there was substantial consequential damage to the remainder of the land. Where the testimony of all the witnesses in a condemnation case showed some consequential damage to the remainder of the land, a special finding by the jury that there was no such damage was not sustained by the evidence and a new trial should have been granted for that reason.

Inasmuch as the case must be retried because of

the error stated, it will be necessary for us to discuss certain other errors assigned.

The plaintiffs contend the verdict was likewise contrary to the law and the evidence because consequential damages had to be assessed for loss of access to the highway from the premises on the north by reason of the restriction to a single entrance hitherto alluded to. In W. E. W. Truck Lines, Inc. v. State, *ante* p. 218, 132 N. W. 2d 782, this court held: "The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.

"An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway.

"The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.

"Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case."

The entrance provided by the State on the highway near the east line of the premises was located in the same place as a previous entrance and across the road from the lane which led from the buildings. Plaintiffs' testimony tended to show the ground to the north of the entrance provided was lower than the rest of the field and water was collected there making it difficult to be used at times. Before the taking there was evidence that the plaintiffs could enter the fields to the north of the highway at all points and that they had used entrances on each side of the drainage ditch. After the taking there remained other entrances to the field hither-

to alluded to. The court by instruction No. 13 submitted to the jury to be determined as a matter of fact the question of whether the plaintiffs' access to the premises after the taking was unreasonably restricted and permitting recovery of damages if it so found. The instruction seems to follow the rule of law stated in W. E. W. Truck Lines, Inc. v. State, *supra,* and the plaintiffs made no objection to it. The instruction properly submitted the question to the jury which viewed the premises.

The plaintiffs assign error in restricting the opinion of the plaintiff Clarence K. Swanson as to the value of the property taken. On direct examination he detailed a minute description of the premises with respect to its adaptability for agricultural purposes only. He stated he had an opinion of the value of the 2.38 acres actually taken. When asked what that opinion was, the defendant's counsel obtained permission to ask questions concerning the foundation for such an opinion. The answers elicited showed the witness was basing his opinion on the value of the premises for industrial purposes. Objection that there was an insufficient foundation for such an opinion was sustained. An effort seeking to lay a foundation was thereafter made by the plaintiffs' counsel. The court continued to rule thereafter that a sufficient foundation had not been laid. The witness was not again asked his opinion of the value of the land for industrial uses. The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value. State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72; 32 C. J. S., Evidence, § 546(116), p. 433. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership. Borden v. General Ins. Co., 157 Neb. 98, 59 N. W. 2d 141. The witness who was also the owner should have been allowed to testify without laying a foundation.

Further error is assigned by the plaintiffs in excluding

the testimony of the sale price of two tracts of land sought to be used by the plaintiffs in comparison with the land taken. One tract consisted of the 3.36 acres of land in the northwest corner of the plaintiffs' farm which was sold by them to the Perry Grain Company for grain storage facilities in connection with its elevator on the railway right-of-way immediately across the highway. The sale price of this tract was attempted to be related by the plaintiff Clarence K. Swanson. The other was a tract of 1 acre sold for residential purposes which was testified to by the witness George Pearson. In both instances the court sustained objections to questions propounded as to the sale price on the ground of insufficient foundation and no further foundation was given. It is not necessary that this court review the evidence in the record concerning the foundation as it may be different on the new trial. In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. 29A C. J. S., Eminent Domain, § 273(10), p. 1210. See, also, State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305.

Lastly, the plaintiffs assign error to the trial court in the giving of the following instruction: "INSTRUCTION No. 10. In this case it is contended that a part of the land in this action is suitable and adaptable for commercial and residential development. However, you are not permitted to speculate as to whether or not said land is adaptable for such purposes. Before you are permitted to consider this matter in determining the market value of the land in question as of February 4, 1963, you must find that such adaptability must have been so reasonably probable and so reasonably expected in the immediate future as to affect the market value

of the land at the time the land was taken or damaged. Should you find from the evidence that such suitability or adaptability was merely within the realm of possibility, but not reasonably probable, then you cannot consider such possibility in arriving at the fair market value at the time of the taking involved herein." The instruction follows the rules of law set out by this court in Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209, and Lybarger v. State, 177 Neb. 35, 128 N. W. 2d 132, and correctly states the law applicable to the evidence disclosed by the record in the case before us. There was no error in giving the instruction.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded for further proceedings pursuant to this opinion.

REVERSED AND REMANDED.

CLARENCE LINCH ET AL., APPELLEES, V. MILDRED NICHELSON, APPELLANT.
134 N. W. 2d 796

Filed April 30, 1965. No. 35847.

1. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. The burden of proving adverse possession is on the person asserting it. He must recover upon the strength of his own claim and not upon the weakness of his adversary's title.
3. **Boundaries.** An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Howard D. Kanouff, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is a suit to establish the boundary line between plaintiffs' lands in Section 23, and defendant's lands in Section 14, both in Township 13 North, Range 5 East, in Saunders County, Nebraska. Defendant by answer and cross-petition asserts an easement by prescription on plaintiffs' lands from the highway west of her buildings to the lane entering her farmstead, and alleges further that she has acquired a prescriptive right to the lands east of her enclosed farmstead to plaintiffs' fence line along the north side of their property. The trial court sustained defendant's assertion of an easement and fixed the location and extent thereof by metes and bounds. The plaintiffs did not cross-appeal from this portion of the judgment and there is no issue here as to the easement. The trial court found the boundary line of plaintiffs' and defendant's lands east from the east line of defendant's enclosed farmstead to be the section line between Sections 23 and 14. Defendant has appealed from this portion of the judgment.

The section line here involved has never been opened as a public road. The plaintiffs appear to have constructed their fence along the line where it would have been built if the road had been constructed on the section line. The defendant built no fence east of the farmstead on the south line of her property, the farmstead being located at the southwest corner of the southeast quarter of the southwest quarter of Section 14. Defendant now contends that the parties over the years, and for more than the statutory period of limitations, have treated plaintiffs' north fence as the common boundary and that she now owns to plaintiffs' north fence by prescription.

There is evidence that a trail road existed north of the fence to the east which was used infrequently by rail-

road employees, material haulers, and others. The road was never graded up or maintained. No contention is made that the public or any person had acquired any rights to this area as a road. The evidence also shows that a ditch ran eastward north of plaintiffs' north fence line. The fence was located from 27 to 29 feet south of the section line as shown by the surveyor's location map designated as Exhibit 1. The topographic map, Exhibit 2, shows that the south bank of the ditch was from 6 to 7 feet north of plaintiffs' fence. The ditch is shown to be from 12 to 14 feet in width. The evidence shows that defendant's lands were farmed to within about 14 feet of the north bank of the ditch. The evidence does not show that defendant, her predecessors in title, or her tenants, farmed south of the section line between Sections 14 and 23. It is urged, however, that the north fence line was mutually understood to be the boundary line, in that plaintiffs never used or farmed any land north of their north fence. We point out that what the plaintiffs did can be of no aid to the defendant. The defendant must recover on the strength of her own title. This principle is pointed up in Elsasser v. Szymanski, 163 Neb. 65, 77 N. W. 2d 815, wherein this court said: "We do not think an owner of property recognizes and acquiesces in the ownership by his neighbor of any part of his property merely because, in constructing a sidewalk near the edge of his property, he does not extend it to his property line. An owner of real property can put a sidewalk on his land wherever he pleases and by so doing does not thereby recognize a relinquishment to his ownership of any part of the property outside thereof."

In the instant case plaintiffs constructed their north fence on the line where it would have been if the section-line road had been legally opened. This is not evidence that plaintiffs relinquished their rights to any land north of the fence that would lend support to defendant's claim of ownership by adverse possession.

There is no evidence in this record that defendant ever claimed ownership to plaintiffs' north fence line. There is no evidence that it was occupied or used by the defendant, particularly the ditch and the land between the ditch and plaintiffs' fence line. There is some fragmentary evidence that defendant's predecessors and tenants may have encroached upon lands south of the section line in turning farming machinery at the end of crop rows. But there is no evidence to sustain a finding that there was an open, continuous, and actual exclusive possession with the intention to hold it as the owner. In the instant case the defendant neither farmed the land to the fence line, enclosed it, nor exclusively possessed it under a claim of ownership.

The record shows that the trial court inspected the area before determining the issues in the case. There is evidentiary support for the findings of the trial court. The effect of the trial court's inspection of the physical facts and the irreconcilable conflicts in the evidence is discussed in Linch v. Nichelson, *post* p. 682, 134 N. W. 2d 793, a companion case released herewith, and will not be repeated here.

The judgment of the trial court is sustained by the evidence and it is affirmed.

AFFIRMED.

CLARENCE LINCH ET AL., APPELLEES, V. MILDRED NICHELSON, APPELLANT.
134 N. W. 2d 793

Filed April 30, 1965. No. 35848.

1. **Waters: Drains.** When surface waters concentrate and gather in volume so as to lose their character as diffused surface waters and flow into a natural drainageway, the flow may not be arrested or interfered with to the injury of an adjoining proprietor.
2. ———: ———. Where a landowner by dike, dam, or ditch

diverts water from a natural drainageway and causes it to be discharged in volume on a lower or servient estate to its damage, injunction is an appropriate remedy for the protection of the rights of the owner of the lesser or servient estate.

3. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed upon this court on a reveiw de novo to give consideration to the fact that the trial court viewed the premises, providing that the record contains competent evidence to support the findings.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Howard D. Kanouff, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is a suit for an injunction to restrain the defendant from collecting and casting surface waters in volume upon the lands of the plaintiffs. The trial court granted an injunction and restrained the defendant from maintaining two terraces and dams on her lands, and directing that they be removed in such manner that surface waters falling on her lands will flow in the natural course of drainage and be no longer diverted to the south onto the lands of the plaintiffs. The defendant has appealed.

The defendant is the owner of the southeast quarter of the southwest quarter of Section 14, Township 13 North, Range 5 East, Saunders County, Nebraska, which we shall hereafter refer to as the Nichelson land. The plaintiffs own the land immediately south, in Section 23, which we refer to as the Linch land. The Union Pacific Railroad right-of-way cuts across the southeast corner of defendant's lands and enters plaintiffs' lands approximately 400 feet west of their east line. Approximately

275 feet west of the center of the railroad right-of-way on the section line is a point designated C which is a pivotal point in this litigation.

Coming from the north is a small draw or drainageway which carried surface water in a state of nature into a ditch near the point where the railroad right-of-way entered plaintiffs' lands where it was carried into a creek passing under a railroad bridge some 600 or 700 feet to the south. To the west was a second drainageway carrying water in a southeasterly direction which spread out on a flat area immediately north of point C. The first drainageway drained an area of 18 acres, the second, 5 acres. This water prior to 1957 either drained into the railroad ditch directly or was conveyed there by a ditch along the section line between plaintiffs' and defendant's lands.

In 1957 defendant's predecessor in title constructed a dam 500 to 600 feet north of the section line in the first drainageway and a terrace to the southwest from the dam which had the effect of diverting the waters, or a substantial part of them, to the southwest into the section-line ditch. A similar dam and terrace were constructed in the west drainageway with similar effect. The waters thus diverted flowed into the section-line ditch which normally carried the water into the ditch on the railroad right-of-way running south into a creek. It is the contention of the plaintiffs that the diverted waters piled up at point C and flooded over onto their lands in Section 23, causing the damage thereto of which complaint is made.

Prior to the trial in the district court the dams in the two drainageways washed out. Defendant contends that thereafter the water flowed in its natural course as it flowed before the dams and terraces were constructed. The plaintiffs assert that the drainageways filled up with silt above the dams while the dams were in existence and that floodwaters continued to divert to the southwest because of the terraces after the dams

washed out. Plaintiffs contend that, as a result, floodwaters continue to pile up at point C and flood across their lands for a distance of 425 feet or so before entering the railroad right-of-way ditch or the creek to the south.

A professional engineer testified that water continued to flow along the terraces to the south and southwest after the dams washed out. The evidence of other witnesses was conflicting on this point, although the evidence for the defendant was equivocal, it being admitted by some of defendant's witnesses that a part of the drainage waters were diverted after the dams were gone. The evidence shows that water continued to pile up and spill over onto plaintiffs' lands at point C. There was evidence by one witness for defendant that prior to 1926 there was a natural drainageway from point C in a southerly direction across plaintiffs' lands. Another witness for defendant who lived on plaintiffs' lands for 12 years subsequent to 1917 testified that no water ever entered plaintiffs' lands from the north during that time. The evidence will not sustain a finding that a natural drain existed across plaintiffs' lands from point C.

The evidence of the plaintiffs is to the effect that no water spilled over on their lands prior to 1957. Since that time waters have come onto their lands, washing ditches and holes immediately south of point C and doing likewise where the water enters the ditch and creek to the south. The evidence also shows damage to crops due to these floodwaters.

The record shows that the trial judge inspected the premises before deciding the case. It must be assumed that he observed the physical facts and the evidence of the flow of the waters as shown on the ground and came to the conclusion, as shown by the memorandum opinion and judgment filed, that the evidence sustains the contention of the plaintiffs. The findings of the trial court, after an inspection of the premises when there is other evidence in the record to support them, is an important

consideration for this court. In Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889, this court said: "But in a case wherein the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite."

It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195. The evidence supports a finding that the dams and terraces diverted surface waters from the drainageways where they naturally flowed which the terraces continued to do after the dams washed out, and caused such waters to pile up at point C and spill over onto plaintiffs' lands to their damage. This an owner may not do as the trial court correctly determined.

The trial court therefore correctly enjoined the defendant from maintaining the dams and terraces, and in directing their removal, in order to permit such surface waters to flow in the drainageway where they were wont to flow. It is fundamental that an owner may not by ditch, dam, or terrace divert surface waters in such a manner as to cast them in volume upon the adjoining lands of another to his damage. When surface waters concentrate or gather in volume or velocity, so as to lose their character as diffused surface waters, and flow in a natural drainageway, the flow may not be ar-

rested or interfered with to the injury of a neighboring proprietor. Nichol v. Yocum, *supra;* Turnell v. Mahlin, 171 Neb. 513, 106 N. W. 2d 693; Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467.

We conclude that the evidence sustains the judgment of the district court and it is affirmed.

AFFIRMED.

MARY CUNNINGHAM ET AL., APPELLEES, V. PATRICIA ANN CUNNINGHAM QUINLAN ET AL., APPELLANTS.

134 N. W. 2d 822

Filed April 30, 1965. No. 35852.

1. **Deeds: Cancellation of Instruments.** In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.
2. ———: ———. Where the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then a presumption of undue influence arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Ralph R. Bremers and John J. McCarthy, for appellants.

John A. Wagoner, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is a suit to set aside a deed. The defendants elected not to introduce evidence and stood on the motion

for dismissal. The district court set aside and canceled the deed and the defendants have appealed.

Mary Cunningham, the grantor, was 75 years of age on March 31, 1958, when she executed the deed in question to her niece, Patricia Ann Cunningham Quinlan. Mary Cunningham was somewhat retarded and had gone to school up to the fifth or sixth grade. The court specifically found at the time of trial that Mary Cunningham was "quite confused and that she apparently has had to be under the care of members of the family. She appears to be a little bit under size; appears to be perhaps a little mentally retarded; is apparently quite hard of hearing at the time of trial." Mary Cunningham was unmarried; had never transacted business; had never been employed for compensation; and had never had a home of her own. She had lived with her parents until the death of her father in 1938. From 1939 to 1957, first her brother and after his death, her sister-in-law (the parents of the defendant, Patricia Quinlan), had handled her financial affairs, and she lived in their home. In 1957, when her sister-in-law became ill, her niece, Patricia Quinlan, took over her care and the management of her financial affairs. The evidence is clear that Mary Cunningham trusted Patricia Quinlan and did what she told her to do. Upon Mary Cunningham's return from the hospital following a fall in February 1958, she signed a paper which Patricia Quinlan told her was for her own good. She did not know that she had signed a deed, nor did she know that the paper she signed was to transfer the farm to Patricia Quinlan. She did not receive any money for signing the deed. There is extensive additional evidence of imposition, fraud, and undue influence which we do not deem necessary to outline or summarize.

The general principles applying to confidential or fiduciary relationships apply to any transaction or situation of advantage in which confidence is rightfully reposed on one side, and a resulting superiority and oppor-

tunity for influence is thereby created on the other. In any such case where confidence is known, or may reasonably be expected to exist as a fact, where it is of a legal, moral, social, domestic, or personal character, equity will scrutinize the transaction critically, and especially so where age, infirmity, and instability are involved, to see that no inequitable action has been taken and no injustice has occurred. Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773. Because of the relationship, and the age, physical infirmity, and mental instability of Mary Cunningham, it was the duty of the defendant Patricia Quinlan to see that no possible advantage was taken of her. Patricia Quinlan could not enter into a transaction with Mary Cunningham of personal benefit to herself, unless it was convincingly clear that Mary Cunningham knew what she was doing, and, with a full understanding of the transaction, was willing to enter it. It is not even necessary here to determine the question of whether Mary Cunningham was lacking in general mental competence, or whether Patricia Quinlan can be said to have perpetrated a deliberate fraud upon her. In the confidential relationship in which they stood, the failure to make the transaction clear, and inducing her to execute a deed, constituted an imposition on her, whether it was intentional or not, and such imposition would constitute in equity a constructive fraud.

When a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the party seeking to sustain such a conveyance to overcome such presumption. It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each case in which

the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

The action of the district court in setting aside the deed and quieting the title to the property involved was correct and is affirmed.

AFFIRMED.

JAMES R. GRACE, APPELLANT, V. COUNTY OF DOUGLAS, NEBRASKA, APPELLEE.

134 N. W. 2d 818

Filed April 30, 1965. No. 35892.

1. **Officers.** A public officer who is duly appointed and qualified and who performs the duties of his office is entitled to draw the salary fixed by law.
2. **Time.** Full time is defined as the amount of time considered the normal or standard amount for working during a given period as a day, week, or month.
3. **Officers.** We find the plaintiff herein to be a full-time deputy sheriff and entitled to the minimum statutory compensation as such.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Reversed and remanded.

Pilcher, Howard & Hickman, for appellant.

Donald L. Knowles and William F. Ryan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ.

SPENCER, J.

This is an action brought by plaintiff, James R. Grace, a former deputy sheriff of Douglas County, to recover

the difference between the salary received by him and the minimum statutory salary for full-time deputy sheriffs in Douglas County, a Class 7 county. The trial court found for the defendant and entered an order of dismissal. Plaintiff has perfected an appeal to this court.

The dispute arises because the 1961 Legislature, in a county officers' salary bill, L. B. 373, Laws 1961, c. 96, § 9, p. 326, provided: "The salaries of full-time deputies of the various county offices shall not be less than seventy-five per cent of the county officer's salary." This section, which subsequent to the time involved herein was amended to limit its operation to one full-time deputy, is section 23-1114.09, R. R. S. 1943. It became effective October 9, 1961.

The plaintiff entered the employ of the defendant as a deputy sheriff on February 1, 1959. He was so employed on September 1, 1961, when he was classified as a part-time deputy, which classification he held until his resignation January 15, 1963.

The sheriff of Douglas County testified as follows relative to this change of classification: "Q. What was the reason for the change of the classification of the deputies on September 1, 1961? A. The reason was that there was a law passed by the Unicameral in Lincoln to the effect that all full-time deputies were to receive three-fourths of the pay of the sheriff, in other words if all deputies were to be classified as full-time, regardless of length or responsibility or experience, on longevity, they were to receive three-fourths of my pay, regardless of the longevity. So as to forestall several contingencies, I asked the Board to designate everybody but the chief deputy as a part-time deputy, so as to retain some semblance of order in the office. That was further motivated so as I could keep all the deputies I had rather than have the County Board cutting back on me when I was short of manpower. That was my motivation, that is why I requested the Board to reclassify the deputies. If they were all part-time I seen no motive for anyone

to want to be chief deputy or captain, and the responsibilities that go with that office, which are much greater than that of an ordinary deputy; they require more experience, training and much more know how and much more common sense."

It was stipulated by the parties that the courthouse employees had been on a 5-day, 8-hour-day work week since May 1, 1953. The salary of the sheriff of Douglas County for the time material herein to December 31, 1962, was $9,000, and since January 1, 1963, to January 15, 1963, was $10,000. The evidence is undisputed that the plaintiff, during the period from September 1, 1961, to January 15, 1963, worked at least an 8-hour shift 5 days a week as a part-time deputy sheriff of Douglas County. This was exactly the same work week he and the other deputy sheriffs had observed between the time of his employment as a deputy sheriff and September 1, 1961. The plaintiff's duty, as well as his work week, was exactly the same after the reclassification as it was before. The only change made was his classification as a part-time deputy, and the execution of a new bond designating him as a part-time deputy sheriff.

The only testimony in the record pertaining to the action of the county board, except that contained in the testimony of the sheriff, is a resolution of the county board dated August 8, 1961, fixing salaries for certain county officers effective as of September 1, 1961. The only information therein pertinent herein is the following: "WHEREAS, the Board of County Commissioners have made a careful and thorough study and have decided upon a schedule of annual salaries to be paid the following deputies and assistants under the various county officers.

"THEREFORE, BE IT RESOLVED that the following schedule of salaries shall be paid the herein set out deputies and assistants until further resolution of the Board of County Commissioners, effective as of September 1st, 1961:

	"Annually
"Chief Deputy Sheriff	$7,500.00
4 Deputy Sheriff Captains	6,750.00 each
6 Part Time Deputy Sheriff Sergeants	6,000.00 each
32 Part Time Deputy Sheriffs	5,400.00 each"

We note that this resolution is one on salaries and not on employment. It covered the exact number of employees in the sheriff's office who at that time were employed as chief deputy, deputy sheriff captains, deputy sheriff sergeants, or deputy sheriffs. If there was another resolution providing for the appointment of specific individuals to the posts designated by the salary resolution, it is not a part of this record.

The plaintiff on August 8, 1961, was employed as a deputy sheriff and had been so employed for more than 2 years. We must assume that his original employment had been authorized by the county board. Other than the inferences to be drawn from the evidence set out herein, there is no evidence that the plaintiff's employment as a deputy sheriff was terminated and that he was rehired in a different capacity. The inference to be drawn from this record is that his designation was merely changed from deputy sheriff to part-time deputy sheriff without any change otherwise. The statute provides for deputy sheriffs. Deputy sheriffs have specific statutory duties. We concede the right of the county board to provide a deputy sheriff who will work only part-time and to fix his salary accordingly, but we do not concede its right to merely use the term "part time" to circumvent a legislative mandate on salaries.

Previous to September 1, 1961, the plaintiff and the other deputy sheriffs received an annual salary of $4,800. This salary resolution, therefore, if it embraced the plaintiff, raised his salary $600 while referring to him as "Part Time Deputy Sheriff." This action is for the difference in the salary paid, $5,400, and 75 percent of the salary received by the sheriff for the period between October 9, 1961, and January 15, 1963.

Section 33-118, R. R. S. 1943, provides: "The county board shall furnish the sheriff with such deputies as it shall deem necessary and fix the compensation of such deputies, who shall be paid by warrant drawn on the general fund." This statute clearly gives the county board the right to determine the number of deputies a sheriff may employ, and to fix their compensation. However, this latter right is subject to any statutory minimum or maximum which may be provided.

In Scott v. Scotts Bluff County, 106 Neb. 355, 183 N. W. 573, we held a deputy sheriff was a public officer, and said: "* * * a contract with a public officer to perform the duties of his office for a different compensation than that fixed by law is void, * * *."

In Bishop v. City of Omaha, 130 Neb. 162, 264 N. W. 447, we said: "A public officer who is duly appointed and qualified, and who performs the duties of his office, is entitled to draw the salary therefor as fixed by law; no more and no less."

The crux of this case, therefore, is the use of the term "full-time deputies," in section 23-1114.09, R. R. S. 1943. Websters New International Dictionary (2d Ed.), p. 1018, defines "full time" as follows: "The amount of time considered the normal or standard amount for working during a given period, as a day, week, or month." It is evident that the ordinary meaning of the term and the one we can assume to be embraced within the legislative intent would be the usual working day for the performance of the duties of the particular office. There is no question in this case but that the plaintiff performed exactly the same duties before the attempted change as thereafter, and that the time spent in his employment was equal to or in excess of what was considered full time for the particular office.

The defendant argues that the sheriff was only authorized to hire part-time deputies. If he employed those deputies to work full time, he was exceeding his authority and the county would not be bound by his action. An

office holder has no authority to bind the county in any contract without its approval. Card v. Dawes County, 71 Neb. 788, 99 N. W. 662.

The evidence is undisputed that the sheriff himself asked the county board to designate the deputy sheriffs as part-time deputies in an attempt to avoid the operation of section 23-1114.09, R. R. S. 1943. From his testimony it is obvious that he did not intend to change their duties or working hours in any particular. "Part time" was not defined or limited in any way. His testimony indicates that even at that time he felt that he was short of manpower. The only reasonable inference to be drawn from the testimony is that the county board understood the action and the motives which prompted it because it adjusted the salaries upward although not to the level provided by the statute.

The only conclusion we can draw from the record is that the plaintiff, before and after the enactment of the minimum salary provision, was a full-time deputy sheriff and included within the operation of the provision. We therefore reverse the judgment of dismissal and remand the cause for judgment in conformity with this opinion.

REVERSED AND REMANDED.

SHELTON GRAIN AND SUPPLY CO., A CORPORATION, APPELLANT, V. VILLAGE OF SHELTON, APPELLEE.
134 N. W. 2d 815

Filed April 30, 1965. No. 35895.

1. **Municipal Corporations: Appeal and Error.** In an action for the disconnection of lands from a city or village under section 17-414, R. R. S. 1943, the decree of the district court is reviewable under the provisions of section 25-1925, R. R. S. 1943, and it will be tried in this court de novo.
2. **Municipal Corporations.** In determining whether or not justice and equity require the disconnection of lands from a city or

village, the court may properly consider if the lands are exclusively agricultural, the existence or nonexistence of a unity or community of interest with such city or village, the benefits, if any, received from the city or village, and the effect upon the compactness of the city or village by the resulting change of its corporate limits.

3. ———. The disconnection of lands from a city or village on the basis of justice and equity requires a consideration of all the facts and circumstances tending to show the fairness or unfairness of disconnection as it relates to the particular case.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Dier & Ross, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

Plaintiff brought this suit in the district court for Buffalo County to obtain a decree disconnecting its lands described in its petition from the village of Shelton. The trial court found against the plaintiff and it appeals.

The plaintiff Shelton Grain and Supply Co., a corporation, is the owner of 11.635 acres of land within the east limits of the village. It is bounded on the east by the east line of Buffalo County, on the south by the Union Pacific Railroad right-of-way, and on the north by U. S. Highway No. 30. The north and south boundary lines of the property come together at a point 1,567.8 feet west of the eastern limits of the village. The tract is a very irregular cone-shaped area which has a common boundary with the eastern limits of the village for a distance of 589.8 feet. The cone-shaped tract points in the direction of the business center of the village, its north and south boundary lines converging at the point heretofore mentioned.

The applicable statute provides in part: "Whenever a majority of the legal voters residing on any territory

within and adjacent to the corporate limits of any city or village, or the owner or owners of any unoccupied territory so situated, shall desire to have the same disconnected therefrom, they may file their petition in the district court of the county in which such city or village is situated praying that such territory be detached therefrom. * * * If the court shall find in favor of the petitioners and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." § 17-414, R. R. S. 1943.

In an action for the disconnection of lands from a city or village under section 17-414, R. R. S. 1943, the decree of the district court is reviewable in this court under the provisions of section 25-1925, R. R. S. 1943, and it will be tried in this court de novo. Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415.

The east end of the tract is occupied by three grain storage bins belonging to the plaintiff. Its principal business is the storing and drying of government corn, although it buys and sells corn in limited amounts. The largest of the grain storage bins is 460 feet long, the other two being of lesser length. There is an office building and a scale east of the largest storage bin. The manager is the only permanent employee, but three other employees are used in the busy season. The only ingress to the tract is by two roads entering from the north-south county road on the east of the tract. The lands west of the grain storage bins have been used for the growing of corn. There is no access to the tract from the railroad right-of-way or the controlled access highway on the north.

It is the contention of the plaintiff that the tract is used exclusively for agricultural purposes and that it receives few or no benefits from the village. Plaintiff's evidence shows that village water mains and sewers do not extend to any part of the tract, that there is no village street connecting it with the village, that it re-

ceives no snow removal, police, or fire protection services from the village, and that it is geographically separated from the village by the highway and the railroad right-of-way.

The village contends that plaintiff built the grain storage bins on the tract when it was a part of the village and that it has received benefits from the village since that time. The evidence shows that the village marshall patrols the area where the buildings are located. It points out without dispute that plaintiff has never requested water, sewer, or snow removal service. It has equipment to afford fire protection and will do so if needed. Plaintiff obtains its electrical energy from the same distributor as does the village. There has been some business development near the west end of the tract, but, like other small villages, such development has not been great. There is a residence area beginning about 200 feet south of the railroad right-of-way. There has been some business development along the railroad right-of-way. There is a beet dump, an alfalfa mill, and a bulk oil and gas storage facility within the village limits. A witness, who is a stockholder and director in the plaintiff corporation, testified there are no streets entering the tract, but none are needed, and any attempt to build them would be opposed by the plaintiff. No sidewalks have been built in the area. The west end of the tract is within 1,375 feet of the public school and 4 or 5 blocks from the business center of the village. The village points out that the disconnection of the tract would unduly disrupt the limits of the village by excluding the long, narrow tract from the otherwise compact limits of the village as presently established.

The record shows that the grain storage bins are served by a commercial track of the railroad which is within the limits of the village. We point out also that the village of Shelton primarily serves as the focal center of a farming area and is the center of farm activities in the community. Plaintiff's business operations are

benefited by this centralization of community interest. We think the operation of the grain storage bins is a commercial enterprise which dissipates the conclusion that the 11.635 acres of land are used exclusively for agricultural purposes. The growth of the village, although not great, is in the direction of this acreage. We are of the opinion also that the resulting detachment of plaintiff's lands would unduly disarrange the compactness of the village's corporate limits, a matter of importance in a case of this kind, even though not a controlling factor. We find that there is sufficient community of interest between the 11.635 acres and the village to sustain their retention within the corporate limits of the village.

We conclude that the finding of the trial court that justice and equity do not require the disconnection of the 11.635 acres of land from the village is sustained by the evidence. The reasoning of the following cases supports the conclusion reached: Runyan v. Village of Ong, 154 Neb. 127, 47 N. W. 2d 97; Davidson v. City of Ravenna, 153 Neb. 652, 45 N. W. 2d 741; Kuebler v. City of Kearney, *supra*.

AFFIRMED.

E. WILLIAM SALL ET AL., APPELLEES, V. EDWARD SCHNACKENBERG, APPELLANT.

134 N. W. 2d 808

Filed April 30, 1965. No. 35897.

1. **Trial.** In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. **Trial: Appeal and Error.** Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and

the weight to be given their testimony are for the jury's determination and not for the court.

Appeal from the district court for Dawson County: JOHN D. ZEILINGER, Judge. Affirmed.

William S. Padley, for appellant.

Smith Brothers, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

The plaintiffs brought this action to recover the balance due for hay purchased by the defendant at a public auction. From a verdict in favor of the plaintiffs the defendant has appealed.

The plaintiffs employed auctioneers and sold prairie hay at public auction on December 3, 1956. The defendant was the highest bidder and it was sold to him for $21.50 per ton. There were over 2,000 bales of hay, and the defendant removed a substantial portion of it during the period following the sale and up to April 26, 1957, and paid for most of the hay he removed. Thereafter, the defendant refused to take or pay for the hay remaining. Evidence on the other principal issues was almost completely contradictory. The defendant's evidence was that the auction was a sale by sample, and that the hay he refused was inferior and did not correspond with the sample. The plaintiffs' evidence was that the auction was not a sale by sample; that purchasers were invited to inspect it, and had the opportunity to do so; and that the quality and condition of all of the hay was good. There was even a conflict in the evidence as to the average weight of the bales.

In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be

deduced therefrom. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

The defendant complains of the giving of a portion of an instruction that: "Representations which merely express a seller's opinion, belief, judgment, or estimate, do not constitute a 'warranty', and consequently, dealer's talk, puffing, or praise of goods do not amount to a warranty." There is no contention that the law as expressed in the instruction was incorrect. It is apparently the defendant's position that the statements made at the sale conclusively established a sale by sample and nothing else, and that the instruction was, therefore, inappropriate. The evidence, however, was in conflict as to what was said, as well as to its interpretation, and the inferences which might be drawn from it. The instruction was, therefore, not in error. See Middleton v. Nichols, *ante* p. 282, 132 N. W. 2d 882.

Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination, and not for the court. Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

ELMER E. MATHIS, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

135 N. W. 2d 17

Filed May 7, 1965. No. 35805.

1. **Appeal and Error.** On appeal, this court will decide the case upon the theory on which it was tried in the district court.
2. **Trial.** For the purpose of decision thereon, a motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of

the party against whom the motion is directed, and such party is entitled to have the benefit of every inference that can reasonably be deduced from the evidence.

3. ———. Before a case is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is any evidence, but whether there is any evidence upon which the jury can properly award recovery to the party upon whom the burden of proof is imposed.
4. **Eminent Domain: Damages.** In condemnation proceedings, the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages.
5. **Eminent Domain.** The taking of control of outside advertising on land is compensable under Chapter 39, article 13, R. S. Supp., 1963, and entitles the owner to compensation for pecuniary loss.
6. **Eminent Domain: Damages.** When the State takes control of outside advertising, the measure of damages of the landowner is the difference in the value of his land before and after the taking.
7. **Eminent Domain: Easements.** Where the record is barren of any evidence to prove actual damages from the taking of an easement, the question of damages should not be submitted to the jury, other than to direct the assessment of nominal damages.
8. **Damages.** Nominal damages are those awarded, not as compensation for pecuniary loss, but in recognition of a legal wrong, where there is no proof of actual damages.
9. **Eminent Domain: Damages.** It is the owner's loss, and not the taker's gain, which is the measure of compensation for property taken.
10. ———: ———. If what a condemnee has given up has no value, an award of compensation is unnecessary.
11. ———: ———. When the State takes control of outside advertising on land, the owner is not entitled to substantial compensation in the absence of proof of pecuniary loss.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

Carl D. Ganz and Flansburg, Mattson, Field, Ricketts & Sorensen, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and James J. Duggan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH,

and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

POLLOCK, District Judge.

This is an action instituted by the State of Nebraska as a proceeding in eminent domain to secure the control of outside advertising on farm land adjacent to an interstate highway, under section 39-1320, R. S. Supp., 1963.

The action was tried in the district court upon the theory that it was a proceeding to condemn a permanent easement, and no issue was raised in this court concerning the form of the proceeding or the nature of the right acquired by the State. We dispose of the case upon the same theory.

The appraisers awarded damages of $1,500 to Elmer E. Mathis, owner of the land. The State claimed that the award was excessive and appealed to the district court. There the condemnee was designated as plaintiff and the condemner as defendant, pursuant to section 76-717, R. S. Supp., 1963.

The plaintiff claimed that the land had an outdoor advertising rental value of $80 per year, and that the potential sign rental value capitalized at a normal rate of interest was $2,000. Plaintiff prayed to recover damages in that amount.

Upon trial to a jury, the parties stipulated that plaintiff had incurred abstract expense of the value of $75 as a result of the condemnation, and they agree that such expense is recoverable by plaintiff. § 76-710.01, R. S. Supp., 1963.

The plaintiff testified that on February 14, 1963, he entered into a written lease agreement with Stoner System, Inc., an outdoor advertising company. Actually, the instrument was an option for a lease wherein, in consideration of $1, he agreed to give the exclusive right to lease either of two undesignated sign sites for a rental

of $40 per site per year, for a period of 5 years, with renewal privileges for 5 more years.

No advertising signs were erected on plaintiff's land, and he received no sign rental income. He did not think that signs, if erected, would interfere with farming operations except he would "have to turn around six inches shorter." He said that the taking of control of outdoor advertising resulted in no inconvenience in farming his land or using his buildings.

Edwin McHugh, Murdock banker, testified that the income on a conservative investment was about 4 percent per annum.

Barry Ackerley, manager of Stoner System, Inc., testified that their signs were 10½ feet tall and 40 feet long, that they were erected on poles from 1 to 1½ feet in diameter, and that they were serviced about twice a year. He said a sign company rarely purchases land on which to erect signs, and that he knew of no company that ever purchased the perpetual right to control outdoor advertising. He said they would pay plaintiff no rental under their agreement unless they chose to erect signs on his land. He said the fair rental value of plaintiff's two sites "would be" $40 each per year, if signs were erected.

Homer Anderson, of Naegele Outdoor Advertising Company of Omaha, testified that sign companies ordinarily lease the sites on which they erect signs, and that he knew of no company that had ever purchased the perpetual right to control outdoor advertising.

At the close of plaintiff's evidence the defendant moved that the court direct the jury to return a verdict awarding plaintiff recovery of $75 for abstract expense and denying further recovery for the reason that there was no evidence to support a verdict for other damages. The motion was sustained, and the court directed a verdict accordingly. Plaintiff's motion for a new trial was overruled and he appeals to this court.

Primarily, the question for decision is whether upon

trial in the district court the evidence adduced on behalf of the plaintiff was sufficient proof of pecuniary damages to warrant submission to the jury of the issue of damages.

Appellant's brief refers to a case of similar nature, Fulmer v. State, *ante* p. 20, 131 N. W. 2d 657, on rehearing, *ante* p. 664, 134 N. W. 2d 798. The same attorneys represented the landowner in each case. Counsel candidly say that they tried the Fulmer case on the theory that the proper measure of damages was the difference between the value of the land before and after the taking. They report that the result was a "zero" verdict. Since that theory proved unrewarding, counsel have apparently decided to hitch their wagon to a different star, and they tried the instant case on a different theory.

Recovery is sought upon the theory that the proper measure of damages is the potential sign rental income, capitalized at a normal rate of interest. It is argued that the "usual before and after" theory is inapplicable because it is impossible to prove the value of the interest taken by the State.

For the purpose of decision thereon, we must treat the motion of the defendant for a directed verdict as an admission of all material and relevant evidence submitted on behalf of the plaintiff who is entitled to have the benefit of every inference that can reasonably be deduced from the evidence. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686.

Before a case is submitted to a jury, there is a preliminary question for the court to decide, if properly raised, not whether there is any evidence, but whether there is any evidence upon which a jury can properly award recovery to the party upon whom the burden of proof is imposed. Buick v. Stoehr, 172 Neb. 629, 111 N. W. 2d 391.

The burden of proof was upon the plaintiff landowner to prove the nature and amount of his pecuniary dam-

ages. Frank v. State, 176 Neb. 759, 127 N. W. 2d 300; Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291; Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865; Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64.

The taking of control of outdoor advertising on land is compensable under Chapter 39, article 13, R. S. Supp., 1963, and entitles the owner to compensation for pecuniary damages.

The rule is well settled that the measure of damages for the taking of an easement is the difference in the fair and reasonable market value of the land before and after the taking, and not the separate value of the easement taken. The recent case of Fulmer v. State, *supra,* decided that this measure of damages is applicable in an action by the State to secure control of outside advertising.

Not only did the plaintiff fail to prove the amount of his damages, but he failed to prove that he suffered any pecuniary damage whatsoever.

There was no evidence that the land was worth any less after the taking than before. Its productivity was unaffected. No inconvenience resulted from the taking. It was not shown that the taking of the control of outdoor advertising would to the slightest degree influence an intending purchaser's estimate of the fair market value of the land.

There was never a sign on plaintiff's land, and no promise that one would ever be erected there. He received no sign rental income, and it was not shown with reasonable certainty that he would receive such income at any future time. Whether or not he would ever receive any sign rental income was very speculative and uncertain.

Where the record is barren of any evidence to prove actual damages from the taking of an easement, the question of damages should not be submitted to the jury, other than to direct the assessment of nominal

damages. Graceland Park Cemetery Co. v. City of Omaha, 173 Neb. 608, 114 N. W. 2d 29.

Nominal damages are those awarded, not as compensation for pecuniary loss, but in recognition of a legal wrong where there is no proof of actual damages. Stewart v. Spade Township, 157 Neb. 93, 58 N. W. 2d 841. In the absence of proof of actual damages, plaintiff may have been entitled to recover nominal damages, but at no stage of the proceedings has he asserted any right thereto, and no assignment of error relates to the question of nominal damages.

Compensation to a condemnee depends upon his pecuniary loss. It is the owner's loss, not the taker's gain, which is the measure of compensation for property taken. State v. Platte Valley P. P. & I. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196.

If what a condemnee has given up has no value, an award of compensation is unnecessary. We quote from Department of Public Works & Buildings v. Filkins, 411 Ill. 304, 104 N. E. 2d 214: "The property owner is entitled to be compensated justly for what is given up to the State. If what he has given up is of no value, the making of an award would not be required in order that he be justly compensated."

In Midwestern Gas Transmission Co. v. Mason, 31 Ill. 2d 340, 201 N. E. 2d 379, the jury returned a verdict which included "no dollars" for a permanent easement for underground storage of gas. The court said: "In summary, the offers of proof as to valuation of the land as a part of an underground gas storage reservoir were too remote and speculative and were properly excluded. The only competent evidence on value of the limestone structures was that they were valueless, and 'just compensation' under section 13 of article II does not necessarily mean that some award must be made."

Plaintiff argues that the value before and after theory is not applicable, and cites Graceland Park Cemetery Co. v. City of Omaha, *supra*. The opinion states: "There

are types of property that are not bought and sold on an open market and consequently do not have a reasonable market value * * *. When the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised. * * * Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the use and purpose for which it is being devoted and to which it is peculiarly adaptable may be shown."

The case is clearly distinguishable. Plaintiff makes no claim that farms are not bought and sold on the open market or that evidence of the fair market value of his farm land is not obtainable, and there is no evidence of its value for outdoor advertising purposes.

When the State takes control of outside advertising on land, the owner is not entitled to substantial compensation in the absence of proof of actual damage.

We conclude that the direction of the verdict by the trial court was correct.

AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion for the reasons enumerated in the dissenting opinion filed in Fulmer v. State, *ante* p. 664, 134 N. W. 2d 798.

It is a useless gesture and no more than a mere exercise in sematics to say that taking control of outside advertising on land is compensable and then to apply a rule which permits a zero verdict. As I pointed out in the other dissent, this court is responsible for the rule of damages applied. If that rule does not effectuate the constitutional mandate, it should be changed. To hold otherwise is to condone legal confiscation in condemnation actions and to make a mockery of our constitutional provisions.

OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, V. THE TRAVELERS INDEMNITY COMPANY, A FOREIGN CORPORATION, APPELLEE.

135 N. W. 2d 1

Filed May 7, 1965. No. 35813.

1. **Contracts.** The construction of a written contract is ordinarily a question of law.
2. **Insurance.** In construing an insurance contract, the words used therein should be considered as used in their ordinary and popular sense.
3. ———. An explosion is a violent bursting or expansion following the production of pressure or a sudden release of pressure.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotsch, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, and MCCOWN, JJ.

BOSLAUGH, J.

This is an action upon a boiler and machinery insurance policy issued by The Travelers Indemnity Company, the defendant, to the Omaha Public Power District, the plaintiff. The jury returned a verdict for the defendant. The plaintiff's motion for judgment notwithstanding the verdict or for a new trial was overruled and it has appealed.

On July 4, 1959, a transformer owned by the plaintiff was damaged as the result of an accidental internal electrical disturbance. The cost of repairing the damage to the transformer amounted to $146,964.85. During the time that the transformer was out of service, the plaintiff temporarily installed two smaller transformers so that the generating unit ordinarily connected to the damaged transformer could be used for the production

of electricity. The expense of the temporary installation amounted to $19,779.86. The defendant paid one-half of these amounts to the plaintiff and asserted that the plaintiff's fire insurance carriers were liable for the remaining one-half because the loss was a "joint loss" within the meaning of the applicable policies.

The action was brought to recover the remaining one-half of the loss from the defendant. Although the action was brought in the name of the plaintiff, the record shows that the fire insurance carriers had paid one-half of the loss to the plaintiff and had taken loan receipts pursuant to an agreement that this action would be brought at their expense to determine the extent of the defendant's liability under its policy.

The defendant's policy also provided coverage for loss of capacity and extra expense. The claim under this coverage amounted to $49,468.62 and was paid in full to the plaintiff. There is no issue concerning it in this litigation.

All of the plaintiff's fire insurance policies which were in force at the time of the accident contained extended coverage endorsements which insured the plaintiff against loss by explosion. The endorsements provided: "The coverage of loss by explosion under this endorsement shall include direct loss by any artificial electrical disturbance immediately preceding and causing such explosion * * *." They further provided: "The following are not explosions within the intent or meaning of these provisions: * * * (b) electrical arcing, * * *." The controlling issue in this case is whether the damage to the plaintiff's transformer was caused by an explosion within the meaning of the extended coverage endorsement of the fire insurance policies.

The plaintiff's transformer which was damaged on July 4, 1959, is a General Electric 133,000 KVA power transformer. It is approximately 8 feet wide, 17 feet long, and 12 feet high and contains three large coils which are submerged in insulating oil when the trans-

former is in operation. The space between the surface of the oil and the top of the transformer is filled with nitrogen gas under pressure. The transformer is designed to operate normally with a nitrogen gas pressure of between 1½ to 7½ pounds per square inch. The transformer is equipped with a pressure relief device which is designed to relieve the gas pressure in the transformer whenever it exceeds 15 pounds per square inch.

The examination and inspection of the transformer which was made after its failure disclosed that an electrical arc or "flashover" had occurred within the transformer. The arc traveled approximately 3 feet from coil B to coil C, created a very high temperature in the oil, and transformed some of the oil into gas and carbon. The resulting increase in gas pressure which occurred within a fraction of a second damaged the internal parts of the transformer and caused the pressure relief device to operate.

The pressure relief device is a curved pipe or elbow fastened to the top of the transformer. The end of the pipe is sealed with a "herkolite" diaphragm and is equipped with a hinged door which covers the diaphragm. The diaphragm is designed so that it will rupture when the gas pressure inside the transformer exceeds 15 pounds per square inch. The door covering the diaphragm is fastened with a bolt or screw that is designed to break when gas pressure against the door exceeds 15 pounds per square inch. The door is equipped with a spring so that it will close after the excessive gas pressure within the transformer has been relieved.

When the pressure relief device functioned on July 4, 1959, the diaphragm was ruptured, the bolt was broken, and one of the hinges attached to the door was broken. Oil from the transformer was thrown horizontally against the wall of a building approximately 15 feet away.

Inside the transformer in the area where the arcing

occurred there was evidence of scorching, and the insulation on the windings of the coils was damaged. A phase barrier and some of the oil diffusors were displaced, several fiber bolts were broken, and two of the high voltage bushings were displaced. The oil in the transformer was badly carbonized and carbon particles were distributed throughout the transformer. It was necessary to return the transformer to the factory in Massachusetts for repair.

There is no controversy between the parties in this case as to the facts. The evidence, although in part circumstantial and in part expert testimony, is undisputed. The controversy in this case concerns the legal effect or consequences of what happened at the time of the transformer failure.

The decision in this case turns upon the construction and interpretation of the fire policies. The construction of a written contract is ordinarily a question of law. Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299. As we view the record, it is a question of law as to whether any part of the plaintiff's loss was within the coverage of its fire policies.

The fire policies insured against loss by explosion. In construing an insurance contract, the words used therein should be considered as used in their ordinary and popular sense. Wilson v. Capital Fire Ins. Co., 136 Neb. 435, 286 N. W. 331. We think that the term "explosion" as used in the policies involved in this case means a violent bursting or expansion following the production of pressure or a sudden release of pressure. Baltimore Gas & Electric Co. v. United States Fidelity & Guaranty Co., 269 F. 2d 138. See, also, 15A Words & Phrases, Explosion (Perm. Ed.), p. 479; 29A Am. Jur., Insurance, § 1296, p. 421; Annotation, 28 A. L. R. 2d 995.

The evidence in this case shows a violent bursting following the production of pressure as the result of an electrical arc occurring within the insulating oil in the transformer. Although an electrical arc alone is not

an explosion, an explosion caused by an electrical arc is within the extended coverage of the fire policies, and their coverage extends to the damage resulting from the arc if it immediately precedes and causes the explosion. Baltimore Gas & Electric Co. v. United States Fidelity & Guaranty Co., *supra*. The damage to the transformer was a "joint loss" within the meaning of the applicable policies, and the defendant's liability as to that item of the loss did not exceed one-half of the cost of repairing the damage.

The loss of capacity and extra expense coverage endorsement of the defendant's policy contained a provision that the defendant would pay any extra expense incurred by the assured at the written direction of the defendant to reduce or avert any loss of capacity. The defendant gave written authorization for the temporary installation of the smaller transformers and it paid one-half of this expense.

The defendant contends that the extra expense incurred by the plaintiff was a "joint loss" and that four of the fire companies are liable for one-half of this expense. Four of the fire insurance policies issued to the plaintiff contain an endorsement which provides coverage for loss resulting from business interruption. The endorsement provides that the policy shall also cover such expenses as are necessarily incurred for the purpose of reducing any loss under the policy not exceeding the amount by which the loss under the policy is thereby reduced. If the expense of the temporary installation of the smaller transformers reduced the loss under the business interruption coverage provided by the fire companies, then this expense was a "joint loss" and the defendant's liability as to that item of the loss does not exceed one-half of the expense.

The business interruption coverage provided by the fire policies was limited to the actual loss sustained by the plaintiff "not exceeding the reduction in gross earnings less charges and expenses which do not necessarily

continue during the interruption of business." The plaintiff contends that the evidence does not show the amount of any reduction in gross earnings sustained by the plaintiff as a result of the transformer failure and does not show that the temporary installation of the smaller transformer resulted in a reduction of a loss under the business interruption coverage. The plaintiff argues that in the absence of such evidence the defendant should be held liable for the full amount.

By this argument the plaintiff attempts to assert a defense that could properly be made only by the fire companies against the plaintiff. In effect, the plaintiff is asking the defendant to prove the items that the plaintiff was required to establish in its proofs of loss to the fire carriers. The fire companies concerned have paid the plaintiff one-half of the expense of the temporary installation of the smaller transformers. There is nothing in the record which indicates that there has ever been any controversy between any of the parties concerned as to whether the plaintiff sustained a reduction in gross earnings as a result of the transformer failure or whether the temporary installation of the smaller transformers was effective to avoid a reduction in gross earnings.

As we interpret the record, the plaintiff's contention in the trial court was that the defendant was liable for the entire loss because the accident was not an "explosion" within the meaning of the extended coverage of the fire policies; that the defendant was estopped from asserting that the loss was a joint loss; and that the plaintiff had failed to notify the fire companies of the loss as required by their policies. The loan receipts recite that the plaintiff had made demand upon the fire companies. The plaintiff cannot now attempt to raise an issue against the defendant upon the theory that it did not sustain a loss and that there was no basis for the claim which it asserted against the fire carriers under the business interruption coverage.

The plaintiff's contention in regard to estoppel is based upon the theory that the defendant's conduct prevented it from giving notice of the loss to the fire companies within the time required by their policies. The record shows that the fire companies did receive notice within the time required and that there has been no prejudice to the plaintiff as a result of the defendant's conduct. There is no merit to the plaintiff's contentions that the fire companies were not timely notified of the loss or that the defendant was estopped from asserting that the loss was a joint loss.

It is unnecessary to consider the other assignments of error relating to alleged errors in the admission of evidence and the instructions to the jury.

The judgment of the district court is affirmed.

AFFIRMED.

ERNEST BIERSCHENK ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLEES.
135 N. W. 2d 12

Filed May 7, 1965. No. 35814.

1. **Municipal Corporations.** Annexation of territory by a metropolitan city pursuant to section 14-117, R. R. S. 1943, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof.
2. ———. In doing so it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act.
3. ———. Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed.
4. ———. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the Legislature and when so conferred must be exercised in

strict accord with the statute conferring it.

5. ———. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.

6. ———. Under section 14-117, R. R. S. 1943, a city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a substantial link of narrower land of the same character.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Shrout, Hanley, Nestle & Corrigan, for appellants.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, and James E. Fellows, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

The appellants, Ernest Bierschenk and 11 other resident landowners and taxpayers in the area affected, as plaintiffs, brought this action on behalf of themselves and those similarly situated. Its purpose was to enjoin the City of Omaha, Nebraska, a municipal corporation, hereinafter referred to as the city, its mayor, council, and other officers who were joined with it as defendants and who are appellees in this court, from enforcing ordinance No. 22649 of said city by which a large portion of an area known as Keystone and Benson Gardens was annexed to the city.

On appropriate pleadings to raise the issues hereinafter discussed, a trial was held in the district court for Douglas County, Nebraska. The trial court found in favor of the defendants that the annexation was valid and dismissed the plaintiffs' petition. The plaintiffs have appealed to this court from an order overruling their motion for a new trial.

Plaintiffs first contend that the area involved included

agricultural land rural in nature and that the trial court erred in holding to the contrary which they urge requires a reversal of the judgment. The statute governing the annexation of territory by a city of the metropolitan class is section 14-117, R. R. S. 1943, the pertinent portion of which reads: "The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction * * *; Provided, that any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof, shall not apply to lots, lands, cities or villages annexed, consolidated or merged under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character." In the case of Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490, this court considered this section and held: "Annexation of territory by a metropolitan city pursuant to section 14-117, R. S. 1943, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof.

"In doing so it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act.

"Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed. * * *

"A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature and when so con-

ferred must be exercised in strict accord with the statute conferring it.

"The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity."

From the testimony it appears that the area annexed by the ordinance included 727 acres of which 118 acres were in streets and roads; 26 acres were occupied by parks, schools, churches, and public grounds; 28 acres were industrial; and 3 acres were commercial. There were 1,218 residences built on an area of 446 acres. The remaining portion was in scattered lots which had no buildings upon them. The whole area had been platted with the exception of one tract of 5 acres zoned commercially with a filling station thereon. Much of it thereafter had been replatted or subdivided, often repeatedly. The lots in the various plats and subdivisions varied greatly in size. Those to the northern part of the annexed area were generally smaller and a greater percentage of these had residences upon them. Midway from north to south was that called the Keystone Addition where the lots were much larger. The area of these varied from about 1 acre to as much as 6 acres. Some of the owners had sold off portions of the larger lots. Near Blondo Street on the south, the lots were again smaller although often larger than those on the north end. The greater portion of the commercial and industrial zoned lots were on the south near Blondo Street. The area was supplied with water by the Metropolitan Utilities District, a separate entity. Electric, gas, and sewer lines having connections with those in the city ran through the district. Certain streets were extensions of those in the city. Most of the streets and utilities had been planned and zoned in conformity with the ordinances of the city pursuant to its power to make regulations applying to lands within 3 miles of the corporate limits. Considerable growth, particularly residential in nature, was shown in the area.

Several witnesses for the plaintiffs testified concerning the use of premises claimed by them to be agricultural lands rural in nature. There was evidence concerning flower and vegetable gardens, orchards, vineyards, and pastures maintained by residents on lots in the area itself and adjoining it. Pictures of ponies kept for the children and riding horses pastured in enclosures were introduced. One resident had fed two or three steers at times on his premises although they were pastured elsewhere the year before he testified. Another raised hogs on his lots. Some corn was raised for feed although most of it was sweet corn. Certain persons had 5 acres in corn or produce but, generally speaking, this consisted of the sum of several small tracts added together and often portions lay outside the annexed area. Most of the vegetables and fruit raised and cattle and hogs fed were consumed by the producer or his family. Produce not consumed was generally given away to relatives or friends. Little was sold and the sums received for it were always quite small and when related to the owner's other income was trifling. Many witnesses who were retired had been engaged in commercial enterprises within the city. Widows testified their husbands had been so employed in their lifetime. The witnesses not retired were generally engaged in commercial pursuits in the city. No one appears to have depended upon agriculture for his or her living. Several witnesses testified that they purchased their holdings because they liked spacious living. Photographs of some premises claimed to be used agriculturally have spacious grounds and beautiful wooded areas. The buildings adapted for livestock were practically all small, old, and dilapidated. None showed corncribs, granaries, or other modern agricultural facilities.

This court in Wagner v. City of Omaha, *supra*, affirmed the judgment of the trial court which had adjudged the annexation ordinance to be void. The cases are clearly distinguishable. In the cited case there were two tracts

containing between 90 and 103 acres of unplatted agricultural lands out of 490 sought to be annexed. The court in its opinion in that case stated: " 'Rural' means of or pertaining to the country as distinguished from a city or town, whereas 'urban' means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the intention of the Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it. It was, however, the purpose of the act to prevent annexation by such city of agricultural areas which are rural in character." From the evidence it appears that although a part of the area may be used agriculturally, it is certainly not rural in nature. The plaintiffs' contention that the trial court erred in not holding the annexed area included agricultural lands rural in nature is without merit.

Plaintiffs next contend the trial court erred in finding the land annexed was sufficiently connected to or contiguous with the city limits to permit its annexation. They place great emphasis on the irregularity of the boundaries of the area and the narrow neck with which the greater portion of it is connected to the city. There are 132 different calls of metes and bounds in the description. As viewed on the plats in evidence the outline of the border is indeed grotesque. From Blondo Street on the south where it joins the city limits to Fort Street on its north is practically 2 miles. On the south it is about 800 feet wide east and west. Further north its breadth narrows to 460 feet, again widens, and some distance further north it is a neck of only 252 feet. Still further north it is 2,950 feet wide. Testimony on behalf of the city in explanation of the odd shape of the area to be annexed indicates that the growth of the city in many instances extended on ridges and spurs.

There is testimony concerning the plats introduced in evidence and the plats themselves which show that the narrow necks in portions of the annexed area were along a street of some importance which connected the city to the more thickly populated area to the north and that along this street even at its narrowest point were houses.

In Wagner v. City of Omaha, *supra*, the question presently before us was discussed as follows: "Appellees contend this question should be, is the area sought to be annexed sufficiently conterminous or adjoining to the city that it can extend its limits over it? The authority granted to the city by section 14-117, R. S. 1943, is: 'The city council * * * may at any time extend the corporate limits of such city over any lands, lots, tracts, streets or highway, such distance as may be deemed proper in any direction, * * *.' It will be observed that the act contains neither the word contiguous or conterminous in relation to what lands, lots, tracts, street or highway the city may extend its boundaries to include. The city's present boundary joins the area sought to be annexed on the north and partially on the west of the northern part. We find the area sufficiently joins the city so that it could properly extend its boundaries to include the area, provided the nature thereof is of such character that the city has the authority to do so." Plaintiffs cite Village of Niobrara v. Tichy, 158 Neb. 517, 63 N. W. 2d 867, where this court reversed the judgment of the trial court permitting annexation because the area was not contiguous to the city. There no proof of any contiguity of boundary at all was shown and, moreover, the court was construing section 17-407, R. R. S. 1943, applicable to cities of the second class and villages where the statute expressly requires contiguity. The cited case has no application to the one before us.

The plaintiffs cite cases from other jurisdictions which we have noted and need not discuss because of the difference either in the factual situation or the statute

which they construe. The defendants, on the other hand, call our attention to 2 McQuillin, Municipal Corporations (3d Ed.), § 7.20, p. 312, where examples are set out of annexation cases approved by other courts where the area annexed is joined to the city by a very narrow strip. These cases also need not be considered. It is only necessary to determine that under section 14-117, R. R. S. 1943, a city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a substantial link of narrower land of the same character.

The plaintiffs contend that the court erred in permitting the annexation because the boundaries of the parcel involved are so irregular as to prevent the city from providing adequate services to the area involved. It is pointed out that there are so many corners and turns that it is possible for one going in a straight line to enter, leave, reenter, and again leave the premises involved in a very short distance. Plaintiffs argue the city fire or police departments would experience great difficulty in answering calls from any location along these borders in ascertaining whether the call comes from areas in their jurisdiction and whether the call should be answered by them or departments from outlying areas in the county.

The city concedes that there might arise problems growing out of the annexation of the territory involved. However, the statute governing the annexation of such territory does not require that the boundaries of the area should be regular or enclosed by straight lines. It is shown that the city does not tend to grow in straight lines and that other portions of the boundary along the city limits are irregular and involve problems in servicing other areas because thereof. There was evidence on behalf of the city by officials of the fire and police departments, together with one charged with the respon-

sibility of providing street service and garbage collection, that they had laid plans to serve the area sought to be annexed and were preparing to do so when enjoined at the commencement of the action. In all instances of annexation it is to be assumed some such difficulties will arise. We do not think that there is merit in this last objection of the plaintiffs.

It follows that the annexation is valid and that the judgment of the trial court was right and should be and is affirmed.

AFFIRMED.

KENNETH W. FLEISCHER, APPELLEE, V. LARRY BRODERS, APPELLANT, IMPLEADED WITH LEONARD T. FLEISCHER, APPELLEE.

135 N. W. 2d 5

Filed May 7, 1965. No. 35883.

1. **Compromise and Settlement.** The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside.
2. ———. Where the evidence shows a meeting of the parties, a presentation, examination, and adjustment of their accounts, and the making of a note for the estimated balance and the surrender of the old ones, such acts constitute settlement between the parties.
3. **Bills and Notes.** A note reciting "for value received" is evidence not only of a promise but constitutes prima facie evidence of consideration and the burden of showing payment is a matter of defense which the defendant must affirmatively establish at trial.
4. **Actions: Partnership.** A party has a right to bring an action on a note on advances made by one party to another for the purpose of carrying on the partnership.
5. **Partnership.** Ordinarily, a partner is not entitled to compensation for winding up the affairs on dissolution.
6. ———. Ordinarily, advances by a partner beyond the amount of capital that he has agreed to contribute bear interest.

Appeal from the district court for Knox County:

GEORGE W. DITTRICK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Burbridge & Burbridge and G. F. Johnson, for appellant.

Cleo F. Robak, Henry F. Reimer, and Deutsch & Hagen, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

This is an action to foreclose a chattel mortgage note dated December 17, 1959, in the sum of $40,000 and on which it is alleged the sum of $37,746.96 is due.

On November 30, 1957, defendant Broders and Kenneth W. Fleischer and Leonard T. Fleischer, who will hereafter be referred to as Fleischers, entered into a partnership agreement for the operation of Fleischers' farm. Fleischers furnished the land and Broders agreed to furnish the labor, equipment, fuel, and oil to operate the ranch. They were to share equally the cost of livestock, feed, seed, and weed spray. Livestock and produce were to be kept on the premises and when sold, and after payment of expenses, the proceeds were to be divided, one-half to each. Both parties agree the partnership was dissolved May 1, 1962. Defendant Broders, by answer, alleges certain credits due him and asks for an accounting of the whole partnership period. There is no denial that the defendant Broders is indebted on the note and for a balance due from the partnership operation. The trial court, by its judgment, enforced the note and foreclosed the chattel mortgage. It found a gross balance due plaintiff in the sum of $35,260.22, allowed a credit of $2,787.80 for damages due to Fleischers buying some Bangs diseased cattle, leaving a balance due of $32,470.42 which, with interest to April 1, 1964, amounted to $35,758.02. At dissolution, partnership assets had been sold and the proceeds placed in escrow by

agreement. The trial court deducted from the judgment $20,716.27, defendant Broders' share of the escrow account, and rendered judgment for $15,041.75. Plaintiff was ordered to pay the outstanding bills in the amount of $3,142.66. Defendant Broders appeals.

The record in this case is a classic of confusion. The Fleischers were druggists at Columbus, Nebraska, and the defendant Broders was the tenant on the farm in Knox County. The operation involved hundreds of transactions. Both parties, especially the Fleischers, bought many items. Sales were made by both parties, proceeds were divided in some cases, and in many cases they were not divided. At the same time, Broders needed substantial financial backing in order to carry on his part of the partnership. No books were kept on the partnership as such during 1957 and 1958 or until April 1, 1959. At the trial, partial records were produced, some checks were produced by Broders, and basic original checks and records were missing. There is a dispute as to what happened to the original 1958 checks and records. It does appear that the Fleischers produced the original invoices, checks, and records from the beginning of 1959 on. Based on these records and on an examination of the 1958 work sheets made from the original records for income tax purposes for the Fleischers, exhibit 3 was prepared by a certified public accountant, named Greteman, covering the years of the partnership. This audit, exhibit 3, constitutes the only comprehensive, intelligible review of the transactions of the parties and the balancing of the credits between them. It has been used by both parties to this appeal as a basis for the credits and debits claimed. Although a portion of it is based on hearsay testimony as to the 1958 records, this testimony was received without objection and constitutes the best evidence available. Exhibit 3 was admitted in evidence and we conclude that this ruling was correct. An examination of the record reveals that, after hearing all of the conflicting evidence relating to the different items of

debit and credit, the district court accepted this audit, exhibit 3, as a basis for its judgment in this action. We have reviewed the evidence and have come to the conclusion that the trial court was substantially correct in accepting the Greteman audit, exhibit 3, as a basis for rendering judgment, except for the particular items later on discussed in this opinion.

This is a case where no books of account or intelligible records were kept by the parties. Records of sales and purchases were made haphazardly by the parties. No orderly procedure for crediting and debiting the various sales, purchases, and other items was ever followed or agreed on. The court is faced with the almost impossible task of harmonizing or reconciling the different sets of figures and trying to reconstruct the truth from the uncertain and confused nature of almost all of the testimony. However, we are aided by certain presumptions of law and conclusions of fact we come to from a review of the testimony.

Exhibits 8, 13, 14, and 15 were offered in evidence by the defendant Broders. They are annual settlement or accounting sheets for the years 1959, 1960, and 1961 (exhibits 14 and 15). According to their agreement, Kenneth Fleischer prepared these exhibits from his records. Annually, in December and January. the parties met and went over these records. Each party brought his own list of sales, purchases, and other records. Without dispute, these records were used by Broders for his income tax returns. There is no essential dispute as to what attitude or regard the parties had for their annual accounting records. They went over the exhibits and the items with Kenneth Fleischer, and Kenneth Fleischer testified they were approved. Broders' own testimony is to the effect that he was satisfied at the end of each year; that he was allowed all work credit; and that he never complained about the settlements shown in their annual accountings until after suit was filed.

After a review of the evidence, we conclude that, ex-

cept for a few items referred to in these exhibits as not being settled, these exhibits constituted annual settlements or accounts stated between the parties. Exhibit 8, the account for 1959, is the most important of these exhibits and forms the basis for this suit on the note and chattel mortgage for $40,000. Exhibit 8 lists in detail the advances for loans from Kenneth Fleischer. It states, "Larry owes K Fleischer to Dec 17-1959" and then states the total amount of the loans with interest, with credit for horse care, in the sum of $27,220.22. This is on the last sheet. The exhibit shows a separate accounting on the partnership or ranch account. It states, "Larry owes Ranch account Fleischer Bros." There are three pages of items showing sales, purchases, and various credits with a balance due Fleischer Brothers in the sum of $13,640.37, or a total with the loan account of $40,860.59. Different handwriting appears on this document at different places. Significant is this handwritten statement which Anna Broders, wife of defendant, does not deny writing. It is: "Lary been waiting for the checks to come through so could give you everything Just received one on Heines none on your Brotherlaw or Schinbinder so can't tell you the true Balance Course the Hay we owe you & money refund we still have coming from salesring-Bangs cows. been waiting to come up for 10 days but weather scares us out. been home with flu since Thursday nite." Further appears the following, "Balance probably is probably around 1100.00 more with 2 batches of corn you * * * up on corn we owe for."

There are further computations on this exhibit, one on which the different balances are added and a net balance due of $39,801.68.

Apparently, there was confusion as to the amount of credits as the parties did not have all of the checks cleared or the records before them. In any event, Broders gave Kenneth Fleischer his note for one year for $40,000 dated December 17, 1959, with interest at

4½ percent and 5 percent after maturity. No precise accuracy may be obtained, but as we see it, this $40,000 note substantially settled the aggregate balance due both for money advances to Broders and the debits on the ranch account.

We go now to the 1960 settlement between the parties, exhibit 13. It was produced by Broders and is an operating statement of the ranch account. It was gone over by the parties in December 1960 or in January 1961. Exhibit 13 shows a balance on the operating account of the partnership on February 15, 1960, of $13,632.97 due Fleischers. This balance is approximately the same as the operating expense due on exhibit 8 and incorporated in the note of December 17, 1959. Exhibit 13 lists numerous items of debit and credit and shows a balance due at the end of the year 1960 on the partnership operating account of $14,767.49. On the last page of this exhibit, offered by Broders, the following appears:

"I owe 27220.22 Ken
14767 49 F Bros
1894 75 Int.

Jan 1,1960 43882 46"

It is not denied or suggested otherwise than that this notation is in Broders' handwriting and offered as his own exhibit in the case. This exhibit substantially confirms the settlement figures of exhibit 8, which were incorporated in the note for $40,000. We conclude that these two exhibits constitute acknowledgment and affirmation, at a minimum, of the indebtedness confirmed by his execution of the note of December 17, 1959, in the sum of $40,000.

The 1961 settlement (exhibits 14 and 15) again reviewed the operating ranch account. It was produced by Broders again. Exhibit 15, which brings the account to date of January 18, 1962, shows a balance due on that date of $37,766.96 for which suit was brought. Before

we examine the evidence further, we pause to state the posture of this case at this point.

The attempt here is to reexamine, going back to the year 1958, a multitude of charges and credits that were either included or settled when these parties met and examined their annual accounts as shown in exhibits 8, 13, 14, and 15 for the years 1959, 1960, 1961, and part of 1962. This may not be done, in the absence of clear and convincing evidence of error or mutual mistake. In a somewhat similar recent case, Lortscher v. Winchell, *ante* p. 302, 133 N. W. 2d 448, this court said: "The district court refused to set aside or recompute any of the settlements which the parties had made, and held that the settlements were binding on both parties and conclusive as to all matters covered in the settlements. We think this determination was correct. In a similar case this court said: 'The parties agree that they met once a year, or thereabouts; that they had their accounts before them, and that debits and credits were demanded, given, and refused, resulting in the giving of a new note for the ascertained balance and the surrender of the old note. The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside. The record conclusively shows a meeting of the parties, a presentation, examination and adjustment of their accounts, the making of new notes for the found balance and the surrender of the old ones. Such acts constitute settlements.' Stuart v. Torrey, 106 Neb. 608, 184 N. W. 215."

It is apparent that in December 1959 or January 1960, these parties settled their accounts as nearly as they could be. They executed a note covering the estimated balances. The only question this court must determine is the balance due under the applicable rules as to the burden of proof. The note "for value received" is evidence not only of a promise but constitutes prima facie evidence of consideration and the burden of showing payment is a matter of defense which the defendant

must affirmatively establish at trial. In re Estate of Hoagland, 126 Neb. 377, 253 N. W. 416; Farmers & Merchants State Bank v. Kuhn, 125 Neb. 457, 250 N. W. 652; Bosle v. Luebs, 169 Neb. 186, 98 N. W. 2d 795. That a party has a right to bring an action on a note by one partner for advance to another for the purpose of carrying his obligations under the partnership agreement and to further its interest is well established. Linch v. Linch, 145 Neb. 792, 18 N. W. 2d 98. Ordinarily recovery on said note may be had, without regard to the status of the partnership accounts, and ordinarily such action may not be turned into an equitable action for accounting by cross-petition. Linch v. Linch, *supra.*

We feel plaintiff has established his case by proof of the note and chattel mortgage. Generally he has substantially established the amounts due under the different settlement agreements hereinbefore set out, except for the items hereinafter referred to in this opinion. The Greteman audit, exhibit 3, offered by the plaintiff to establish more accurately the amount due, we feel, as the trial court did, should be accepted as the basis for the computation of the judgment, except as to errors hereafter pointed out. There is no dispute about the credit for damage to Broders from the purchase by Fleischers of some Bangs diseased cattle in the sum of $2,787.80 which leaves a balance due of $32,470.42 as of about January 1, 1962.

The Greteman audit, however, we think made some plain errors in the allowance of credits under the partnership agreement and which we think the defendant Broders has proven by clear and convincing evidence. Broders was charged in his unpaid bills with a debit of $700 for pasture rent. Fleischers have paid their half. The pasture rented was substituted for land described in the partnership contract. Fleischers were supposed to furnish the land, but Fleischers wanted their own land to lie idle. We deduct this as a credit to Broders. Broders baled hay for Fleischers' race horses,

not in the partnership agreement. He is entitled, under the evidence, to $150 credit for this.

There are many items, a discussion of which would unduly burden the opinion. We feel that Broders is entitled to credit for $175 for plowing done on land leased from the State Game Commission and not properly allocable to the partnership agreement. We reject Broders' claims of $1,500 in credits for taking care of the stock and labor during the dissolution. Under both the partnership agreement and the law, he was obligated to furnish these services in the termination of the partnership. He is not entitled to compensation for winding up the affairs of the firm. Efner v. Reynolds, 105 Neb. 646, 181 N. W. 552; 40 Am. Jur., Partnership, § 284, p. 325.

The trial court used exhibit 3, the Greteman audit, as a final basis for the adjustment between the parties. The defendant Broders contends three items of credit, half of the price of a bull sold on February 28, 1960, in the amount of $42.43; credit on hogs sold on July 1, 1960, in the sum of $833.14; and a $50 credit for cow sold, were not properly credited on exhibit 3, although credit was given when the parties settled their accounts in exhibit 13 for the year 1960. We find no answer to this contention by Fleischers. We think it is clear that a mistake was made here and an additional credit is allowed Broders for the year 1960 in the total sum of $925.57.

Broders claims that he should not be charged one-half of the expenses of fertilizer, aphid spray, and many items of veterinary supply and expense. We have reviewed the evidence and reject this contention. Under the terms of the agreement and the manner in which the parties construed it in their operations and the settlement of their accounts, we think these were part of the contemplated operating expenses and one-half should be chargeable to Broders.

Broders generally contends that he should not have

been charged interest in the accounts through the years. But, the parties executed a note, bearing interest, for the advances and their conduct and their settlements indicate an agreement to pay interest. Advances by a partner beyond the amount of capital he agreed to contribute bear interest. § 67-318 (c), R. R. S. 1943. See, also, 68 C. J. S., Partnership, § 84 c, pp. 523, 524. Interest was charged defendant Broders in the settlements of their account, and Broders admittedly made no complaint until after this action was commenced. However, the evidence clearly shows Kenneth Fleischer made certain advances prior to April 17, 1959, at which time Broders executed a note for $17,500 with interest at 4½ percent per annum. The parties apparently intended interest to run from that date. Broders is properly chargeable with interest on this note until it was merged in the note for $40,000 on December 17, 1959. He is charged $830.22 interest, the basis of which does not appear. We conclude that he should be charged interest only on the $17,500 note from April 17, 1959, to December 17, 1959. This results in an overcharge on interest of $234.56, which Broders should have credit for.

There are other items, too numerous to mention in this opinion, for which Broders claims credit. Broders has not demonstrated, by clear and convincing evidence, an error or mutual mistake as to these items, many of which, if not all, were in their settlement of accounts for the years, and which were carried over into the Greteman audit, exhibit 3, which the defendant Broders, in a large part, seems to accept and yet rejects it when he desires this court to go back and recompute the different items of account. As we have pointed out, this court will not do that unless it appears by clear and convincing evidence that an error or mutual mistake was made. We note that Fleischers in their brief make no answer to most of the items allowed as additional credits herein.

The trial court found a gross amount due of $35,260.22

on the note and mortgage. Deducting the additional credits herein allowed of $2,185.13 and allowing Broders the sum of $2,787.80 on his cross-petition about which there is no dispute on appeal, we find the net amount due as of January 1, 1962, of $30,287.29. The judgment is modified accordingly with directions to compute interest on $30,287.29 at the 4½ percent rate from January 1, 1962, to the date of entry of judgment on the mandate herein. The court used a 4½ percent interest rate on the note and there is no cross-appeal herein, although the note provides for payment of 5 percent after maturity. In the final judgment, credit should be further allowed Broders for his share of the money received from the sale of the partnership assets now in the escrow account which, at the time of the judgment in the lower court, was $20,716.27. Judgment should be entered for the balance and foreclosure of the chattel mortgage accordingly. The plaintiff is also ordered to pay the outstanding bills. The costs on this appeal are taxed one-half to Fleischers and one-half to defendant Broders.

The judgment is affirmed in part, and in part reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF VINCENT SKINNER FOR A WRIT OF HABEAS CORPUS.

VINCENT SKINNER, APPELLEE, V. LESTER JENSEN, SHERIFF OF SHERIDAN COUNTY, NEBRASKA, APPELLANT.

135 N. W. 2d 134

Filed May 14, 1965. No. 35896.

1. **Criminal Law.** The purpose of a preliminary hearing is to ascertain whether there is evidence which justifies holding an accused for trial.
2. ———. Before an accused can be held to answer a charge

upon information, he is entitled to a preliminary examination and there must be proof and a judicial determination that an offense has been committed and that there is probable cause to believe that the accused committed the offense.

3. ———. A preliminary hearing is not a prosecution or trial. Evidence which will justify a finding by a committing magistrate that probable cause exists for the detention of a defendant need not be sufficient to sustain a verdict of guilty or show guilt beyond a reasonable doubt.
4. **Habeas Corpus.** In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of the evidence produced at a preliminary hearing, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge.
5. ———. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge the accused.
6. **Homicide.** Manslaughter is the unlawful killing of another, either upon a sudden quarrel, or unintentionally, while in the commission of some unlawful act. § 28-403, R. R. S. 1943.
7. ———. Manslaughter may consist of the unintentional killing of a person, without malice, resulting from an unlawful assault and battery that in itself is not of a character or intended to cause death.
8. **Criminal Law: Evidence.** A death certificate is not competent evidence of the cause of death in a controversy where the cause of death is a material issue.
9. **Criminal Law.** A preliminary hearing which results in the discharge of the accused because of a defect in proof is not a bar to a second preliminary hearing upon a new complaint charging the same offense.

Appeal from the district court for Sheridan County: ALBERT W. CRITES, Judge. Affirmed.

Everett A. Anderson and Michael V. Smith, for appellant.

Charles A. Fisher and Charles F. Fisher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

A complaint was filed in the county court of Sheri-

dan County, Nebraska, charging the relator, Vincent Skinner, with manslaughter in the death of Sophie Plenty Wounds. A preliminary hearing was held and the relator ordered committed to the county jail until discharged according to law or until bail in the amount of $5,000 was furnished.

The relator then commenced this action to obtain a writ of habeas corpus upon the ground that his imprisonment was unlawful because the evidence produced at the preliminary hearing was not sufficient to sustain the order of the county court. The trial court found that the detention of the relator was unlawful and ordered that he be discharged from custody. The respondent, who is the sheriff of Sheridan County, Nebraska, has appealed from that order.

A transcript of the evidence introduced at the preliminary hearing was attached to and made a part of the petition. This evidence tends to show that Sophie Plenty Wounds appeared to be in good health on April 14, 1964; that she spent the night of April 14, 1964, at the relator's house in Gordon, Nebraska, on his bed; that the relator and Sophie Plenty Wounds were in the relator's house from about 7 p. m. on April 14, 1964, until about 8 a. m. on April 15, 1964; that on the morning of April 15, 1964, Sophie Plenty Wounds was found lying on the floor at the side of the bed in the relator's house; that she was unconscious and had no clothes on; that she had severe bruises upon her arms, legs, and mouth; that the right side of her face was blue and swollen and her right eye was closed; that the bruise mark on her face extended over to the side of her head near the temple; that she was carried to an automobile and taken to the Pine Ridge Hospital; that she did not recover consciousness; and that on April 22, 1964, she was transferred to the Rapid City Hospital. Over the objection of the relator, a certified copy of a "Death Register" or death certificate was received in evidence. The certificate recited that Sophie Plenty Wounds died at

Rapid City, South Dakota, on April 23, 1964, as a result of head injuries.

The purpose of a preliminary hearing is to ascertain whether there is evidence which justifies holding an accused for trial. Before an accused can be held to answer a charge upon information, he is entitled to a preliminary examination and there must be proof and a judicial determination that the offense has been committed and that there is probable cause to believe that the accused committed the offense. Carson v. State, 80 Neb. 619, 114 N. W. 938; Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587.

A preliminary hearing is not a prosecution or trial. Evidence which will justify a finding by a committing magistrate that probable cause exists for the detention of a defendant need not be sufficient to sustain a verdict of guilty or show guilt beyond a reasonable doubt. State ex rel. Pribyl v. Frank, 165 Neb. 239, 85 N. W. 2d 328.

In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of the evidence produced at a preliminary hearing, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge. Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge the accused.

The relator in this case was charged with manslaughter. Manslaughter is the unlawful killing of another, either upon a sudden quarrel, or unintentionally, while in the commission of some unlawful act. § 28-403, R. R. S. 1943. It may consist of the unintentional killing of a person, without malice, resulting from an unlawful assault and battery that in itself is not of a character or intended to cause death. Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

In this case the relator was charged with causing the death of Sophie Plenty Wounds from injuries resulting from an unlawful assault and battery upon her. The evidence is sufficient to sustain a finding that an assault and battery was committed upon Sophie Plenty Wounds and that there is probable cause to believe that the relator is guilty of that offense. There is no evidence as to the death or cause of death of Sophie Plenty Wounds other than the certified copy of the South Dakota death register.

The rule in this state is that a death certificate is not competent evidence of the cause of death in a controversy where the cause of death is a material issue. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761. The basis of the rule lies in the fact that death certificates are made ex parte, without a hearing and without the right of cross-examination.

Except for the death certificate, there was no evidence to establish the death or cause of death of Sophie Plenty Wounds. Thus, the evidence was not sufficient to sustain a finding that manslaughter has been committed and that the relator should be held for trial on that offense.

The preliminary hearing which has been held is not a bar to the filing of a new complaint and a hearing upon the new complaint. See, Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240; Neudeck v. Buettow, *supra;* State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007; Van Buren v. State, 65 Neb. 223, 91 N. W. 201. If the State has additional evidence which it may wish to present, a new complaint may be filed.

The judgment of the district court is affirmed.

AFFIRMED.

SAMUEL E. SPELLMAN ET AL., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.
135 N. W. 2d 137

Filed May 14, 1965. No. 35929.

1. **Evidence.** The parol evidence rule is not merely one of evidence, but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved.
2. **Contracts.** Negotiations and conversations leading up to a written contract are merged therein, and evidence of such negotiations and conversations is not admissible to vary, modify, or contradict the written contract.
3. ———. In the absence of fraud, mistake, or ambiguity, the written instrument is the only competent evidence of the agreement.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

John McArthur and Merrill R. Reller, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Woods, Aitken & Aitken, and Warren D. Lichty, Jr., for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is an action for damages brought by Samuel E. Spellman and Berdina Spellman as plaintiffs against the State of Nebraska. The jury returned a verdict for the defendant. The plaintiffs' motions for judgment notwithstanding the verdict and for a new trial were overruled and they have appealed.

The plaintiffs own a tract of land in Lancaster County, Nebraska, which lies south of U. S. Highway No. 6 and east of the village of Emerald, Nebraska. A watercourse known as Middle Creek crosses the northeast corner of the plaintiffs' property.

In 1954, the defendant obtained by purchase from the plaintiffs and their predecessors in title two "easements"

for use in the construction of a highway improvement project. As a part of the project, the channel of Middle Creek upon the plaintiffs' property was relocated to the south and west. One easement conveyed a strip of land 120 feet wide across the plaintiffs' land to the defendant to be "used for channel change purposes only." The second easement conveyed a temporary easement to the defendant "for the purpose of storing road construction machinery, road materials and excess dirt" for a period of 2 years upon a 3-acre tract in the northeast corner of the plaintiffs' land. The temporary easement further provided: "It is agreed and understood that upon completion of highway construction work in connection with this land, that the ground will be leveled as well as reasonably possible."

The plaintiffs contend that the defendant had agreed to place all earth excavated from the new channel upon the 3-acre tract in the northeast corner of plaintiffs' land and level it so that after the project was completed the surface of the 3-acre tract would be 2 feet above the surface of the highway as constructed. The plaintiffs further contend that the defendant removed a large quantity of earth from the plaintiffs' land in violation of the alleged agreement.

There was evidence that 44,235 cubic yards of earth were excavated for the new channel of Middle Creek upon the plaintiffs' land; that 7,680 cubic yards of earth were placed upon the plaintiffs' land; and that the remaining 36,555 cubic yards of earth were removed from the plaintiffs' land. The action was brought to recover the damages alleged to have resulted from the removal of the earth in violation of the alleged agreement.

There is no provision in the easements that the defendant will place all of the earth excavated from the new channel upon the plaintiffs' land and leave it there upon completion of the project. The easement for channel change purposes is an absolute conveyance of the property described subject to reversion only in the event

of abandonment of the use of the premises for channel change purposes. The temporary easement provides only for the temporary use of the property and that the ground be leveled upon completion of the construction work.

The plaintiffs attempted to establish an agreement on the part of the defendant to place all excavated earth upon the 3-acre tract and to leave it there upon completion of the project by evidence concerning the negotiations which led up to the execution and delivery of the easements to the defendant. The plaintiffs attempted to introduce testimony concerning oral statements made by officers and employees of the defendant as to the meaning of some of the language which appears in the two easements. The plaintiffs produced a copy of a letter addressed to the State Engineer in which a lawyer for the plaintiffs stated that certain requirements would have to be included in the written instruments before the plaintiffs and their predecessors in title would sign them. All of this evidence related to negotiations which preceded the execution of the written instruments and was not admissible under the parol evidence rule.

The easements were contractual in nature and were the evidence of the agreement which the parties had made. The effect of the evidence offered by the plaintiffs was to enlarge the contractual obligation of the defendant and create a duty of performance that was not included in the written instruments.

The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective and forbids them to be proved. Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849. Negotiations and conversations leading up to a written contract are merged therein, and evidence of such negotiations and conversations is not admissible to vary, modify, or contradict the written contract. Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884. In the absence of fraud, mistake,

or ambiguity, the written instrument is the only competent evidence of the agreement. Preferred Pictures Corp. v. Thompson, 170 Neb. 694, 104 N. W. 2d 57.

The plaintiffs do not seek relief on the ground of fraud or mistake, and the easements in question are not ambiguous so as to authorize the introduction of parol evidence to explain and interpret them.

There is no competent evidence in this case to establish any agreement on the part of the defendant to leave all earth excavated from the new channel upon the plaintiffs' land. In the absence of such evidence the plaintiffs had no right of recovery against the defendant under the pleadings in this case.

Under the pleadings and evidence in this case there was no basis for the recovery of any damages by the plaintiffs from the defendant. The verdict and judgment of the trial court is the only one which the pleadings and evidence will sustain. The judgment is, therefore, affirmed.

AFFIRMED.

EDWIN J. OHNMACHT, APPELLANT, V. PETER KIEWIT SONS CO., APPELLEE.
135 N. W. 2d 237

Filed May 14, 1965. No. 35962.

1. **Workmen's Compensation: Limitations of Actions.** The statute of limitations does not become applicable and compensation will not be denied if the injury was latent and did not result in a compensable disability until after the time for commencing action, but it does become applicable after the expiration of 1 year from the time the employee has knowledge that the accident has caused a compensable disability.
2. ———: ———. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff.
3. ———: ———. Where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have

become reasonably apparent, that he has a compensable disability of any class from an accident (whether he is working or not) if the employee is aware that the disability is due to his employment.

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

Ross & O'Connor, for appellant.

Stoehr, Rickerson, Sodoro & Caporale, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is a workmen's compensation case. One judge of the Nebraska Workmen's Compensation Court and later that court sitting en banc dismissed the petition. On appeal to the district court, the dismissal was affirmed. The plaintiff has appealed.

The basic issue is whether or not the plaintiff's claim is barred by the statute of limitations.

The plaintiff, while employed by the defendant as a carpenter in Omaha, Nebraska, tripped and sprained his ankle on July 15, 1960. He continued to work the rest of the day. He thereafter reported to Dr. Leahy, a physician employed by the defendant's compensation carrier. Dr. Leahy examined the plaintiff, took X-rays, and reported that he sustained a sprain. Dr. Leahy gave the plaintiff a prescription for pain, reported to the compensation carrier that the plaintiff was able to perform regular work, and that the accident did not result in any permanent injury. The plaintiff was also seen by Dr. Fellman, his own family physician, on July 29 and August 6, 1960, whose findings were the same as Dr. Leahy's. These medical expenses were all paid by the workmen's compensation carrier of the defendant. Plaintiff continued in the employment of the defendant through October 1960, and thereafter was employed by a number of other contractors. He testified that at no time

did he lose any compensable time because of his injury until May 1963. There was testimony that approximately 2 weeks after the occurrence in 1960 he was transferred by the defendant to another job since he had difficulty on rough surfaces. On his other jobs thereafter his foreman was aware of his problem and made it easier on him. The plaintiff had difficulty with his ankle from July 15, 1960, had pain more or less regularly from that date, and had restricted movement in the ankle from the date of the accident. In the early part of the week, pain did not normally bother him. During the middle of the week, the pain would start again and normally cleared up on weekends. The pain got worse when he worked on uneven surfaces or plowed ground. The plaintiff took it a bit easier in doing his work as a carpenter after July 1960, but always did his work. There were one or two occasions between July and December 1961, when the plaintiff left work early because of the pain. Since the accident, he limped when working. The plaintiff always attributed his pain and difficulties with his ankle to the accident of July 1960. In May 1963, the plaintiff went to Dr. Burney, an orthopedic specialist in Omaha. He did not consult with any other physician between August 1960 and May 1963, a period of 33 months. Upon examination, Dr. Burney found some muscle atrophy in the left ankle; that it was swollen in comparison to the right ankle; that there was a mild elevation of the arch of the foot; and that there was about 10 degrees of restricted ankle motion. This was lateral movement and the ability of twisting the foot in and out. X-ray examination disclosed bony masses which were abnormal. The bony formations were from hemorrhaging into torn ligaments secondary to the sprain or tearing of the ligaments. All sprains involve hemorrhaging, and the bony masses are one form of complication of a sprain. There is no medical testimony as to the progressiveness, if any, of the bony masses after 6 months following the accident. Dr. Bur-

ney testified that such bony formations are not very common in a sprain and it is not very likely that one would anticipate the happening. He also testified that it would take 6 months for the bony masses to show up as hazy shadows in an X-ray, and that if plaintiff's symptoms continued for 6 months after the accident, you would suspect complications and look for this type of thing. He also testified that if a joint is painful, it will have restricted motion which may be due to muscles or to bony blocking, and that he did not know which until he took the X-rays. He also testified that the plaintiff was unusually tolerant of pain and that the ankle condition, in his opinion, was the result of the accident in July 1960. Dr. Burney hospitalized the plaintiff and performed orthopedic surgery in an effort to remove the bony masses and thus relieve the pain and give the ankle better mobility. The results were not entirely satisfactory and, in the opinion of Dr. Burney, the plaintiff has a 30 percent permanent disability of the left foot.

Section 48-137, R. R. S. 1943, provides in part: "In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, * * * one of the parties shall have filed a petition as provided in section 48-173."

The plaintiff alleged that the injury in this case was latent and progressive. The rule is well established in this court that the statutory limitation does not become applicable and compensation will not be denied if the injury was latent and did not result in a compensable disability until after the time for commencing action, but it does become applicable after the expiration of 1 year from the time the employee has knowledge that the accident has caused a compensable disability. Webb v. Consumers Cooperative Assn., 171 Neb. 758, 107 N. W. 2d 737; Seymour v. Journal-Star Printing Co., 174 Neb. 150, 116 N. W. 2d 297. While it may not have been specifically so held, our cases are clear that the burden

of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. See, Bame v. Lipsett, Inc., 172 Neb. 623, 111 N. W. 2d 380; Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261.

The plaintiff filed his original petition in the workmen's compensation court July 31, 1963. The accident occurred July 15, 1960. It is the plaintiff's position that the only disability of which he had knowledge prior to May 1963, was pain, that pain alone is not compensable, and that, therefore, he was not chargeable with knowledge of a compensable disability until he knew that the bony masses had formed around his ankle joint. The evidence in this case establishes more than mere pain insofar as disability is concerned. The evidence is that from the date of the accident, the plaintiff limped when he worked, had restriction of motion in his ankle, and could not do his work as a carpenter as he could before. The plaintiff admitted that on at least one or two occasions between July and December 1961, more than 1 year after the accident, he left work early because of the pain in his ankle. The plaintiff's doctor testified that a sprain ordinarily lasts about 6 weeks. He also testified that after 6 months, the bony masses which resulted from the sprain would show up as hazy shadows in an X-ray. He also testified that if the plaintiff's symptoms continued for 6 months following the accident, you would look for complications such as this. Even if it might be conceded that the injury was originally latent and progressive, it can fairly be inferred from the evidence that it was reasonably discoverable after 6 months following the accident. It is clear that the plaintiff always knew his difficulties with his ankle stemmed from the accident of July 1960. All of the symptoms of his disability were evident from that time on. Even if it be conceded that the plaintiff did not have, or should not have had, knowledge of a compensable injury for the first 6 months, the evidence remains that he left work early because of his ankle between July

and December 1961. Yet for a period of 33 months, plaintiff never consulted a doctor.

There can be no question that the plaintiff knew that he had a physical disability, and that it was due to his employment. It might be said that the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable. See Letteau v. Reynolds Electrical & Engineering Co., 60 N. M. 234, 290 P. 2d 1072. Although each case must be determined on its own facts and circumstances, the evidence here establishes that it should have become reasonably apparent that the plaintiff had a compensable disability more than 1 year before filing his petition.

We hold that where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability of any class from an accident (whether he is working or not) if the employee is aware that the disability is due to his employment.

For the reasons stated, the judgment should be and is affirmed.

AFFIRMED.

SCHOOL DISTRICT NO. 65R OF LINCOLN COUNTY, NEBRASKA, A BODY CORPORATE, APPELLEE, V. UNIVERSAL SURETY COMPANY, LINCOLN, NEBRASKA, A CORPORATION, APPELLANT.

135 N. W. 2d 232

Filed May 21, 1965. No. 35880.

1. **Principal and Surety.** The surety on a builder's bond is bound in the manner and to the extent provided in the obligation it assumes.
2. ———. The contract of a surety company, acting for hire,

will be strictly construed most strongly against a compensated surety and in favor of an obligee.

3. ———. Where the contract provides that neither the final certificate of the architect, nor payment made, nor use of the property shall relieve the contractor of responsibility for negligence, or faulty materials or workmanship, or a failure to build in accordance with the specifications, such provision is enforceable against the surety according to its terms.

4. ———. Ordinarily, a surety of a builder's bond occupies the relationship of guarantor for the performance of the contract in the manner and to the extent therein provided and the surety is bound in the same manner and to the same extent as the contractor.

5. ———. In the absence of special provisions in the contract, there is no duty on the part of an owner to notify the surety company of default of the principal contractor and there is no need to proceed against the principal first or give notice to the surety of breach of the contract.

6. Interest. Interest on damages for breach of a contract, where the amount of the claim is not known or determinable, runs from the date of the rendition of the judgment.

Appeal from the district court for Lincoln County: CLARENCE S. BECK, Judge. Affirmed as modified.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Donald E. Girard, and Rady A. Johnson, for appellant.

Murphy, Pederson & Piccolo and James E. Schneider, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

This is a suit against a surety on a builder's bond. The juncture of a sand and gravel roof deck with the higher outside or parapet wall was defectively constructed and was not in accordance with the specifications. The wall was not high enough above the roof deck. Flashings and counter flashings were not properly installed, were too low, and were not properly covered. The stone coping on top of the wall was not properly mortared and water leaked into the wall

underneath the stone coping. Drain scuppers connecting to downspouts were improperly sealed and welded, and water leaked down through or inside of the wall into the interior of the building. Construction of the building took place in 1955 and 1956. Final payment on the contract was made in November and December 1956 and without knowledge by the School District of these defects. The architect authorized final payment after inspection of the building. The School District discovered the defects in about March 1957 and contracted for and had the defects corrected in October or November 1959. Two layers of brick were required to build the outside wall to the proper height. Then, the coping, flashings, cant strip, and other structures were installed to properly guard against water leaking from the roof. The reasonable cost for remedying these defects in workmanship and for failure to build in accordance with the specifications was in the sum of $2,800. The School District recovered this amount in this action and the defendant surety company has appealed.

Liability in this case is governed by the contract between the parties. The bond itself guarantees the faithful performance of the contract and agrees to save the owner harmless from any damages by reason of the contractor's failure to do so. By its terms, the plans, specifications, and drawings were incorporated into the surety bond contract. The specifications detailed the duties of the architect in the supervision of the building contract. The general principles of the law involved are that the surety is bound in the manner and to the extent provided in the obligation. A builder's bond is construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. Brennan v. Clark, 29 Neb. 385, 45 N. W. 472; Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692; 50 Am. Jur., Suretyship, § 318, p. 1112.

Article 16 of the specifications provided as follows: "Neither the final certificate nor payment nor any pro-

vision in the Contract Document *shall relieve the Contractor of responsibility for negligence or faulty materials or workmanship within the extent and period provided by law,* and upon the written notice he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom. All questions arising from this article shall be decided under Article 10 and 45." (Emphasis supplied.)

Article 27 of the specifications provided in part as follows: *"No certificate issued for payment made to the Contractor nor partial nor entire use or Occupancy of the Work by the Owner shall be an acceptance of any work or materials not in accordance with this Contract.* The making and acceptance of final payment shall constitute a waiver of all claims by the Owner; *otherwise than under Article 16 and 29,* of these conditions or *under requirements of the specifications,* and of all claims by the Contractor, except those previously made and still unsettled." (Emphasis supplied.)

The defects were discovered by the School District 3 or 4 months after completion of the building and the final payment. A detailing of the evidence is not necessary. It conclusively establishes faulty workmanship in the installation of the flashings, negligence in the performance of the work, and an entire failure to construct the wall and roof juncture in accordance with the plans and specifications. It would therefore seem apparent, under the plain import of the surety's obligation as set out above, that the plaintiff is entitled to recovery.

But, the defendant argues that the plaintiff made an unauthorized final payment to the contractor and that this constituted a surrender of security to the surety's damage. The defendant further argues that under the contract it was entitled to the protection of a payment based upon an architect's final certificate. The contract provided that payments were to be made to the contractor and were to be based upon the submitted estimates of the contractor and approval by the architect.

Exhibit 18 is the contractor's final estimate. It states: "Estimate No. 20 (Final)." It shows a final balance of $14,134.43. The record shows that a previous balance of $209,374.30 had been paid in accordance with the submitted written progress estimates. This final estimate was signed by the contractor and written thereon is an approval and the signature of the architect dated October 23, 1956. Pursuant to this written approval, the balance of the contract was paid by the plaintiff, the last payment in the amount of $50 being made on December 3, 1956. This money was paid with the understanding that certain trivial items on the contract requiring completion would be finished. None of these items are involved in this controversy. The defendant surety company's contention that the plaintiff made an unauthorized payment under the contract cannot be sustained. The architect testified as follows: "Q. When the work on the roof and the walls, and the coping, flashing and the scuppers and drains was completed, did your inspection show the defects that we have described in the evidence here today? A. No; it was general inspection; we looked the building over, of course, for the final inspection. Q. You couldn't by an ordinary visual inspection see these defects, could you, at that time? A. No. Q. That would be in the fall of 1956? A. That is correct. Q. Now is this final estimate, Exhibit 18, and which is called a final estimate, does that serve as a final certificate as far as an architect is concerned? * * * A. At that time we were using final estimates—approval of final estimates at the conclusion of the project. Q. That would be the custom in the business—in the construction business at that time in this community, is that right? A. In this area. Q. Use it as the final certificate? A. In this area."

The contract did not provide for notice to the surety or approval by the surety of the final payment. Exhibit 18, in substance, complied with the requirements of the contract as to the final certificate under the evidence.

Failure to comply with some of the formal requirements becomes immaterial. No notice was required to the surety and the above testimony is conclusive that the architect himself intended it to be a final certificate and that final payment was authorized as the result of it. The plaintiff made the final payment after this written authorization and did not breach the contract in this respect by making an unauthorized payment. Defendant relies solely on O'Rourke v. Burke, 44 Neb. 821, 63 N. W. 17. But, in that case it was specifically held that it was shown there never was a certificate made by the architect that would justify the owner's payments. This argument fails, however, for another more cogent reason. The surety is bound by the contract with the principal and it especially provides, in Article 16 and in Article 27, that either payment or a certificate for payment does not relieve the contractor (and, therefore, the surety) of responsibility for negligence, faulty workmanship, or failure to build in accordance with the specifications. There is no merit to this contention.

Defendant's next contention is interwoven with and overlaps the one previously mentioned. The surety next changes position and argues that there was a final certificate by the architect; that therefore there was full acceptance of the building in the condition that it was in; that the School District accepted and used the building for several years; and that because of all of this the plaintiff School District is estopped from recovering for defective workmanship and failure to build the roof in accordance with the plans and specifications. Defendant cites many persuasive cases but an examination of them reveals that the facts or the contract provisions as to the conclusiveness of the architect's certificate are different in these cases. The substance of defendant's argument is that the architect was negligent in not discovering the defects complained of and that responsibility for these defects was, therefore, imputed to the owner School District. The scheme embodied in

this contract, strictly construed against the surety, and the laws applicable do not sustain this contention. We point out that Article 9 of the specifications provides that the architect is not the agent of the owner except as especially provided. The surety is bound by Articles 16 and 27, hereinbefore quoted and now referred to, which specifically protect the School District owner and reserve to it its right of recovery for negligence, faulty workmanship, and failure to build in accordance with the specifications, despite the final certificate of the architect, the making or acceptance of payment, or the entire use and occupancy of the property. The contention of the defendant would require us to rewrite this contract. The contract does not bind the owner for failure of the architect to discover the defects involved here. On the contrary, it provides a plan for inspecting and checking by an architect for the mutual benefit of both parties. The contract language quoted reserves to the School District owner the right to recover and no exception is provided for the failure of the architect to discover the defects. If the parties intended that the architect's certificate or approval be binding or that the owner would be bound by failure of the architect to discover the defects, it would have been easy to include this in the terms of the contract. We see no reason for not enforcing this contract strictly according to its terms. It is not pleaded nor contended that there was any fraud on the part of the School District. It made the final payment following the written approval of the architect and is now relying on rights of recovery expressly reserved to it in the contract and specifications which the surety accepted as part of its contract and is strictly binding on it. A case directly in point is Hutchinson v. Bohnsack School Dist., 51 N. D. 165, 199 N. W. 484. In that case the contract was to install a hot water heating plant. The plant was installed, the architect issued a final certificate, full payment was made, and the school district accepted and used the plant. The

provisions of the specifications as to the architect and payments were almost verbatim with the present case. The contentions of the defendant were the same in substance. Said the court: *"The appellants contend that the architect was the agent of the owner; that under the terms of the contract, his approval and acceptance of the work done thereunder by the appellants and the issuance by him of a final certificate was conclusive upon the respondent.* * * * Article 9 of the contract defines the status and authority of the architect (the same as in the present case). Article 16 provides that 'Neither the final certificate nor payment shall relieve the contractor of responsibility for faulty materials or workmanship,' and this provision is reinforced by page 12-M of the specifications. It is also stipulated by article 27 that *'No certificate issued nor payment made to the contractor nor partial or entire use or occupancy of the work by the owner shall be an acceptance of any work or materials not in accordance with this contract.* The making and acceptance of the final payment shall constitute a waiver of all claims by the owner otherwise *than under articles 16 and 29 of these conditions or under requirements of the specifications.'* Thus it is made plain that the issuance of the final certificate, payment thereunder and the use of the work does not waive any claim because of faulty materials or workmanship or on account of failure to comply with the specifications." (Emphasis supplied.)

As pointed out, these provisions of the contract and specifications were part of the surety's contract. To the plaintiff it sustained the relation of guarantor and it is bound in the manner and extent therein provided. O'Rourke v. Burke, *supra;* Brennan v. Clark, *supra.* The contract of a surety company, acting for hire, will be strictly construed most strongly against a compensated surety and in favor of an obligee. Sun Ins. Co. v. Aetna Ins. Co., *supra;* 50 Am. Jur., Suretyship, § 318, p. 1112.

Each case must be considered upon its own facts and

under the particular provisions of the contract and specifications. We have no doubt that in a proper case, unauthorized payment without an architect's certificate will protect a surety pro tanto to the extent of the amount of the unauthorized payment. But, the parties may agree that the certificate of an architect shall not be conclusive and that the surety and the contractor are bound nevertheless. In Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104, this court stated: "While each of these contracts provides for the payment to the contractor, as the work progressed, eighty per cent of the contract price, upon the certificate of the architect to the effect that the work is done in strict accordance with the drawings and specifications, and that he considered the payments justly due, each also contained the further stipulation, which is not found in either of the contracts before the court in the cases alluded to, that *'said certificate, however, in no way lessening the total and final responsibility of the contractor,* neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill or not, according to the drawings and specifications, either in execution or materials.' *The parties having by this clause agreed that the certificate of the architect should not be conclusive, it was not error for the court to refuse to charge the jury as requested by the eighteenth instruction.* To have done so would have been prejudicial to the plaintiff." (Emphasis supplied.)

Defendant argues laches and undue delay to its prejudice. It is true that the defects were discovered on or about March 1, 1957; that repairs were not made until October 1959; and that this action was instituted on March 22, 1960. But, this is a law action with a 5-year period of limitations. The plaintiff School District had no duty to give notice to the surety on the bond under the terms of the contract or the law. There was no duty of the plaintiff to notify the defendant of the default of the principal contractor. There is no need to proceed

against the principal first or give notice to the surety of breach in the absence of a special agreement to that effect. 50 Am. Jur., Suretyship, § 175, p. 1018, § 42, p. 933; 17 Am. Jur. 2d, Contractors' Bonds, § 30, p. 212.

The trial court allowed interest on the judgment from November 6, 1956, on the theory that that was the date of the default or breach. This was error. Interest on damages for breach of a building contract, where the amount of the claim is not known or determinable, runs from the date of the rendition of the judgment. Gee v. City of Sutton, 149 Neb. 603, 31 N. W. 2d 747; Reorganized Church of Jesus Christ of the Latter Day Saints v. Universal Surety Co., 177 Neb. 60, 128 N. W. 2d 361. Interest should be allowed from the date of the rendition of the judgment for $2,800 in the district court.

Plaintiff, under section 44-359, R. R. S. 1943, is allowed an additional attorneys' fee in this court in the sum of $300. The judgment of the district court is affirmed as modified in this opinion. Costs are taxed to defendant.

AFFIRMED AS MODIFIED.

CITY OF SIDNEY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. ABE LIEBERMAN, APPELLANT.
135 N. W. 2d 452

Filed May 21, 1965. No. 35900.

Municipal Corporations: Zoning. Where the provisions of a zoning ordinance as to the uses of property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to their generally accepted meaning.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Affirmed.

Heaton & Heaton, for appellant.

Clinton & McNish, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SMITH, J.

The question is whether a building used by defendant for processing and storing animal hides is a wholesale, storage, or warehouse facility, which is permitted by the zoning ordinance of plaintiff. On findings for plaintiff the district court directed that an order of injunction issue.

The answer is to be derived from the business activities of defendant. At the time of trial the building contained more than 6,000 hides. Of the number received each month, 2,000 came from a nearby slaughterhouse. The hides were cured for 30 days, and then they were graded, weighed, and bundled. The condition of the market sometimes delayed outgoing shipments for 60 days.

Hides came in different forms. Dry hides, which had been preserved for a long time, were softened by immersion. "Fresh" or "green" hides, which had been washed at the slaughterhouse, were dry-salted. In the curing process bloody matter dripped from the undersides to the floor.

Defendant often cut off tails, heads, or other parts. The tails were soaked and later bundled for sale. In the 6 weeks preceding trial 12 loads of the other severed parts were transported by pickup truck to a dump.

"Where the provisions of a zoning ordinance, as to the uses of property which are permitted * * *, are expressed in common words * * *, without enlargement, restriction, or definition, they are to be interpreted * * * according to their generally accepted meaning." Henke v. Zimmer, 158 Neb. 697, 64 N. W. 2d 458.

Although in a sense the hides were stored, the curing process was the principal use of the building. In combination, the salting, the immersion, the drip, the trim-

ming, and the refuse are not normally associated with the uses permitted by the ordinance.

The judgment is correct and it is affirmed.

AFFIRMED.

PAUL RHODES, APPELLANT, V. CHARLOTTE EDWARDS ET AL., APPELLEES.

135 N. W. 2d 453

Filed May 21, 1965. No. 35907.

1. **Actions: Evidence.** A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection and use by an adverse party under section 25-1267.39, R. R. S. 1943.
2. **Evidence.** A person who has made the amount or nature of his income an issue in litigation thereby makes his federal income tax return a legitimate subject of inquiry and he can no longer claim that the relevant information contained in it is confidential or privileged.
3. ———. A party who has not retained copies of his income tax returns can be required to obtain copies from the proper office for use in accordance with the discovery order.
4. ———. The fact that a party's income tax return is joint and not his individually is not a defense to an order to produce. His remedy for any anticipated misuse of the income tax return is by application to the court for a limitation of use of the return.
5. **Constitutional Law: Evidence.** An order to produce copies of income tax returns under section 25-1267.39, R. R. S. 1943, is not violative of the due process clauses of the state and federal Constitutions, or of 26 U. S. C. A., § 7213, p. 228.
6. **Actions: Evidence.** Under the provisions of section 25-1267.44, R. R. S. 1943, a party refusing to obey a discovery order made under section 25-1267.39, R. R. S. 1943, may suffer the dismissal of the action or proceeding.

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Paul Rhodes, pro se.

James L. Macken, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is an appeal by the plaintiff from an order of the district court for Morrill County dismissing plaintiff's petition without prejudice for failure to comply with an order to produce copies of his 1958 and 1959 federal income tax returns.

Plaintiff commenced an action on April 8, 1963, against the defendants on a note dated April 9, 1958, for $6,515.36 and interest upon which a credit for $1,568 was endorsed on October 26, 1958. The defendants' answer and cross-petition alleges that the note was given for a one-half interest in a drugstore in Bridgeport, Nebraska, and the execution of a written partnership agreement which was never consummated by the plaintiff. Defendant Jack Edwards alleged that he assumed the management of the drugstore on February 24, 1958, and continued as manager until October 26, 1958. He contends that the assets in the drugstore on October 26, 1958, were of sufficient value to equal plaintiff's capital investment and the amount of the note in suit. Defendants seek to recoup the amount of the note and counter-claim for damages sustained by plaintiff's breach of contract.

Plaintiff in his reply asserts laches and the statute of limitations as defenses. In addition thereto plaintiff alleges that defendant Jack Edwards purchased the drugstore from a trustee in bankruptcy and borrowed $3,400 from plaintiff to complete payment for the same. Plaintiff further alleges that Edwards conveyed a one-half interest to him on February 25, 1958, and the business was thereafter operated as a partnership until it was dissolved on October 26, 1958, by mutual agreement.

Plaintiff alleges further that he advanced further sums for the operation of the partnership business in the amount of $11,800, one-half of which is a capital investment of Edwards. Plaintiff alleges that an accounting

was had and as a result a chattel mortgage on Edwards' half interest was given to plaintiff in addition to his securing a cosignor on the note, Charlotte Edwards being such cosigner, as payment for the amount due. Plaintiff alleges that defendant Jack Edwards is estopped to deny the partnership and asserts his right to judgment as prayed.

On March 24, 1964, defendants moved for an order, pursuant to section 25-1267.39, R. R. S. 1943, requiring plaintiff to produce and permit inspection of certain specified documents including his federal income tax returns for 1958 and 1959. The order was granted by the trial court. Plaintiff sought a rehearing on the grounds that the federal income tax returns were privileged, that plaintiff did not have copies of said returns, and that defendants' attorney learned of the contents of the returns by unlawful means which amounted to an unlawful search and seizure, contrary to the state and federal Constitutions. The trial court overruled the motion for a rehearing.

On May 11, 1964, plaintiff moved for a vacation of the discovery order on substantially the same grounds as asserted in his previous motion for a rehearing. On June 5, 1964, the trial court modified its previous order by requiring plaintiff to produce only those parts of the 1958 and 1959 federal income tax returns relating to the operation of the drugstore business. The amending order also recites the plaintiff's assertion that he made only joint returns with another person and that he was prohibited by federal law from making the disclosure. The court's order fixed July 6, 1964, as the time in which the income tax returns should be produced. On July 7, 1964, the trial court dismissed plaintiff's petition without prejudice for failure to comply with the discovery order. A motion for a new trial was filed, which was overruled. Plaintiff then perfected this appeal.

It is provided in part by section 25-1267.39, R. R. S. 1943: "Upon motion of any party showing good cause

therefor and upon notice to all other parties, and subject to the provisions in section 25-1267.22, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by section 25-1267.02 and which are in his possession, custody, or control; * * *."

Plaintiff contends the trial court erred in requiring him to produce copies of his 1958 and 1959 federal income tax returns for the reason that they are privileged and specifically excluded by the provisions of section 25-1267.39, R. R. S. 1943. A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection by an adverse party under the rules or statutes which deal with discovery procedures. Cases supporting this holding are collected in section 3 of the Annotation on Discovery—Income Tax Returns, 70 A. L. R. 2d 244.

The effect of the privilege provided by federal statute is stated in Kingsley v. Delaware, Lackawanna & Western R.R. Co., 20 F. R. D. 156, as follows: "The purpose of the statute is to prevent the disclosure of confidential information to those who do not have a legitimate interest in it. But once a person has made the amount of his income an issue in litigation it becomes a legitimate subject of inquiry and he can no longer claim that the information contained in his returns is confidential." See, also, Connecticut Importing Co. v. Continental Distilling Corp., 1 F. R. D. 190; Currier v. Allied New Hampshire Gas Co., 101 N. H. 205, 137 A. 2d 405, 70 A. L. R. 2d 237; Bush v. Chicago, B. & Q. R.R. Co., 22 F. R. D. 188.

Plaintiff asserts that he had no copies of his federal income tax returns for 1958 and 1959 and they were not

therefore within his possession, custody, or control within the meaning of section 25-1267.39, R. R. S. 1943. Copies of a taxpayer's income tax returns are in his possession and control within the meaning of the statutes, where he does not have copies but can obtain them from the federal government on application. Conner v. Gilmore, 45 Del. 184, 70 A. 2d 262; Gould v. Sullivan, 54 N. Y. S. 2d 430; Mandell v. Yellow Cab Co. (Ohio), 170 N. E. 2d 296; Kingsley v. Delaware, Lackawanna & Western R.R. Co., *supra;* Reeves v. Pennsylvania R.R. Co., 80 F. Supp. 107; Paramount Film Distributing Corp. v. Ram, 91 F. Supp. 778.

Some contention is made that plaintiff is excused from compliance with the court's discovery order because no provision was made for the cost of the copies of the income tax returns by the defendants. No demand was made for such expenses in the trial court. While the trial court may provide for the payment of such expenses in advance, it is not required to do so. Unless demand for the expenses is made, the plaintiff cannot be excused from compliance on that ground. In any event, the question of expenses was not an issue in the district court nor is it assigned as error on this appeal.

Plaintiff contends that he made no individual income tax returns in 1958 and 1959. He argues that his returns were joint ones with his wife, and that he is prohibited by law from disclosing the contents of the joint returns. The trial court limited its order to information relating to the drugstore. It stands to reason that a taxpayer may not avoid a discovery order merely because he is a party to a joint return. The trial court has authority to protect against an unreasonable use of the returns, which it did in the instant case. Even though his return is a joint one, it is still his return and must be produced. His remedy, if improper use is anticipated, is to invoke the powers of the court to insure proper use. Plaintiff cites no case authority on the question. In Brei v. Sharon Steel Corp., 8 Pa. D. & C. 2d 483, the court stated with

reference to a joint tax return made by a husband and wife: "Plaintiff further contends that the returns are irrelevant for the reason that they are the joint returns of himself and his wife. However, the mere fact that the returns contain certain irrelevant matter would not bar their use as evidence when they also contain facts that are clearly relevant." Where the trial court has limited the discovery order, as here, to matters relevant to the issues before the court, it is not an excuse for noncompliance with the discovery order that plaintiff's income tax return was joint and not his individually.

The plaintiff refused to comply with the trial court's order to produce copies of his income tax returns for 1958 and 1959, and the trial court dismissed his action without prejudice. Plaintiff contends that the action of the trial court is violative of Article I, section 3, Constitution of Nebraska, the Fifth and Fourteenth Amendments to the Constitution of the United States, and to 26 U. S. C. A., § 7213, p. 228.

It is provided in part by section 25-1267.44, R. R. S. 1943, as follows: "(2) If any party * * * refuses to obey * * * an order made under section 25-1267.39 to produce any document * * * the court may make such orders in regard to the refusal as are just, and among others the following: * * * dismissing the action or proceeding or any part thereof, * * *." We point out that a discovery statute without means of enforcement by the trial court would be of little value. The statute specifically authorizes a dismissal of the action for failure to comply with a discovery order. Plaintiff had every opportunity to comply and refused to do so. The dismissal of the action without prejudice is a common and recognized method of enforcing its orders. Plaintiff knew, or should have known, that he could not persist in refusing to comply with the court's order, after hearing, without suffering the penalties with which the court is empowered in enforcing its discovery orders.

The holding that federal income tax returns are not

privileged when material to the issues in an action or proceeding, that the fact that such returns jointly made with another is not a defense, and that such returns in the custody of the federal government are in his possession and control within the meaning of section 25-1267.39, R. R. S. 1943, eliminates any question as to due process under the state and federal Constitutions. To otherwise hold would permit the plaintiff to engage in litigation and to suppress evidence material to a proper decision of the case.

We find no error in the record. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUDOLPH E. MCNAIR, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. KELSEY JONES, APPELLANT.

135 N. W. 2d 463

Filed May 28, 1965. Nos. 35801, 35802.

1. **Disturbance of Public Meetings.** "To disturb" is defined: To throw into disorder or confusion; to interrupt.
2. ———. Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance.
3. ———. The rule applicable to disturbance of public assemblies is that conduct which, being contrary to the usages of the particular meeting and class of people assembled, interferes with its due progress, or is annoying to the assembly in whole or in part, is a disturbance.

Appeals from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Thomas D. Carey and Wilbur L. Phillips, for appellants.

Herbert M. Fitle, Edward M. Stein, Walter J. Matejka, Charles A. Fryzek, and Allen L. Morrow, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

The appellants were found guilty after a jury trial of the violation of a city ordinance of the city of Omaha, classified as disturbing an assemblage. The ordinance, No. 25.33.010, is as follows: "Loud and Indecent behavior unlawful. It shall be unlawful for any person to disturb any lawful assemblage of people or to disturb any congregation or assembly where religious worship is being held by making any noise or by loud or indecent behavior." Appellants have perfected an appeal to this court.

The city council of the city of Omaha, hereinafter referred to as council, started a regularly scheduled meeting at approximately 2 o'clock p. m. on Tuesday, October 22, 1963. The business of the council proceeded in regular order as it appeared on a prepared agenda from that time until approximately 2:37 p. m., when its proceedings were interrupted by the singing of the National Anthem. At that time the council was listening to the presentation of a lawyer on a zoning question for a client. The appellants, together with some 47 others who were sitting together in the city council chamber, at 2:37 p. m. stood up and began singing "The Star Spangled Banner." After they had completed singing the National Anthem, they began marching around the council chamber, singing "We Shall Overcome," which one of the appellants identified as the unofficial hymn of the Civil Rights Movement. The president of the council called for order and rapped his gavel several times to no avail. The appellants were then informed by a lieutenant of the Omaha police department, who was in charge of a police detail at the council chamber, that they were disturbing the council proceedings and would have to stop. When they continued singing and marching, he placed them under arrest.

The appellants are both ordained clergymen. On October 8, 1963, they had both appeared and spoken before the city council on the urgency and the need for a fair housing ordinance. On that occasion the council had before it a proposed ordinance which appellants were attempting to induce the council to introduce. Appellant Jones admitted that on October 8, 1963, he told the council that appellants would, if necessary, go to extremes within their constitutional rights to make their needs and urgencies known, and if need be would climb on the tables, under the tables, and would sit in the laps of the council members.

Appellant Jones admitted that he and appellant McNair, when they reached the council chamber on October 22, 1963, synchronized their watches with the clock in the chamber so that they could start the singing at the same time. Both of the appellants in effect testified that they had consulted their consciences and their training in moral behavior, and it was not possible for them to have done otherwise than they did on this occasion. Both of them admitted they knew that the matter in which they were interested was not on the council agenda on October 22, 1963. They were both familiar with the council procedure and knew that the council followed a prepared agenda, although it was possible for the council, upon request and with unanimous consent, to consider a matter not on the agenda. On this occasion, they made no attempt to obtain the consent of the council to place their matter on the agenda. They infer that they were prevented from doing so, but there is nothing in the record which gives the slightest indication that they made any attempt to have their matter considered on this occasion.

Did the acts of the defendants disturb the council proceedings? There is no question but that they did and that their actions were planned to do just that. The council was unable to continue with any business until the appellants and their group were removed from the

council chamber. This removal was effected by the police, who had been alerted for such contingency. Appellants claim the verdict is not supported by the evidence. There is no merit to this contention. The evidence is substantial and fully adequate. It would have been a miscarriage of justice to have returned any other verdict on the evidence adduced.

The offense of disturbing a public meeting was recognized by the common law as a misdemeanor. Certain like provisions have been enacted into our statutes. The ordinance in question is a general regulation for all types of meetings. What constitutes a disturbance of a lawful assembly is not susceptible to specific definition, but must depend to some extent upon the nature and the character of the particular assemblage. However, while it may be difficult to specifically define beforehand, there is no problem in determining what constitutes a disturbance in a given case. In the instance of a city council, we hold that any conduct contrary to the normal presensation of business which disturbs or interrupts the orderly progress of the proceeding is a disturbance.

Webster's New International Dictionary (2d ed.), p. 757, defines the word "disturb" as follows: "To throw into disorder or confusion; to interrupt the settled state of."

In People v. Malone, 141 N. Y. S. 149, 156 App. Div. 10, "to disturb" is defined: "To throw into disorder; to move from a state of rest or regular order; to interrupt; to throw out of course or order." See, also, Commonwealth v. Porter, 67 Mass. (1 Gray) 476.

In State v. Mancini, 91 Vt. 507, 101 A. 581, the Supreme Court of Vermont, on the question of the disturbance of a public assembly (in that case a public dance) quoting from 2 Bishop, Criminal Law, § 309, said: "Speaking generally, the rule applicable to disturbances of public assemblies is that any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress, or

is annoying to the assembly in whole or in part, is a disturbance." See, also, State v. Stuth, 11 Wash. 423, 39 P. 665.

Appellants seem to contend that because the rules of the city council make the city clerk the sergeant-at-arms, they were not subject to arrest until she or the presiding officer asked them to stop. The evidence is undisputed that the presiding officer attempted to stop the disturbance with his gavel. The police were there for a purpose. That purpose could only have been to see that the council proceedings were not interrupted. They were requested by the officer in charge to stop, and they ignored his request. This argument is so absurd under the facts in this case that it needs no further discussion herein.

Appellants cite Nelson v. State, 33 Neb. 528, 50 N. W. 679, and infer that the officer had no right to make an arrest without a warrant. We suggest the case is no authority for appellants' inference. What the case does say is: "The rule of criminal law is settled that an officer without warrant acts as an individual without police authority *unless* he witnesses the criminal act; * * *." (Emphasis supplied.)

Appellants cite but do not argue the applicability of Gaddis v. State, 105 Neb. 303, 180 N. W. 590, 12 A. L. R. 648. This case involved a prosecution under what is now section 28-801, R. R. S. 1943, involving the disturbance of a religious meeting. There is no analogy between the facts of that case and those herein. That case holds a member of the church, if permitted by its precepts and usage, may in a becoming manner with good motives interrupt a minister in the midst of a sermon to correct an utterance at variance with the established tenets or rites of the church. Here the appellants interrupted a presentation in which they had no interest, and deprived another of his right to petition for a redress of his grievance. They insist on their right

to petition, but by their conduct prevented someone else from doing so.

On the theory that custom and usage prevail to determine what constitutes a disturbance, appellants complain that the State did not prove that the rules of the city council forbade them to sing or to march in the council chamber. It is not necessary to prove the self-evident. It should be obvious that the business of a city council could not be conducted in an orderly manner if everyone who felt so moved had a right to interrupt the business at hand by singing and marching around the council chamber. We note, however, that the evidence is undisputed that there had never been any singing or marching in the council chamber on any previous occasion. This certainly would negative any claim of usage and custom in the absence of proof otherwise.

Appellants contend the demonstrating is petitioning within the First Amendment to the United States Constitution, and that as citizens they had the right at any time to petition the council for a redress of their grievance. They do have a right to petition, but that right is not absolute. There is a time and a place for everything. Appellants' rights must be considered in conjunction with the rights of their neighbors. If we are to have a government of law and not of men, no one has a right to disrupt orderly proceedings because he cannot have his way. The laws apply to the appellants as well as to their neighbors. If their consciences and training in moral behavior do not make them realize the merits of their goal does not give them the right to take the law into their own hands, then they need restraining because their actions will in the long run imperil the very freedom they seek. If everyone who wanted to coerce the city council could disrupt the council proceedings whenever, to accomplish their purpose, they felt moved to do so, the business of the city would stagnate. The council would become a mere rubber stamp for the mob.

Our constitutional safeguards are intended to protect against the very thing appellants attempt to do.

There is no question here of the denial of appellants' right to be heard. The appellants as citizens of Omaha had a right to be heard on their grievance. Appellants knew how to obtain that right and had exercised it on October 8, 1963, but because the council had not seen fit to honor their request, they attempted to coerce it to do something it apparently did not wish to do. The appellants not only disturbed the meeting, but they did so intentionally. The precise manner in which their maneuver was executed indicates that the appellants agreed on a planned course of action before they came to the meeting, and they carried out that plan. That plan obviously was to disrupt the council proceedings until they secured a commitment from the council, or forced the council to adjourn.

The only logical inference which can be drawn from appellants' conduct is that they were carrying out the threat made by appellant Jones on October 8, 1963. What the appellants did cannot be condoned. They cannot hide behind a patriotic song or a hymn, religious or otherwise, to take the law into their own hands to achieve their ultimate objective, regardless of the merits of that objective. If the law should wink at their conduct or hold that any right they might have must be preferred over the rights of their neighbors, we have no law. We have abdicated to the whim and caprice of the irresponsible enthusiasts. They virtually are elevated above the law. To do so is to take a step backward in the march of freedom, to return to anarchy or tyranny. This cannot be if we expect to preserve our individual freedoms. To depart from the rule of law is to return to the law of the jungle.

We find no merit in any of the appellants' assignments of error. The judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

MAURICE BERG ET AL., APPELLEES, V. MIDWEST LAUNDRY EQUIPMENT CORP., A CORPORATION, APPELLANT, IMPLEADED WITH INDUSTRIAL CREDIT COMPANY, A CORPORATION, APPELLEE.

135 N. W. 2d 457

Filed May 28, 1965. No. 35888.

1. **Judgments: Appeal and Error.** Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate.
2. **Appeal and Error.** The appellate court may, on the second appeal between the same parties, if justice requires, review and reverse its former decision; but the parties are not entitled to such review as a matter of right; such practice will be resorted to sparingly, and only in cases where cogent reasons exist therefor.
3. ———. The appellate court, on a second appeal between the same parties, will not ordinarily reexamine questions of law presented in the first appeal, as the matters decided therein come within the rule of stare decisis, and become the law of the case.
4. **Judgments: Appeal and Error.** On a second appeal between the same parties in the same cause, where the second appeal merely seeks to relitigate questions settled by the opinion in the former appeal, this court will not inquire into the merits of its former opinion, where it appears that the second appellants sought a rehearing in the former appeal, which was denied, and the judgment was reversed and the cause remanded with directions to the lower court to render judgment in accordance with the opinion.
5. **Penalties.** A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.
6. **Usury.** The plain wording of section 45-138, R. R. S. 1943, before its amendment by Laws 1963, Special Session, chapter 9, section 2, page 108 (L. B. 17), rendered void only the payments of principal, interest, and charges included in the loan and did not affect a downpayment which was no part thereof.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part reversed and remanded.

Young, Denenberg & Mullery, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellees Berg.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

Plaintiffs Maurice Berg and June Berg, husband and wife, hereinafter referred to as the plaintiffs, brought this action in the district court for Lancaster County against the defendants Midwest Laundry Equipment Corp. and Industrial Credit Company to declare a retail installment contract void as usurious and recover payments made by them thereon.

This is the second appearance of this case in this court. The previous opinion appears in Berg v. Midwest Laundry Equipment Corp., 175 Neb. 423, 122 N. W. 2d 250, where the facts involved are set forth. A supplemental opinion entered after a motion for a rehearing appears in 175 Neb. 874, 124 N. W. 2d 699.

At the first trial in the district court, the trial court overruled a special appearance of the defendant Industrial Credit Company objecting to jurisdiction over its person. That court held the installment sales contract in question valid but that the Industrial Credit Company had made certain charges in violation of the Installment Sales Act and assessed a penalty to be deducted from the balance due upon the contract. It adjudged that the plaintiffs pay the installments which remained thereon to Industrial Credit Company.

Our opinion in Berg v. Midwest Laundry Equipment Corp., 175 Neb. 423, 122 N. W. 2d 250, filed herein June 14, 1963, held the special appearance of Industrial Credit Company should have been sustained, that the retail installment contract actually evidenced a loan for the balance of the purchase price, and being usurious was void under section 45-138, R. R. S. 1943. It further held

that the evidence showed the defendant Midwest Laundry Equipment Corp., hereafter at times referred to as Midwest, did not intend to make a sale except a cash sale and that plaintiffs were entitled to judgment against it for two payments made, less a credit of $725 which was admitted to have been received by plaintiffs from Midwest. The amount of one of the two payments made not being disclosed by the record, the district court was authorized to receive further evidence to determine the amount thereof. The judgment of the trial court was reversed and the cause remanded with directions to enter judgment in conformity with the opinion.

The defendant Midwest timely filed a motion for rehearing in this court objecting to the opinion of the court, among other things contending that the downpayment to the retail seller Midwest was no part of the installment loan contract. It contended this court erred in ordering this downpayment refunded. The supplemental opinion of this court filed November 22, 1963, Berg v. Midwest Laundry Equipment Corp., 175 Neb. 874, 124 N. W. 2d 699, directed the trial court to determine both the amount of the payments to Midwest and whether it should recover their amount on the determination.

Meantime on November 21, 1963, Midwest filed a motion calling attention to the enactment of statutes at the extraordinary session of the Legislature bearing on the issues involved in the litigation and asking leave to brief the same. The motion was denied by this court on December 10, 1963.

The mandate of this court was issued December 13, 1963, with our opinion and supplemental opinion attached. Both parties moving for judgment on the mandate, hearings were held and thereafter the trial court sustained the special appearance of Industrial Credit Company. It further held that the retail installment contract between the parties was void and uncollectible, and enjoined Midwest and its successors from collecting

the same. Midwest was ordered to return two down-payments made to it in the total amount of $2,243.45 with interest from the respective dates of payment. It found that by stipulation of the parties, the $725 payment referred to in the opinion of this court had been disposed of by agreement between the parties and need not be further considered. The motion of Midwest to vacate the judgment and for a new trial being overruled, it has brought the matter to this court on appeal.

Midwest assigns error to the trial court in finding the installment sales contract void and uncollectible. It contends that under sections 45-137, 45-138, 45-154, and 45-155, R. R. S. 1943, as amended by Laws 1963, Special Session, chapter 9, page 103 (L. B. 17), a loan made in violation of the Installment Loan Act as it existed prior to the amendment of these sections is no longer void although any interest or charges collected should be forfeited and refunded to the borrower. In this respect it cites Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907, where this court held this statute to be valid and constitutional legislation and to effectively repeal the provisions in the original Installment Loan Act which rendered loans made in violation thereof void and uncollectible, and that because of the expressed intention of the Legislature, the repeal was given retroactive effect. In Jurgensen v. Ainscow, 160 Neb. 208, 69 N. W. 2d 856, this court held: "Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate." To the same effect see Regouby v. Dawson County Irr. Co., 128 Neb. 531, 259 N. W. 365. The trial court had no alternative under the mandate but to enter the judgment it did in this respect and committed no error in so doing.

Midwest further assigns error to this court in overruling its motion for a rehearing on its consideration of the previous appeal herein. It points out that the judgment of this court was not final until the disposition of its motion for rehearing. State ex rel. Caldwell v. Lincoln Street Ry. Co., on rehearing, 80 Neb. 352, 118 N. W. 326; Revised Rules of the Supreme Court, Rule No. 22a. It calls attention to its motion addressed to this court seeking permission to file a brief on the applicability of the recent remedial legislation before our decision became final. Further, it asserts this court on the second appeal between the same parties may review and reverse its former decision and has done so in certain instances. It cites City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, which case was before this court several times. Foxworthy as plaintiff had sued the City of Hastings for injuries incurred in falling on a sidewalk. The City answered that plaintiff had failed to file action within 6 months from the date of the accident as required by the statute. Plaintiff demurred to the answer. The trial court sustained the demurrer. This court on the first appeal held that the section of the statute requiring action to be brought within 6 months was unconstitutional. It reversed the judgment and remanded the cause generally for trial. The statute then under consideration had a further provision requiring filing of a statement with the city clerk showing the date of the injury and certain matters concerning it within 6 months of the injury. Between the time of the reversal on the first appeal and the decision of this court in City of Hastings v. Foxworthy, *supra,* this court had held in other cases that such a provision was valid, that the giving of the statement was a condition precedent to maintaining the action, and was required to be alleged and proved. In the cited case the court held the demurrer to the answer should have searched the record and disclosed the failure of the petition to state a cause of action. The judg-

ment was thereupon reversed and the petition dismissed, the rule of law set out stating: "An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

Midwest seizes on certain statements in the long opinion in the Foxworthy case discussing many cases and aspects of the law applicable from which it contends this court should review all questions coming before it on a subsequent appeal that by reason of a change in the law might be decided anew. In the Foxworthy case, however, there had been a general remand for a new trial. The previous ruling had sustained a demurrer to the answer and it was only by the application of the rather technical legal rule that a demurrer searches the record that it could even be inferred that the previous opinion of the court had determined that the original petition had stated a cause of action. A careful reading of the Foxworthy case clearly shows no intent to go beyond the rule stated.

Midwest cites also the case of Eccles v. Walker, 75 Neb. 722, 106 N. W. 977. There the Supreme Court had previously reversed the judgment of the trial court which had dismissed the action. The court called attention to the fact that it had previously remanded the cause for trial generally and applied the rule in the Foxworthy case permitting it to arrive at a new and different decision. It did not enlarge upon that rule.

Midwest also calls attention particularly to Stratton v. Bankers Life Co., 102 Neb. 755, 169 N. W. 722, 1 A. L. R. 1671. It points out this case was decided differently on the second appeal in spite of the directions to enter

a judgment on certain issues at the first hearing of this case in this court. The opinion states that the appellate court will not ordinarily reexamine questions once determined by it but the case comes within the exceptions of City of Hastings v. Foxworthy, *supra*. The first opinion in the Stratton case is apparently not reported and the substance of the pleading is not disclosed. The real basis of the decision seems to be that the former decision was "manifestly outside of the pleadings." It has been held by this court in Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843, that: "The judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for determination, is a nullity." See, also, Petersen v. Dethlefs, 139 Neb. 572, 298 N. W. 155, where this court held: "A finding or other part of a judgment foreign to any pleading and not necessary to the relief grantable to any litigant in a case is contrary to the course of the law and the practice of the courts, is void and should be stricken from the record on motion." If the first decision was outside the pleading as stated, the ground of the second ruling is apparent. We do not think this case should be the basis of extending the rule in City of Hastings v. Foxworthy, *supra*, and applying it to the case before us.

In the case of Burnham v. Bennison, 130 Neb. 558, 265 N. W. 531, this court held: "The appellate court may, on the second appeal between the same parties, if justice requires, review and reverse its former decision; but the parties are not entitled to such review as a matter of right; such practice will be resorted to sparingly, and only in cases where cogent reasons exist therefor.

"The appellate court, on a second appeal between the same parties, will not ordinarily reexamine questions of law presented in the first appeal, as the matters decided

therein come within the rule of stare decisis, and become the law of the case.

"On a second appeal between the same parties in the same cause, where the second appeal merely seeks to relitigate questions settled by the opinion in the former appeal, this court will not inquire into the merits of its former opinion, where it appears that the second appellants sought a rehearing in the former appeal, which was denied, and the cause reversed and remanded, with directions to the lower court to render judgment in accordance with the opinion." In the opinion it is stated: "Appellants seem to rely upon the case of City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955. This case contains an exhaustive and elaborate discussion of a number of cases in which the rule of stare decisis was presented, and in a well-considered opinion it announced the following rule: * * *. (Setting forth the rule quoted in Foxworthy.) It will be noted in the case above mentioned that the rule applied arose in a case where on the first appeal the case was reversed and remanded for new trial. Such is not the fact as presented by the record here. The case was reversed and remanded, not for new trial, but was remanded with specific directions to a trial court to enter judgment in accordance with the opinion." See, also, Gund v. Ballard, 80 Neb. 385, 114 N. W. 420; Jurgensen v. Ainscow, *supra*.

In the case before us our opinion of June 14, 1963, held the installment sales contract was void and reversed the judgment in that respect. It remanded the cause permitting the trial court to determine only the amount of the downpayment for the purpose of entering judgment for the plaintiff for that also. The supplemental opinion of November 22, 1963, modified the original opinion only to the extent of directing the trial court to determine whether the downpayment after it was determined should be recovered by plaintiffs. In Kometscher v. Wade, 177 Neb. 299, 128 N. W. 2d 781, this court de-

termined it would not reverse a judgment of the trial court entered previously to the enactment of Laws 1963, Special Session, chapter 9, page 103 (L. B. 17), because of the changes made in that law. We think the rule in City of Hastings v. Foxworthy, *supra,* should be adhered to and not extended. After the determination of the present case in this court, the issuance of a mandate thereon, and a judgment in the trial court pursuant to its command, we will not thereafter review the questions determined by our previous decision.

Midwest further assigns error to the trial court in ordering it to refund the downpayments of $2,243.45 and interest to the plaintiffs. This aspect of the case was left for the determination by the trial court in our supplemental opinion. The statute determinative of this matter as it existed prior to its amendment by Laws 1963, Special Session, chapter 9, section 2, page 108 (L. B. 17), was section 45-138, R. R. S. 1943. The portion setting forth the effect of a violation of the provisions thereof reads as follows: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan." It refers to the *"loan"* and provides that the loan shall be void and that the licensee shall have no right to collect or receive any principal, interest, or charges *"on such loan."* Plaintiffs contend the word "charges" included in this phrase means any payment exacted or received by the seller and includes the downpayment. We believe, however, it refers to charges as used in section 45-139, R. R. S. 1943, which are permitted to be included in an installment loan. It does not mention the downpayment made on the purchase. The downpayments in this instance were made in November 1959 and January 1960. The installment sales contract was not signed until February 19, 1960. In Misle v. Miller, 176 Neb. 113, 125 N. W. 2d 512, this court said: "A penalty

statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions." We are referred to many cases where certain statements in the opinions are urged by the respective parties herein as indicative of their desired interpretation of the section. They appear to be obiter dicta. We are referred to no case where the downpayment was adjudged to be invalid. Neither have we found such a case. The reports are, however, replete with cases where the principal, interest, and charges on the loan itself were recovered and the downpayment was not mentioned. We conclude the plain wording of section 45-138, R. R. S. 1943, before its amendment by Laws 1963, Special Session, chapter 9, section 2, page 108 (L. B. 17), rendered void only the payments of principal, interest, and charges included in the loan and did not affect a downpayment which was no part thereof. We conclude the trial court erred in ordering it returned to the plaintiffs in its judgment.

It follows that the judgment of the trial court should be reversed and the cause remanded insofar as it provides for the payment to the plaintiffs of the $2,243.45 and interest, and should be and is affirmed in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, COUNTY OF SALINE, CITY OF WILBER, APPELLEE, V. MARGUERITE SUKOVATY, APPELLANT.
135 N. W. 2d 467

Filed May 28, 1965. No. 35914.

1. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case.
2. **Criminal Law: Trial.** The instructions in a criminal case may describe the offense in the language of the statute.

3. **Disorderly Conduct: Breach of the Peace.** Disorderly conduct is any act which tends to breach the peace or to disturb those who hear or see it, or to endanger the morals, safety, or health of the community. The word peace as used in the phrase breach of the peace means the tranquility enjoyed by members of a community where good order reigns.
4. ———: ———. Ordinarily, misconduct of the complaining witness is not a defense to a charge of disturbing the peace by disorderly conduct through the use of profane and abusive language.
5. **Witnesses: Trial.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. Affirmed.

Jack L. Craven, for appellant.

Bernard J. Ach and Clarence C. Kunc, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

The defendant, Marguerite Sukovaty, was convicted in the police court of the city of Wilber, Nebraska, of the violation of an ordinance of that city. She appealed to the district court for Saline County, Nebraska, where she was again found guilty. Her motion for new trial was overruled and she has appealed to this court.

The assignments of error relate to the admission of certain evidence over objection and to certain instructions of the trial court to the jury.

The amended complaint charged that the defendant did, on September 8, 1963, in Wilber, Nebraska, "publicly curse and swear and use profane, obscene, indecent, abusive, and offensive language against A. R. Sellmeyer and at said A. R. Sellmeyer's home disturb the peace and the good order and quiet of said A. R. Sellmeyer and said city by violent, tumultuous and disorderly conduct."

A. R. Sellmeyer, the complaining witness, is the chief of police of the city of Wilber, Nebraska. The incident

which is the basis for the complaint filed in this case took place about 11 p. m. on a Sunday evening on the front porch of the home of the complaining witness in Wilber, Nebraska. On the preceding day there had been some difficulty between the complaining witness and his wife, and Mrs. Sellmeyer had spent Saturday night and Sunday with the defendant. At about 11 p. m. on Sunday evening, Mrs. Sellmeyer, with her two children and the defendant, went to the home of the complaining witness. The complaining witness refused to allow Mrs. Sellmeyer to enter the home. An argument ensued in which the defendant took part. The complaining witness requested the defendant to leave but she failed to do so. There is evidence from which the jury could find that the defendant used profane and abusive language against the complaining witness and disturbed his peace and quiet by disorderly conduct. Although the testimony of the defendant contradicts the testimony of the complaining witness, the credibility of the witnesses was a question for the jury. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328. The evidence is sufficient to sustain the verdict finding the defendant guilty.

The defendant was charged with violating an ordinance which provides in part that: "Any person * * * who shall publicly curse or swear, * * * or shall in any place, public or private, disturb the peace of others or the good order and quiet of this City, by * * * disorderly conduct, * * * shall be deemed guilty of a misdemeanor." C. 12, § 2, p. 81, Municipal Code of the City of Wilber, Nebraska.

Instruction No. 6 informed the jury of the quoted provisions of the ordinance. Instruction No. 4 set out the material elements of the offense which the jury was required to find were established by the evidence before the defendant could be found guilty. These instructions were not erroneous. The court may describe the offense in the language of the statute. Harrison v. State, 133

Neb. 794, 277 N. W. 96. The ordinance does not provide that a particular intent shall be an element of the offense charged, and the trial court was not required to instruct in reference to intent as an element of that offense.

Instruction No. 6½ correctly defined the terms "disorderly conduct" and "peace." Disorderly conduct is any act which tends to breach the peace or to disturb those who hear or see it, or to endanger the morals, safety, or health of the community. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 30, p. 685. The word "peace" as used in the phrase "breach of the peace" means the tranquility enjoyed by members of a community where good order reigns. 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 4, p. 666.

The defendant contends that the trial court should have instructed the jury as to provocation, aggressor, assault and battery, justification, lawful arrest, and lawful imprisonment. There were no issues in this case which involved any of these matters. The defendant was charged with using profane and abusive language against the complaining witness and disturbing the peace by disorderly conduct. Alleged misconduct on the part of the complaining witness would not be a justification or an excuse for the misconduct of the defendant. See, Roberts v. State, 82 Neb. 651, 118 N. W. 574; 12 Am. Jur. 2d, Breach of Peace and Disorderly Conduct, § 10, p. 671; 11 C. J. S., Breach of the Peace, § 7, p. 821; 27 C. J. S., Disorderly Conduct, § 2, p. 523.

On direct examination, the defendant testified that Mrs. Sellmeyer and her children had spent Sunday afternoon and evening with her and that she had no knowledge of any domestic trouble between the complaining witness and Mrs. Sellmeyer at the time she went to the home of the complaining witness with Mrs. Sellmeyer. Over objection, the plaintiff was allowed to cross-examine the defendant as to what she had done on the Saturday night preceding the incident in question.

The scope of the cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. State v. Brown, *supra*. The cross-examination of the defendant in this case brought out the fact that the defendant had been with Mrs. Sellmeyer on Saturday night and that Mrs. Sellmeyer had spent that night at the defendant's home. The evidence in question had some relation to the testimony of the defendant on direct examination and to her credibility. The record does not show an abuse of discretion by the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH HUNT ET AL., APPELLANTS.

135 N. W. 2d 475

Filed May 28, 1965. No. 35922.

1. **Rape.** In a prosecution for forcible rape, competent evidence must show beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed.
2. ———. In a prosecution for forcible rape it is not essential that prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact.
3. ———. The degree of force required to sustain a conviction for forcible rape is relative, depending upon the particular circumstances, but it must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good faith resistance on her part.
4. ———. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances, but she must in good faith resist to the utmost of her physical ability as long as she has the strength to do so, until the offense is consummated.
5. **Criminal Law.** Where competent evidence is adduced to sup-

port every element of the offense charged, it is ordinarily for the jury to determine if the offense has been proven by evidence beyond a reasonable doubt.

6. **Rape.** In a prosecution for rape the prosecutrix may testify in chief that she complained to another within a reasonable time under the circumstances after the act was committed, and such other party may likewise testify in chief to such fact and the nature of the complaint, such evidence being for the consideration of the jury as corroboration of the main fact in issue.
7. **Criminal Law.** This court will not interfere with a verdict of guilty in a criminal action based upon conflicting evidence in the absence of prejudicial error at the trial unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
8. **Searches and Seizures.** Where a search of a building is authorized by the owner in possession, a search warrant is not required and the search pursuant thereto is in all respects lawful.
9. **Criminal Law: Evidence.** Where a voluntary written statement is obtained from a defendant in a criminal proceeding, admissions against interest contained therein are ordinarily admissible against him as evidence-in-chief, even though such written statements are not in evidence.
10. ———: ———. Where an exhibit, alleged to be incompetent and prejudicial, is offered in evidence and refused or withdrawn, the defendant has no cause for complaint where the request of defendant as to the manner of correcting the claimed error is fully complied with by the trial court.
11. **Criminal Law: Trial.** It is not error for a prosecutor to argue to the jury that it is its sworn duty to find a defendant guilty under the evidence adduced at the trial.
12. **Trial: Appeal and Error.** The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion.

Appeal from the district court for Stanton County: GEORGE W. DITTRICK, Judge. Affirmed.

McFadden & Kirby, for appellants.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

CARTER, J.

This is a prosecution for forcible rape against the defendants Kenneth Hunt, Robert Mussack, Arnold Vollbrecht, and William Watts. The jury returned a verdict of guilty against each of the defendants. Each was sentenced to the Nebraska Penal and Correctional Complex for a period of 4 years at hard labor. Defendants seek a review in this court.

The information charged that the defendants did, on March 1, 1964, in the county of Stanton, Nebraska, have carnal knowledge of Margery Ott forcibly and against her will. The charge was made pursuant to section 28-408, R. R. S. 1943.

The prosecutrix was born on April 16, 1947. She was working on the evening of February 29, 1964, at a place called the Fountain, in Stanton. Two of the defendants, Watts and Vollbrecht, asked her to go riding with them when she got off work about midnight. She agreed to go if a girl friend would go along. The result was that the four of them got into Watts' car and, after driving around town for a while, went out of town to a place called Piller's lake. Soon after their arrival there another car containing three boys, including the defendants Mussack and Hunt, came into the area. It developed that this rendezvous was pursuant to a prearranged scheme to get the prosecutrix out to Piller's lake for immoral purposes. Several of them, if not all, heard stories about the prosecutrix, which precipitated the prearranged plan. One of the boys left in his car shortly thereafter, leaving the four defendants and the two girls at Piller's lake. All were about 17 years of age.

The four defendants devoted their attention almost exclusively to the prosecutrix. She resisted their advances at Piller's lake with success. They concluded to leave and take Vollbrecht home first. They left Piller's lake and on arrival at Vollbrecht's home they got out of the car and eventually went into the house. While

the girl friend of prosecutrix was in and out of the house at times and guessed as to what was going on, she was in no way involved. It would serve no useful purpose here to recite the sordid details of the events which transpired in the house. Suffice it to say that the evidence is sufficient to sustain a finding that each of the four defendants had sexual intercourse with prosecutrix in the early morning hours of March 1, 1964. There is evidence by prosecutrix that she resisted to the utmost, screamed her loudest, and sustained many bruises, torn clothes, and other evidences of physical abuse. Prosecutrix was corroborated by her mother when she arrived home and by a physician to whom she was taken early the next morning.

The general tenor of the defense was that, although they mutually agreed to take prosecutrix out for the purpose which was accomplished, they used no force, that prosecutrix did not resist with any sincerity of purpose, and that she acquiesced in the sexual acts. There is evidence in the record to support these contentions, which were denied by the prosecutrix. Three witnesses other than the defendants testified that they had engaged in sexual relations with the prosecutrix prior to the happening of the events that brought about this prosecution. Prosecutrix admitted having sexual relations with these three witnesses on one occasion, which she stated was against her will, but which she reported to no one. As to whether or not the defendants forcibly had sexual relations with prosecutrix, the evidence is conflicting.

There is evidence in the record by the girl friend of the prosecutrix that she heard no calls for help or other evidence of resistance at the Vollbrecht home. She was, however, outside of the house. She also testified to a statement by prosecutrix to the defendants, heard by her while listening at a window, indicating acquiescence, which was explained by prosecutrix rather unsatisfactorily. On the other hand, the facts show that prosecu-

trix was the victim of a prearranged plan to trick her into a situation where their objective could be accomplished. She refused to go unless her girl friend would also accompany her. Inquiry was made as to whether or not the date was to be just between the two girls and Watts and Vollbrecht, which was passed off with hurt pride that anything else would be suspected. Admittedly, the resistance of prosecutrix at Piller's lake was sufficient to resist their advances, which defendants admit were made. It was not until prosecutrix was enticed into the Vollbrecht home that her resistance was overcome and the preconceived plan accomplished. While the evidence shows that prosecutrix had previously had sexual relations with others, which is a circumstance on the issue of consent, it is not a controlling factor on the issue of force. The issues of fact were conflicting and were for the determination of the jury. There is sufficient evidence to sustain the verdict of guilty which the jury returned.

Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22. In a prosecution for rape it is not essential that prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principle fact. Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897. The degree of force required to sustain a conviction for forcible rape is relative, depending upon the particular circumstances, but it must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good faith resistance on her part. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circum-

stances, but she must in good faith resist to the utmost of her physical ability as long as she has the strength to do so, until the offense is consummated. Salerno v. State, 162 Neb. 99, 75 N. W. 2d 362. In a prosecution for rape the prosecutrix may testify in chief that she complained to another within a reasonable time under the circumstances after the act was committed, and such other party may likewise testify in chief to such fact and the nature of the complaint, such evidence being for the consideration of the jury as corroboration of the main fact in issue. This court will not interfere with a verdict of guilty in a criminal action based upon conflicting evidence, in the absence of prejudicial error in the conduct of the trial, unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. Texter v. State, 170 Neb. 426, 102 N. W. 2d 655. No contention is made that the jury was not so instructed in the instant case.

Counsel for the defendant Hunt moved for a mistrial for the reason that sheriff Emil Christensen, in an answer that was not responsive to the question, referred to the guilt of the defendant. The record shows that counsel for defendant asked the sheriff where he first found the defendant Hunt. He answered that he found him at the Robert Hansen farm. He was then asked if he put him under arrest, to which he replied: "For stealing gas." Objection was made that the answer was not responsive. The trial court sustained the objection, ordered the answer stricken, and instructed the jury to disregard the same. Defendant's counsel then moved for a mistrial. The motion was overruled. The inadequacy of the objection to raise the question of proof of unassociated offenses is apparent. In any event, under the circumstances shown by the record, the action of the trial court in sustaining the objection and instructing the jury to disregard the answer was

sufficient to remove any prejudicial error resulting from the answer.

Defendants assign as error the admission of two exhibits which were alleged to have been obtained by an unlawful search and seizure. The evidence shows that the sheriff went to the Vollbrecht home and asked permission of Melvin Vollbrecht, the owner of the farm home, to look through the house. He was told that he was welcome to look through the house, which he did. This evidence is not disputed. We know of no rule requiring a search warrant where a search is freely authorized by an owner in possession under the circumstances here shown. The contention of the defendants on this point cannot be sustained.

Defendants complain of the admission of statements contained in written statements given to the county attorney shortly after the happening of the event which brought about the charge of forcible rape. The record shows that the trial court held a hearing outside the presence of the jury to determine whether or not the statements were voluntarily and freely given. The court determined that they were and the evidence sustains this ruling. The State then called the stenographer who transcribed the statements and testified to the admissions made by the defendants in their respective statements. Complaint is made that this evidence was not properly admitted prior to the introduction of the statements in evidence. The record affirmatively shows that the statements were read by the defendants after they were typewritten. It also shows that copies were delivered to them before the commencement of the trial. The facts stated in the statements are not disputed as having been made, although some attempt was made by one defendant to show that the county attorney put the answers in his mouth. The evidence shows that this contention was not true by those in attendance when the statements were taken. It is not error to offer admissions against interest in evidence in the case-in-chief

before the written statement from which they are taken is offered in evidence. In fact, unless a dispute arises as to what is contained in the statements, such statements are not ordinarily admissible in evidence at all. There is no merit in this assignment of error.

Defendants assign as error the misconduct of the county attorney in offering a bloody towel in evidence which did not tend to prove any issue in the case. The record shows that the county attorney offered the bloody towel in evidence and immediately withdrew his offer. There is no evidence that it was shown to the jury. After the offer and withdrawal of the exhibit, defendants moved that the jury be instructed not to consider even the attempt to offer it. The objection was sustained and the trial court admonished the jury to disregard the exhibit and that it was not to draw any inference of any kind from the attempt to offer the exhibit. The trial court fully and adequately complied with the request of defendants' counsel. Defendants cannot now claim misconduct on the part of the county attorney, even if it were misconduct. The trial court complied with the request made which defendants' counsel considered adequate at the time. Under such circumstances the defendants will not be permitted to claim prejudice on some other ground not raised by objection.

Defendants object to the following statement by the county attorney in his closing argument to the jury: "* * * and I say to you Gentlemen of the Jury that on this evidence that was presented here to you it is your sworn oath to find them guilty and I will say this to you —." He was interrupted by opposing counsel as follows: "I object to this, Your Honor, they don't have any such obligation. I object to the remark of counsel, they have an obligation to consider and weigh the evidence and determine * * * There is no such obligation to find these boys guilty." The court ruled as follows: "The determination of the evidence and its force and effect is strictly within the province of the Jury. With

that statement by the Court, proceed, Mr. Grady."

The argument of the county attorney is not error. A county attorney may properly argue the duty of a jury based on the evidence in the case. The county attorney expressed no personal opinion as to the guilt of the defendants. He merely argued that under the evidence the jury was required by its oath to find the defendants guilty. The argument bears upon the weight of the evidence as the trial court informed the jury. The argument to which objection was made is without substance. Wamsley v. State, *supra.*

On motion for a new trial the defendants asserted by the affidavits of Don Reed and Louise Reed that Herman Pohlman, a juror in the case, told them the day before the trial: "I've got a girl of my own and you know how I feel about this thing." By the counter-affidavit of Herman Pohlman, he stated: "As far as the boys' trial, I do not know them and I have never seen the girl. * * * I never expressed any opinion about this case. I never did have any conversation with Mrs. Reed. I may have said something about having daughters. I know that Don Reed knows I have three sons. I am just as much concerned with my three boys being treated fairly as I am concerned about the safety of my two daughters. If I made any reference to my daughters in front of the Reeds it was not to indicate that I had anything against the boys. * * * The only gossip I really ever heard about this case was entirely different from what I heard at the trial and I completely forgot all the gossip during this trial." The evidence of misconduct of juror Pohlman is not sustained and the trial court correctly refused to grant a new trial on such ground. There is no proof of a preexisting opinion or proof of any conduct that indicates that this juror could not well and truly try the case on the evidence adduced and the instructions of the court. The trial court's action in denying a new trial because of misconduct by juror Pohlman is sustained by the record. The ruling of the trial court

on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion. Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598; Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

Defendants assign other errors occurring during the course of the trial. Some have no basis in the evidence and others are so plainly nonerroneous as to require no discussion here. We find no prejudicial error in this record. The verdict of the jury is sustained by the evidence and the judgment entered thereon is affirmed.

AFFIRMED.

JERRY RITTER, APPELLANT, V. HAWKEYE-SECURITY INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.
135 N. W. 2d 470

Filed May 28, 1965. No. 36002.

1. **Workmen's Compensation.** An occupational disease under the Workmen's Compensation Act is a disease which is due to causes and conditions which are characteristic of and peculiar to the employment and which is not an ordinary disease of life to which the general public is exposed. § 48-151, R. R. S. 1943.
2. ———. An occupational disease need not originate exclusively from the employment, but the employment must result in a hazard which distinguishes it in character from employment generally.
3. ———. A dishwasher who develops a contact dermatitis on his hands as a result of the use of cleansing chemicals in his employment sustains an injury as a result of an occupational disease and is entitled to recover workmen's compensation for the injury.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Reversed and remanded with directions.

McGinley, Lane, Mueller & Shanahan, for appellant.

Firmin Q. Feltz, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Jerry Ritter, the plaintiff, against Hoke's Cafe, Inc., hereinafter referred to as the defendant. The Hawkeye-Security Insurance Company is the workmen's compensation liability insurance carrier for the defendant employer.

The compensation court found that the plaintiff had sustained an injury to his hands as a result of a contact dermatitis arising out of and in the course of his employment and entered an award in favor of the plaintiff. The defendants waived rehearing before the compensation court and appealed directly to the district court.

The district court found that the plaintiff's alleged disease was not characteristic of or peculiar to the plaintiff's occupation, that the general public was subject to the same risks, and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The record shows that the plaintiff was employed as a cook's helper and dishwasher by the defendant for about 2 years. The plaintiff's duties included washing dishes, glassware, pots, and pans. Dishes were washed by machine using a soap or detergent known as "Gitz." The Gitz was dipped from a barrel and placed in the dishwashing machine by the plaintiff. Pots and pans were washed by hand using a soap powder known as "JaDa." Glassware was washed by hand using a soap known as "Besol." The plaintiff also used a scouring powder known as "Ajax" and a bleaching agent known as "Clorox."

The plaintiff's hands developed a rash while he was employed by the defendant. The operator of the restaurant referred the plaintiff for medical attention and the condition seemed to improve. In July or August 1963,

the plaintiff developed a severe rash upon his hands. His fingers became red and scaly. On August 27, 1963, the plaintiff was examined by Dr. L. C. Potts. At that time the plaintiff had a severe dermatitis on both hands. The skin was dry, scaly, and cracked in areas over the entire hand. Where the skin was cracked it was oozing and extremely tender. Dr. Potts recommended that the plaintiff remove himself from the defendant's employment.

The plaintiff terminated his employment with the defendant on August 27, 1963. The condition of his hands responded to treatment and on December 7, 1963, the plaintiff was discharged as being able to return to work. Dr. Potts testified that it was his opinion that the plaintiff's dermatitis was caused by the cleansing agents used by the plaintiff in his employment by the defendant. There is no medical evidence to the contrary in this case.

Dr. Potts also testified that contact dermatitis is a superficial inflammation of the skin caused by a sensitizing or irritating agent. It is a condition that occurs frequently and is common among housewives. Detergents and cleansing chemicals are common causes of the condition. Some persons are more sensitive than others and are more apt to develop a dermatitis.

The evidence in this case establishes that the plaintiff was injured as the result of a contact dermatitis which arose out of and in the course of his employment by the defendant. The controlling question is whether the injury was caused by an occupational disease within the meaning of the Workmen's Compensation Act.

An occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and which is in excess of that attending employment in general. Russo v. Swift & Co., 136 Neb. 406, 286 N. W. 291.

The Workmen's Compensation Act defines an occupational disease as "a disease which is due to causes

and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." § 48-151, R. R. S. 1943.

The requirement of the statute is that the cause and conditions of the disease be characteristic of and peculiar to the employment and that the disease be other than an ordinary disease of life. The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally. Riggs v. Gooch Milling & Elevator Co., 173 Neb. 70, 112 N. W. 2d 531; Underwood v. National Motor Castings Division, 329 Mich. 273, 45 N. W. 2d 286; Samels v. Goodyear Tire & Rubber Co., 317 Mich. 149, 26 N. W. 2d 742; LeLenko v. Wilson H. Lee Co., 128 Conn. 499, 24 A. 2d 253.

The evidence in this case does not establish that the plaintiff's disease is an ordinary disease of life. The evidence is that contact dermatitis results from the use of a sensitizing or irritating agent and that detergents and cleansing chemicals are common causes of the disease. The evidence establishes that the cause and conditions of the disease are characteristic of and peculiar to the occupation of dishwashing and that dishwashing involves a hazard which is greater than that which occurs in employment generally.

Under the evidence in this case the plaintiff is entitled to recover compensation for an injury resulting from an occupational disease. The plaintiff is entitled to recover compensation for total temporary disability at the rate of $37 per week for 9 2/7 weeks, and medical expenses in the amount of $132.46.

The plaintiff claims travel expense in the amount of $32. Apparently this expense resulted because the plaintiff moved from Ogallala, Nebraska, where the in-

jury occurred, to Venango, Nebraska, and then received medical attention at Grant, Nebraska. The record fails to show facts sufficient to require the defendants to reimburse the plaintiff for this expense.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLLY CLARK, APPELLEE, V. ROY NORMAN CLARK, APPELLANT.
135 N. W. 2d 481

Filed June 4, 1965. No. 35901.

1. **Divorce.** Ordinarily, acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm.
2. ———. There is no general rule as to the degree of corroboration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed.

Schrempp, Lathrop & Rosenthal, for appellant.

Alfred A. Fiedler, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is an action for divorce brought by Holly Clark as plaintiff. Roy Norman Clark, the defendant, filed a cross-petition asking that he be granted a divorce. The trial court found generally for the plaintiff; awarded the custody of the minor child of the parties to her; ordered the defendant to pay child support in the amount of $25 every 2 weeks; and dismissed the cross-petition.

The defendant's motion for new trial was overruled and he has appealed.

The assignments of error relate only to the granting of the divorce to the plaintiff and the dismissal of the cross-petition. The defendant contends that the evidence is not sufficient to entitle the plaintiff to a divorce and that he should be granted a divorce upon his cross-petition.

The petition alleges that the defendant was guilty of extreme cruelty in that he struck the plaintiff on several occasions; that he had illicit relations with another woman in the family trailer; and that he constantly nagged, argued, and opposed the plaintiff, which caused her to develop a nervous condition requiring medical attention. For the purposes of this appeal it is unnecessary to consider any of the allegations other than those relating to the defendant striking the plaintiff.

The plaintiff testified that they had an argument about attending a bridal shower about 2 weeks after they were married and that the defendant struck her. The defendant admits striking the plaintiff on that occasion. On another occasion the parties had an argument about attending a church supper and the defendant again struck her.

On February 21, 1963, the parties had an argument in which the defendant beat, slapped, and kicked the plaintiff. The defendant admits that he struck the plaintiff at that time. On that occasion the owner of the trailer court came to the trailer house where the parties lived and told the defendant to quiet things down or they would have to leave. The plaintiff took the baby and went to another trailer where a Mrs. Slocum lived.

Mrs. Slocum testified that when the plaintiff came to her trailer she was crying, was hysterical, and that she had fingernail marks on her wrists and a large bruise on her hip. The plaintiff said that the defendant had beaten and kicked her. While the plaintiff was at the Slocum trailer, she telephoned her mother and the sheriff. On

the following day, Mrs. Slocum took the plaintiff to her parents' home. The plaintiff's mother testified that the plaintiff had bruises and scratches on her arms and a large bruise on her hip when she returned to their home.

The evidence shows acts of extreme cruelty on the part of the defendant which are sufficient to entitle the plaintiff to a divorce. Ordinarily, acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Stephens v. Stephens, 143 Neb. 711, 10 N. W. 2d 620.

There is no general rule as to the degree of corroboration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case. Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279. In this case there is sufficient corroboration as to the conduct of the defendant on the night before the parties separated.

The cross-petition contains a general allegation of extreme cruelty on the part of the plaintiff. The testimony of the defendant, for the most part, is not corroborated. There is evidence which is corroborated that the plaintiff was a poor housekeeper and that the trailer was in a state of extreme disorder when the plaintiff returned to her parents' home on February 22, 1963. However, there is some conflict in the evidence concerning this matter, and the trial court which heard the testimony and observed the witnesses concluded that the evidence was not sufficient to entitle the defendant to a divorce or prevent the granting of a divorce to the plaintiff. We think this conclusion was correct. The evidence as to the misconduct of the defendant transcends and outweighs the other evidence and justifies an award of a divorce to the plaintiff. See Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300. The cross-petition of the defendant was properly dismissed.

The judgment of the district court is affirmed. The

plaintiff is allowed $250 for the services of her attorney in this court.

AFFIRMED.

IN RE APPLICATION OF ALBERT ROY ANDREWS. ALBERT ROY ANDREWS, DOING BUSINESS AS ANDREWS TRANSFER & STORAGE, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.
135 N. W. 2d 712

Filed June 4, 1965. No. 35911.

1. **Judgments.** The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. It is an order to make the record speak the truth. Such a judgment must conform to and be no broader in its terms than the judgment actually rendered.
2. ———. In proceedings to secure the correction of the record of a judgment or order nunc pro tunc on the ground of alleged clerical error therein, the party moving to correct the record bears the burden of proof. In any such case, there is a presumption that a judgment appearing on the record in the regular form is the judgment rendered by the court or administrative body and not an error of the clerk.
3. **Public Service Commissions: Judgments.** In the absence of a showing to the contrary, the court or administrative body ordering the nunc pro tunc amendment of its own records is presumed to have acted properly and to have been justified in making the amendment.
4. **Judgments.** An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made, nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to.
5. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the ques-

tion for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding & Acklie and Richard A. Peterson, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is an appeal from an order of the Nebraska State Railway Commission denying appellant's petition for an order nunc pro tunc to correct an order and certificate of the commission entered March 31, 1938.

The rather involved history of this proceeding begins about August 24, 1936, when Albert Roy Andrews filed his "grandfather" application to secure a certificate authorizing continuation of his operations as a motor carrier conducted on and since April 1, 1936. Following a hearing before the Nebraska State Railway Commission, an order was entered March 31, 1938, and a certificate was issued authorizing the transportation of commodities generally over "Irregular routes from Madison County, to and from Omaha, and occasionally to and from various points within the State of Nebraska at large." It is the appellant's position that this certificate did not properly reflect the authority authorized by the report of the examiner for the commission, which was approved by the commission; and did not reflect the scope of appellant's operations as they had been conducted on and prior to April 1, 1936. After receiving a copy of his "grandfather" certificate, the appellant believed that confusion might arise as to the proper interpretation of the order and certificate and held a discussion with the director of the Motor Transportation

Department with reference to the matter. The individual with whom he talked said: "Mr. Andrews, your authority says just what you're telling me you're doing. It reflects it. What do you want? Special attention? Or do you want us to give you a special order or authority?" Relying upon those comments, the appellant says he continued to perform nonradial, statewide service, without regard to a base hub or territory. In 1953, the Motor Transportation Department advised the appellant that their opinion was that any shipment handled by the appellant which did not either originate or terminate in Madison County would be outside the scope of his territorial authority. Thereafter, appellant filed a petition for an order nunc pro tunc seeking to correct the order of the commission entered on March 31, 1938, to read: "* * * commodities generally, between points in Nebraska over irregular routes." Through an extended process of hearings, orders, motions, and a prior appeal to this court (dismissed for procedural reasons, and as to which no plea of res judicata is raised in this case), this matter is again before us. The general rules applicable here were stated in Watson Bros. Transportation Co. v. Red Ball Transfer Co., 159 Neb. 448, 67 N. W. 2d 475, quoting from North Loup River P.P. & I. Dist. v. Loup River P.P. Dist., 149 Neb. 823, 32 N. W. 2d 869: "If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order.

"It must be borne in mind that the proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. In

other words, it is an order to make the record speak the truth.

"We have also held that such a judgment must conform to and be no broader in its terms than the judgment actually rendered."

We must, therefore, turn to the record which appears with respect to the hearing preceding the entry of the order and certificate in 1938. The application showed:

"II. Description of each route regularly operated * * *

1. Between Omaha and Norfolk, as follows:
   (a) From Norfolk to Omaha, via Highway 8 and 30
   (b) From Norfolk to Fremont, via Highway 8
   (c) From Fremont to Omaha, via Highway 30
   (d) From Omaha to Fremont, via Highway 30
   (e) From Fremont to Norfolk, via Highway 8

Show, also, * * *

   (1) Whether all intermediate points were served —Yes (if necessary)
   (2) The off-route points served—None * * *

III. Description of operations over irregular routes * * *

   A. Location of applicant's headquarters—Norfolk, Nebraska.
   B. Where did applicant obtain the main volume of its traffic? * * * Norfolk and vicinity.
   C. To what principal place, places or territory did applicant transport such traffic? * * * All over Nebraska; mostly in eastern half.
   D. If * * * do not adequately and completely describe applicant's operations * * *: We move household goods and fixtures anywhere, any time, by request, as previously noted, merchandise from Omaha, also from Lincoln and Sioux City by request."

By amendment, in a letter filed February 11, 1937, appellant stated: "One type of commodity was inadvertently omitted, it should read: 'We move Household gds,

Fixtures and *genl. mdse.* Anywhere, any time, including pool car distribution, in fact anything, anyplace, anytime.' "

Six affidavits attached to the application show movements of (1) merchandise and household goods to different parts of the state (origin not shown, presumably Norfolk); (2) oxygen and acetylene from Omaha to the Norfolk territory; (3) telephone company supplies and household goods to different parts of the state (origin not shown, presumably Norfolk); (4) merchandise of wholesale fruit company from Omaha to Norfolk and distribution of pool cars at Norfolk; (5) merchandise and household goods to different parts of the state (origin not shown, presumably Norfolk); and (6) merchandise (welding supplies) to the Norfolk territory, including Neligh and Lyons, Nebraska.

There is no transcript of the hearing and the reporter's notes have been lost. The examiner's note sheet and report are in evidence. The examiner's note sheet shows:

"Irregular Route Operations:

(1) Point or territory where main volume of traffic is obtained: Norfolk - Madison County.
(2) Point or territory to which main volume of traffic is transported: Omaha.
(3) Additional points in state to which traffic is transported: State Wide."

The examiner's report and recommendations show: "From the evidence adduced, the examiner finds:

1. That said applicant was in actual bona fide operations as a common carrier of commodities generally by motor vehicle on April 1st, 1936, over the following irregular routes:

IRREGULAR ROUTE OPERATIONS—

1. That said applicant transports commodities generally * * *
2. That he obtains his main volume of traffic from Madison County * * *.

3. That he transports the main volume of traffic to Omaha * * *.
4. That on and since April 1st, 1936, said applicant has operated to and from various points within the State of Nebraska at large."

The appellant contends that his affidavit filed in support of his present petition, in which he affirmed "that since the year 1920 he has always held himself out to and actually physically conducted operations over irregular routes to and from all points in the State of Nebraska when called upon to do so" establishes that he was in actual bona fide operation on April 1, 1936, to and from all points in the State of Nebraska. We gather that it is appellant's position that a mere holding out to operate to or from any point statewide, and physically conducting some such operations when called upon to do so, without evidence of what operations were actually performed, constituted actual bona fide operation to and from all points statewide; and establishes not only what the order should have been, but a mistake in recording it. Even if there were actual evidence of such operation, where the action really taken by the commission was wrong, it is not the function of an order nunc pro tunc to correct it now.

The proper function of a nunc pro tunc order is not to correct some affirmative action which ought to have been taken, but its true purpose is to correct the record which has been made. The only suggestion of such a clerical error or mistake, aside from the implications, if any, which can be raised from the findings, is the assertion in the petition, unsupported by any evidence, that it is well known to the commission and others familiar with the processing of "grandfather" applications, that many inadvertent errors were committed by stenographers, and that many times the findings and intentions of the commission as shown by the approved report were not fully and correctly reflected in the final order entered by the commission.

In proceedings to secure the correction of the record of a judgment or order nunc pro tunc on the ground of alleged clerical error therein, the party moving to correct the record bears the burden of proof. In any such case, there is a presumption that a judgment appearing on the record in the regular form is the judgment rendered by the court or administrative body and not an error of the clerk. See 30A Am. Jur., Judgments, § 622, p. 600.

It is certainly significant to note that in the case at bar, the order which the appellant seeks to correct nunc pro tunc was itself signed by the chairman of the commission who was one of the two commissioners who approved the examiner's report, findings, and recommendations. His signature on the order was attested by the secretary.

The appellant contends that the facts in this case are virtually identical with the facts in Watson Bros. Transportation Co. v. Red Ball Transfer Co., *supra,* and that this case should be governed by that case. There are, however, substantial differences in the two cases. Not the least of these is the fact that in the Red Ball case, the commission approved and granted the order nunc pro tunc, while in this case, the commission denied it. In the absence of a showing to the contrary, the court or administrative body ordering the nunc pro tunc amendment of its own records is presumed to have acted properly and to have been justified in making the amendment. See 30A Am. Jur., Judgments, § 622, p. 600.

In the Red Ball case there were four widely separated points of origin even as to the "main volume" of traffic and the destination points of the "main volume" of traffic were specifically "all points within the state." The transcript of the hearing in the Red Ball case shows that: "* * * the applicant produced his files and manifest sheets of movements of commodities generally * * * by days, during the year 1936 up to April 1, 1936, and to and from various points in the State of Nebraska at large." That record also shows that at the conclusion

of the hearing, the examiner stated: "My recommendation will be to the Commission that a certificate of public convenience and necessity be granted to your company in operations the same as you have related under your regular and irregular route operations."

While it is, of course, unfortunate that the transcript of the actual hearing in the case at bar was lost, nevertheless, the facts actually of record in the two cases are very substantially different.

While the appellant here introduced substantial evidence of irregular route shipments in the state at large commencing in 1943, none of this can be considered in determining whether an order entered in 1938 was erroneously entered. Such evidence only establishes that the appellant was openly conducting nonradial operations in 1943 and thereafter.

The appellant's contention is that a clerical error was somehow made in recording the action taken. The appellant's own testimony of his conference with the commission following the entry, however, discloses that the commission had no question as to the correctness of the record, although there may have been a misunderstanding as to the interpretation of it.

The real bone of contention here is that the words "and occasionally to and from various points within the State of Nebraska at large" have been held not intended to authorize operations to and from all locations in the state. See In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507.

Appellant seeks to have the 1938 order corrected to delete any reference to any point of origin, or any point of destination, and omit the word "occasionally," upon the ground that all of these were a clerical error or mistake. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered; nor to render an order different from the one actually rendered, even though the order actually rendered was not the order the com-

mission intended to render. An order nunc pro tunc "cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made, nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to." 49 C. J. S., Judgments, § 258, p. 475.

On appeal to the Supreme Court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

The action of the Nebraska State Railway Commission in denying the petition for an order nunc pro tunc was not unreasonable or arbitrary and the action of the commission should be and is affirmed.

AFFIRMED.

OSGOOD-LEWIS-PERKINS, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ALMA M. GREEN ET AL., APPELLANTS AND CROSS-APPELLEES.
135 N. W. 2d 718

Filed June 11, 1965. No. 35857.

1. **Judgments.** A prior judgment may be an operative fact, although rules of res judicata are not applicable.
2. **Waters: Boundaries.** A general rule cannot be followed in dividing accretion among riparian landowners under all circumstances.
3. ———: ———. Under exceptional circumstances and in order to do equity, an incomplete meander line may be used as the old bank to be measured pursuant to the frontage-to-frontage method of apportioning accretion among landowners.
4. **Judgments.** If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former

action is not conclusive of the question in a subsequent suit on a different cause of action.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed in part, and in part reversed and remanded.

Otto Kotouc, Jr., William L. Walker, and Earl Ludlam, for appellants.

Wiltse, Wiltse & Lantzy and Paul P. Chaney, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

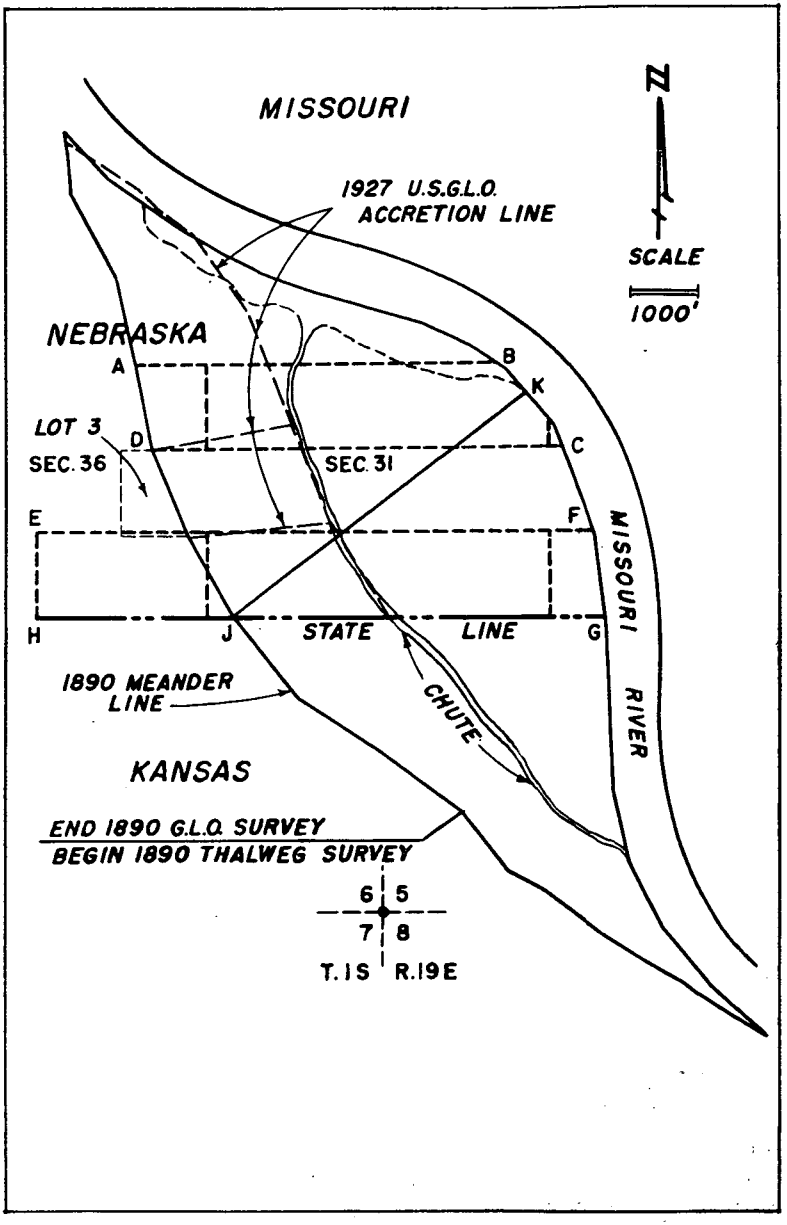
SMITH, J.

The district court quieted title in plaintiff to uplands and accretions located in Richardson County and along the Missouri River. The principal issue is the proper method of apportioning accretions.

Reference to the sketch which appears on the following page will simplify some problems. The right bank of the Missouri River in 1890 is shown by the 1890 meander line, which separates the accretions from the uplands. Title was quieted in plaintiff to tracts ABCDA and EFGHE. Defendants have renounced any interest in the disputed land located west of the easternmost 1927 U.S.G.L.O. accretion line, except for an undefined part of the lower tract which they are claiming by adverse possession.

Titles to certain other lands are unchallenged, but they are relevant to our disposition of the apportionment issue. The United States holds in trust Lot 3, also known as the Indian land; but it is not a party to this suit. We are unable to determine the nature of the trust or the applicability of state law.

Defendant Alma M. Green, hereinafter called Alma, with whom the other defendants are in privity, owns land riparian to the 1890 meander line south from the Nebraska-Kansas boundary to a point below the end of


MISSOURI
1927 U.S.G.L.O. ACCRETION LINE
N
SCALE
1000'
NEBRASKA
A
B
K
LOT 3
D
C
SEC. 36
SEC. 31
E
F
MISSOURI RIVER
H
J
STATE LINE
G
1890 MEANDER LINE
CHUTE
KANSAS
END 1890 G.L.O. SURVEY
BEGIN 1890 THALWEG SURVEY
6
5
7
8
T. 1 S
R. 19 E

the 1890 U.S.G.L.O. survey, together with all Kansas accretions extending east to the present bank of the river.

Defendants urge us to apply the ratio of frontages on the 1890 meander line to the new bank. See, Swanson v. Dalton, *ante* p. 55, 131 N. W. 2d 704; Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538. By that formula Alma would gain all accretions south of line JK, although the allocation would be diminished by her disclaimer.

A weighty factor in selecting an appropriate method of division is a prior action involving the Indian land. In 1929 the United States obtained a judgment by confession against defendants who are predecessors in title of the present parties. In that case the court added to Lot 3 the accretion bounded on the north, south, and east by the 1927 U.S.G.L.O. lines.

The judgment was rendered in accordance with a plat of survey executed by the United States Surveyor in 1927 and accepted by the Commissioner of the General Land Office. In the sketch the easternmost 1927 U.S.G.L.O. line, which is located in Nebraska, represents the 1927 meander of the right bank.

In the survey the ordinary frontage-to-frontage method of apportionment was modified by use of the incomplete 1927 line. The right bank of the river was not surveyed south of the state boundary. The explanation offered by the assistant commissioner in the acceptance was that accretion located in one state could not be attached to riparian land located in another state.

The course of the chute in Kansas, as shown in the sketch, was platted from a 1959 aerial photograph; and the evidence is persuasive that a satisfactory 1927 meander line of the bank in Kansas cannot now be established.

The 1929 judgment is not to be ignored. "* * * a judgment may be an operative fact * * * although the rules of res judicata are not applicable." Restatement, Judgments, § 111, p. 527.

General principles governing allocation of alluvion, reliction, and frontage lose utility when we unbalance competing needs for uniformity and flexibility. See Cramer v. Perine, 251 N. Y. 177, 167 N. E. 213. The judgment under review, in prolonging the sidelines easterly beyond the chute, is not responsive to the equitable demand for flexibility under the evidence.

The exceptional facts in the case at bar impel us to adopt the 1927 meander line in Nebraska as the old bank to be measured under the frontage-to-frontage method approved in Conkey v. Knudsen, *supra*. Whether or not the 1929 judgment was erroneous, it is an equitable barrier to use of the 1890 line. Our conclusion defeats defendants' claim to any land as accretion to Kansas uplands.

Defendants also rely upon principles of res judicata. Green v. Ector, 187 Kan. 240, 356 P. 2d 664, is said to be decisive of Alma's right to accretion.

In the pleadings, the findings of fact, the conclusions of law, and the judgment we discover no suggestion that title to accretion in Kansas was quieted in Alma on the basis of accretion in Nebraska. The contestants were Alma and the State of Kansas. By stipulation Alma was to prevail unless the land was an island.

Nothing in that case affects any right in this case. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former action clearly is not conclusive of the question in a subsequent suit on a different cause of action. See Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507.

Although defendants have no interest, evidence should be taken on remand in order that accretions east of the 1927 meander line may be apportioned in accordance with the method which we approve on the evidence before us. This conclusion and the state of the record are our reasons for pretermitting decision on plaintiff's claims to this land by adverse possession and record title.

Defendants' disclaimers and plaintiff's evidence of pos-

session and chains of title to land west of the 1927 meander line amply support the findings and judgment in that respect except for the interest of the United States. Several discrepancies in description should be considered on remand. The tract adjoining Lot 3 on the south and the tracts adjoining the north and south boundaries of the accretion added to Lot 3 in the 1929 judgment lack common boundaries with the Indian land. Justification does not appear.

To guide the proceeding on remand we turn to other branches of the controversy. The findings and judgment against defendants on their claim by adverse possession are correct. Contentions concerning causes of action against Alma for removal of 1962 and 1963 crops are open to disposition by the district court.

The judgment is affirmed as to the part concerning land located west of the 1890 meander line and not abutting Lot 3, and the judgment is reversed as to the other parts. The cause is remanded for proceedings consistent with this opinion, each party to pay his own costs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

MARGARET A. KASSEBAUM, APPELLEE, V. ROBERT LEE KASSEBAUM, APPELLANT.
135 N. W. 2d 704

Filed June 11, 1965. No. 35921.

1. **Divorce.** In a divorce action where no supersedeas bond is furnished, the payment of attorneys' fees and costs, and the payment of a judgment for child support do not deprive the payor of his right of appeal.
2. **Divorce: Appeal and Error.** An appellant who withdraws $200 from a former jointly held account assigned by the divorce decree to him is not estopped from appealing from the decree on the grounds that the property division awarded him was insufficient.

3. **Divorce.** A division of property in approximately equal amounts, which includes property inherited by the husband during the marriage, is not improper under the circumstances.
4. ———. An allowance of $70 per month child support for each of two children, where the husband's income was $6,850 a year, is not excessive under the circumstances.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Thomas J. Gorham, for appellant.

Kier, Cobb & Luedtke and Janice L. Gradwohl, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This is an appeal in a divorce action commenced in the district court for Lancaster County and transferred to the separate juvenile court. Prior to determination on the merits, there is a preliminary matter to dispose of.

The plaintiff filed a motion to dismiss the appeal upon the ground that the defendant had paid the court costs, attorneys' fees, and all amounts of child support required by the decree. He also had withdrawn from a joint savings and loan account of the parties, assigned to him individually by the decree, the sum of $200, after the entry of the decree. It is the contention of the plaintiff that these actions on the part of the defendant constitute acceptance of the fruits of the judgment of the lower court, and that he has, therefore, waived his right of appeal.

The payment of costs is not a waiver of the right to appeal. Woodward v. State ex rel. Thomssen, 58 Neb. 598, 79 N. W. 164. Traditionally the question of whether the payment of a money judgment cuts off the payor's right of appeal has seemed to depend on whether the payment was voluntary. The majority view appears to

be that payment of an enforcible judgment prior to issuance of an execution does not of itself cut off the payor's right to appeal. This court has previously held that payment of a money judgment was not voluntary where made to avoid a sale of property on execution. Burke v. Dendinger, 120 Neb. 594, 234 N. W. 405. In the case at bar, no supersedeas bond was furnished and execution could have been issued at any time. We think it also worthy of note that in a divorce action, the husband is responsible for the attorneys' fees of the wife. Both contempt charges, as well as criminal action, could be brought for failure to make the child support payments required by an enforcible decree. While it is true that the defendant might have availed himself of the opportunity to obtain a supersedeas, this is generally regarded as immaterial. See, 4 Am. Jur. 2d, Appeal and Error, § 260, p. 756; 39 A. L. R. 2d § 5(b), p. 160. We believe the better rule to be that in a divorce action, where no supersedeas bond is furnished, the payment of attorneys' fees and costs, and the payment of a judgment for child support do not deprive the payor of his right of appeal.

It is asserted that where the appellant has accepted the fruits of a judgment of the lower court, he waives his right of appeal. The cases cited in support of this proposition generally involve the acceptance of money deposited or paid into court. The case of Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520, is typical. It sets out the rule that a litigant cannot voluntarily accept the payment of a part of the judgment in his favor and afterward prosecute an appeal from that part of the judgment against him.

Essentially, the only acts of the defendant here relied upon as constituting acceptance of benefits of the decree consist of withdrawing $100 on two occasions from what had formerly been, and was still shown on the books of the association, as the joint account of the defendant and the plaintiff. One withdrawal was between the entry of the original decree and the amended de-

cree, and the other was 20 days after the entry of the amended decree. The amendment did not involve the account, but the account was assigned to him individually in both decrees. The record shows that he had withdrawn $613 shortly before the separation of the parties. The amount withdrawn by the defendant after the decree was less than half of the then balance in the account.

Some exceptions to the general rule on acceptance of benefits are stated in 4 Am. Jur. 2d, Appeal and Error, § 253, p. 748: "If the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal. There is no acceptance of benefits under a judgment, and hence no waiver of rights of appeal, where a party exercises a right which existed prior to the judgment and which, though recognized or confirmed by the judgment, is not merged in it."

In the case of Bohl v. Bohl, 72 S. D. 257, 32 N. W. 2d 690, a somewhat similar factual situation was involved, and the court stated: "Appellant is in this court asking for relief in addition to that awarded her by the trial court. The property which she is alleged to have accepted under the decree is personal property only, and is not in such an amount that it is probable that less might be awarded to her. Appellant, therefore, by using or accepting this property which under the decree was awarded to her has done nothing inconsistent with her present position."

An appellant who withdraws $200 from a former jointly held account assigned by the decree to him is not estopped from appealing from the decree on the grounds that the property division awarded him was insufficient. The motion to dismiss is therefore overruled.

The appeal here is upon the ground that the division of property was unfair, unjust, and inequitable, and that an allowance of $70 per month child support for each of two children, age 4 and 7 is excessive.

The property covered by the decree consisted of a

residence in Lincoln, Nebraska, purchased 3 years prior to the divorce for $17,300, on which no capital improvements had been added except some painting. The balance due on the mortgage on the residence of the parties was $11,400. The defendant testified that the property had a value of $20,000. The parties also had a savings account in Union Loan and Savings Association which, prior to their separation, had a balance of between $1,400 and $1,500, and as of the date of hearing had a balance of $511.54, the difference having been withdrawn by the defendant. There was also an equity of $3,424.70 in a real estate property in Lincoln, Nebraska, sold under contract. There was a pickup truck purchased for $205, a 1954 Chevrolet, and a 1963 Ford. The household goods, as to which no value is shown, were basically all 8 years old. In addition, the defendant had a one-half interest in farms in Thayer and Jefferson Counties, one of 75 acres and one of 48 acres, which he had inherited. He testified that his interest in these farms was worth $3,500 and that the previous year they had produced a net income of $350. The parties, prior to their separation, had had a joint checking account in the National Bank of Commerce. The plaintiff opened a separate account in the State Federal Savings and Loan Association which had more than $150 in it as of the date of trial. The defendant had two $1,000 insurance policies on his life, the cash value of which is not shown. There was no testimony as to any amounts in the defendant's separate checking account as of the date of trial. The plaintiff had made the last 4 payments on the Ford automobile in the sum of $340 and had also made the house payments of $113 per month for 6 months prior to the hearing. The defendant had paid to her the sum of $100 a month for child support for 6 months prior to the hearing. The defendant's earnings in the year prior to trial were $6,500, plus the $350 income from the farm properties. The trial court assigned to the plaintiff the Ford automobile, the household furniture and furnishings, and the

residence; and assigned to the defendant the 1950 pickup truck, the 1954 Chevrolet automobile, the balance in the Union Loan and Savings Association account, the equity in the real estate sales contract, and the farms in Jefferson and Thayer Counties.

"In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at that time, its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage; and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case." Reckling v. Reckling, 172 Neb. 731, 111 N. W. 2d 627.

The parties were married in 1954 and the plaintiff had worked as a medical technician during the 8 years of the marriage. It must be borne in mind that the divorce was awarded to the plaintiff for offenses of the defendant, and that the plaintiff was awarded the care and custody of the two minor children of the parties, aged 4 and 7. The property division was in lieu of all alimony. The plaintiff received only one car, the household furniture, and the residence. Whether the equity interest in the residence may have been $5,900 based on its purchase price just 3 years prior, or was $8,600 in accordance with the defendant's testimony, is not clear. The defendant received the equity in the real estate contract of the admitted value of $3,424.70, the savings account which was $511.54 at the time of trial, and had been $1,400 to $1,500 at the time of the separation, farm properties which, according to his own testimony, were worth $3,500, the pickup truck, and the 1954 automobile.

The division of property was close to one-half, and,

in addition, was in lieu of all alimony. Under all of the facts in this case, it cannot be said to be unjust or inequitable.

The defendant has also challenged the allowance of $70 per month child support for each of the two children. One child wore corrective shoes, one required braces on her teeth, and the other was to obtain braces. The cost for a babysitter for the children while the mother was employed was $17.50 a week. The house payments required for the residence in which the mother and children resided were $113 a month. The husband's income was $6,850 a year. Under such circumstances, the award of $70 per month per child was not excessive.

For the reasons stated, the decree of the separate juvenile court was correct and is affirmed. The plaintiff is allowed $250 for the services of her attorneys in this court.

AFFIRMED.

GEORGE SNELLING, JR., BY AND THROUGH HIS FATHER AND NEXT FRIEND, GEORGE SNELLING, SR., APPELLANT, V. LEO PIEPER ET AL., APPELLEES.

135 N. W. 2d 707

Filed June 11, 1965. No. 35927.

1. **Automobiles.** A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.
2. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.
3. ———. The benefit or compensation accruing to the owner or operator need not be in cash or its equivalent and the benefit or compensation to the owner or operator need not pass from the passenger to the driver.

4. ———. Each individual case must be determined separately and the answer ascertained from the relationship between the parties and the purposes to which the transportation is incident.

5. **Automobiles: Parent and Child.** Where the owner or operator of an automobile transports a minor child, with the consent of the child's parents and pursuant to and in performance of a contract for the care of said child, such carriage confers a tangible and substantial benefit upon such owner and operator beyond those merely incidental to hospitality and social relationship.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

Schrempp, Lathrop, Rosenthal, Albracht & Bruckner, for appellant.

Boland, Mullin, Walsh & Cooney, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

Plaintiff, a 12-year-old boy, suffered a broken leg and injuries resulting from a one-car accident occurring on July 27, 1962, when defendant Pieper's station wagon went out of control, overturned, and crashed while going around a sharp curve. The trial court found, as a matter of law, that plaintiff was a guest under section 39-740, R. R. S. 1943, and by appropriate instruction required the plaintiff to prove gross negligence. The verdict of the jury was for the defendants. Defendant Pieper had permitted the 15-year-old, unlicensed defendant Alfrey to drive his station wagon. Pieper was sitting in the front seat watching and directing the driving. As the station wagon approached the curve, it went into a skid and Pieper grabbed the steering wheel and attempted to make the turn himself. The station wagon went out of control and overturned. The assignments of error present no question concerning this phase of the case. The sole question presented in this appeal is

whether or not the plaintiff was a guest.

At the time of the accident, defendant Pieper was returning to his home in Omaha from a 3-week vacation and camping trip on the Fremont Lakes. He had tents, a boat, and other equipment on the lakes and had taken his own children and the plaintiff there during this period. Plaintiff's father had been divorced and in March 1962 hired the defendant Pieper to take care of the plaintiff for $15 per week. The evidence is undisputed. Pieper was to have the custody of plaintiff in his home in Omaha and generally care for him. The father of the plaintiff was to furnish him clothing and an allowance. The father's undisputed testimony is as follows: "Q. What in return did Mr. Pieper agree to do for that $15? A. See that the boy went to school properly, got home at the right time in the evening, see that he had recreation, correct recreation, completely guide him and everything, punish him if he needed it, take complete care of him."

Pieper called plaintiff's father and received his consent to take the plaintiff from Pieper's home to the vacation spot on the lakes. It appears that the plaintiff was kept there under the control and direction of defendant Pieper during the entire period of 3 weeks. Pieper was paid $15 per week for this period in accordance with the terms of the agreement.

Under the guest statute, section 39-740, R. R. S. 1943, the applicable test is stated in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, as follows: "A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or busi-

ness purpose of the owner or operator, he is not a guest."

Each individual case must be determined separately and the answer ascertained from the relationship between the parties and *the purposes to which the transportation is incident.* Van Auker v. Steckley's Hybrid Seed Corn Co., *supra.*

The benefit or "compensation" accruing to the owner or operator need not be in cash or its equivalent and the benefit or compensation to the owner or operator need not pass from the passenger to the driver. Sunderman v. Wardlaw, 170 Neb. 70, 101 N. W. 2d 848; Van Auker v. Steckley's Hybrid Seed Corn Co., *supra;* Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593.

In Born v. Estate of Matzner, *supra,* we said: "A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation."

Applying the above principles we examine the relationship between the parties to determine what the motivating influence was for furnishing the transportation and the stay at the lakes to the plaintiff, and determine if there was a benefit to defendant Pieper beyond that incidental to hospitality, social relations, companionship, or the like. It is true defendant Pieper incidentally benefited from plaintiff's presence as to companionship and social relations as he did from the companionship of his own five children. They were kept together at the lakes the same as they were at home. There was a special motivating purpose and reason for taking the plaintiff on the trip. Pieper wanted to take his 3-week vacation with his family and at the same time perform his contract of caring for the plaintiff. At home the plaintiff was cared for and controlled along with the children of the defendant Pieper, and the contract, both directly and impliedly, required him to furnish recreation in the normal and usual manner, the same as he did for

his own children. The transportation of the plaintiff on the trip was a necessary part of this purpose and plan. He had a joint purpose in the stay at the lakes. It was the performance of his contract, care of the plaintiff, care of his own children, and the enjoyment of his vacation. It is argued that he could have left the plaintiff at home. Perhaps he was not obligated to take the plaintiff on this particular trip. But, he had been caring for and controlling the plaintiff as one of the family along with his own children. He construed the contract as requiring this. He merely changed the place of performance. In any event, the fact is that he elected to perform his contract of care and to furnish this recreation to the plaintiff at the place he did. The defendant Pieper was seeking a method by which he could perform his contract and at the same time enjoy his vacation. He received the consent of the plaintiff's father. The father's uncontradicted testimony is: "He asked me if the boy could accompany him, and I told him that he had *complete charge of the boy, and that if he went to the lakes the boy would have to go with him because I was working out of town.*" (Emphasis supplied.) The contract in no way was altered. Pieper merely received consent to perform it and furnish the recreation incidental to it while keeping the plaintiff at the lakes. We therefore come to the conclusion that the defendant Pieper received a substantial and tangible benefit over and beyond the companionship of the plaintiff and the social relation normally incident to the family relationship. In essence, we see no difference between this trip and one at home in which he would be returning the plaintiff from a visit to the movie, the zoo, or the circus with other members of the family. Again, we point out that he received $45 for the 3 weeks he had the plaintiff at the lakes. This payment and the conduct of defendant Pieper in performing his contract are repugnant to the defendants' contention that the stay at the lakes was a mere gesture of hospitality and not connected with

or a part of the contract for the care of the plaintiff. We further point out that the plaintiff himself had no choice but to go on the trip or no power to control movements of the automobile. He was merely following the orders of the defendant Pieper.

Although there is a diversity of opinion, the weight of authority seems to be that a minor who, with the consent of the parents, is transported gratuitously is a guest within the meaning of comparable guest statutes. See, cases in Annotation, 16 A. L. R. 2d 1304; cases in Annotation, 2 A. L. R. 2d, Later Case Service, pp. 945, 946; Horst v. Holtzen, 249 Iowa 958, 90 N. W. 2d 41; Buckner v. Vetterick, 124 Cal. App. 2d 417, 269 P. 2d 67; Chancey v. Cobb, 102 Ga. App. 636, 117 S. E. 2d 189; Lynott v. Sells, 52 Del. 385, 158 A. 2d 583. None of the above cases pass upon the question involved here where the child is being cared for under a contract for hire. The only case cited by counsel which appears to be in point is Wendel v. Shaw, 361 Mo. 416, 235 S. W. 2d 266. In that case the defendants were keeping a child in their Missouri home under a custodial contract for hire. An accident occurred while they were taking a trip into Kansas to take the child to a pony ride. The court held that the child was a passenger and not a guest. We feel that the reasoning in this case is sound and directly applicable to the circumstances and facts of the present case. In the above case, it was held: "In our case, the transportation was not a gesture of hospitality—not a part of the courtesies of a host. The transportation was actuated or motivated by the existent contractual relationship by virtue of which a valuable consideration was to be paid to defendant. Defendant was *hired* to temporarily keep and care for plaintiff, and, while plaintiff was in defendant's custody and while he was caring for her for a valuable consideration, defendant put plaintiff into his automobile and took her to see the ponies. Can it be soundly said plaintiff was transported gratuitously?"

We come to the conclusion that, as a matter of law, plaintiff occupied the status of passenger in the automobile of the defendant Pieper and could recover on proof of ordinary negligence. The trial court instructed otherwise and this was error. The evidence was ample to sustain a finding of ordinary negligence as to the defendants. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., dissenting.

The evidence shows that defendant Pieper took his children and the 12-year-old plaintiff on a 3-week vacation and camping trip to the Fremont Lakes. The accident which caused injury to the plaintiff occurred during the return trip. The sole issue is whether or not plaintiff was a guest or a passenger for hire.

Pieper was caring for the plaintiff, as shown by the majority opinion, for an agreed compensation of $15 per week in accordance with an understanding with the boy's father. It is my contention that the vacation and camping trip was a gratuitous gesture on the part of Pieper, completely outside of the scope of his agreement to care for the boy. Pieper was to receive his $15 per week whether he took the boy on the outing or left him at home with his wife. The fact that Pieper called plaintiff's father for permission to take the boy on the outing is indicative that the trip was gratuitous and not a contractual obligation. He was a guest on the trip the same as Pieper's own children. The holding of the majority that the agreement to pay Pieper $15 per week for the care of the boy was a payment for transportation on this unusual vacation trip is contrary to a long line of holdings of this court. The rule in this state is: "A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation." Born v. Estate of Matzner, 159 Neb. 169, 65 N. W.

2d 593. See, also, Carter v. Chicago, B. & Q. R.R. Co., 170 Neb. 438, 103 N. W. 2d 152.

I submit that the vacation trip was not pursuant to any contractual obligation, and that the payment of $15 per week was not, nor intended to be, compensation for transportation on this vacation trip. The benefit to Pieper was not a tangible nor substantial one, nor was it a motivating factor in making the trip. The majority holding that the cost of transportation of this 12-year-old plaintiff was a motivating factor in making the trip is not sustained by evidence or inference. Such finding is based on a strained consideration of the facts and an impracticable refinement of the definition of a passenger for hire that leads to an unjustified conclusion. The majority opinion is inconsistent with the previous holdings of this court and amounts to an unwarranted extension of the definition of a passenger for hire.

The trial court correctly determined that plaintiff was a guest in the automobile of Pieper at the time of the accident, and I would affirm the judgment based on such determination.

BROWER, J., concurs in this dissent.

HARRY H. BICKELS ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
135 N. W. 2d 872

Filed June 18, 1965. No. 35890.

1. **Eminent Domain: Evidence.** The law in this jurisdiction is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the carrying on of the business in its established location cannot be considered in estimating the damages.
2. **Eminent Domain: Statutes.** Section 76-710.01, R. S. Supp., 1963, has not changed the rule in this respect.
3. **Statutes.** In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and

the particular topic under which the language in question is found, and the intent so deduced from the whole will prevail over that of a particular part considered separately.

4. **Eminent Domain: Witnesses.** It is not proper in a condemnation action to put into evidence the names and qualifications of the witnesses who appeared before the board of appraisers for the purpose of creating an inference that certain witnesses were not called because their testimony would not sustain the contention of the party who may have used them before the board of appraisers.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

Floersch & Floersch, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and James J. Duggan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

SPENCER, J.

This is a condemnation action involving the total taking of two lots at Thirty-sixth and A Streets in Omaha, Nebraska. A neighborhood grocery store was in operation on the premises on April 1, 1960, the date of the taking. The stock of groceries and meats, and the removable fixtures which were located on the improvements at that time, were not included in the condemnation.

The appellants, Harry H. Bickels and Julia J. Bickels, owned the premises and had profitably operated the business thereon for several years. Their average yearly sales, using the last 3 years, was $171,000. Appellants were unable to locate another store to which they could move their stock and fixtures, so attempted to dispose of them by special sales. They sold some of the stock by discount sales in the ordinary course of trade, and the rest in quantity sales to other grocers. Most of the latter they delivered to the purchasers. The fixtures

were sold piecemeal, with the exception of a dairy case which appellants had moved to storage. The cost of moving this case was $35. Appellants vacated the premises in May 1960. They did not resume a business venture until December 1961, when they purchased the stock and fixtures of another grocery store in a different section of the city of Omaha.

Appellants' assignments of error, with one exception, are premised on the trial court's refusal to permit them to prove loss of profits by reason of the interruption of their business during the period of relocation, and the loss they claim was occasioned by the forced sale of the removable fixtures and the stock.

The law in this jurisdiction is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the continued carrying on of the business in its established location cannot be considered in estimating the damages. James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273; Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865.

The primary question involved herein is whether section 76-710.01, R. S. Supp., 1963, has changed the rule to permit a recovery for loss of profits. This section reads as follows: "Where any condemner shall have taken or attempts to take property for public use, the damages for taking such property shall be determined according to the laws of this state irrespective of whether the condemner may be reimbursed for a part of such damage from the federal government and such damages shall include all compensable damages suffered by the condemnee including but not limited to the reasonable cost of any necessary removal of personal property from the real estate being taken and condemnee's abstracting expenses."

This statute was originally passed by the 1959 Legislature in the following form: "Where any condemner shall have taken or attempts to take property for public

use, the damages for taking such property shall be determined according to the laws of this state irrespective of whether the condemner may be reimbursed for a part of such damages from the federal government and such damages shall include the reasonable cost of any necessary removal of personal property from the real estate being taken." The statute was then amended in 1963 by adding the portions italicized in the following quotation: "* * * and such damages shall include *all compensable damages suffered by the condemnee including but not limited to* the reasonable cost of any necessary removal of personal property from the real estate being taken *and condemnee's abstracting expenses.*"

It is appellants' assertion that the use of the words "all compensable damages suffered by the condemnee including but not limited to" in the last amendment indicates an intention on the part of the Legislature to increase the amount of the recovery allowed the condemnee in a condemnation case to include all damages sustained if provable, whether previously compensable or not. We do not so construe it. We construe "all compensable damages" to refer to such damages as are now recoverable by our laws. This seems to be evident by the inclusion of the additional specific items. If the Legislature had intended to allow recovery for any and all damages, whether previously compensable or not, limited only by the condemnee's ability to prove them, it does not seem likely that it would have added the specifics because they would be included in the general provision. This is in harmony with well-recognized principles of statutory construction. In Lang v. Sanitary District, 160 Neb. 754, 71 N. W. 2d 608, we said: "In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent so deduced

from the whole will prevail over that of a particular part considered separately."

Appellants complain of the refusal of a tendered instruction which would have permitted the allowance of the costs of removal if the jury found the stock and fixtures were in the premises on the date of condemnation, regardless of whether any removal expense was incurred. We suggest that the statute permits the recovery of the cost of any *necessary* removal of personal property from the real estate being taken. Certainly, if the personal property is sold in such manner that the condemnee incurs no expense in its removal, it is hard to understand on what basis he should be compensated. In appellants' case the bulk of the merchandise was sold through regular trade channels. The hard-to-move items were sold to other grocers, and were delivered by the appellants themselves to the purchasers. There is, however, no evidence in this record on the cost of these deliveries. If such expenses were proved, they would be recoverable. The fixtures, except for the dairy case, were sold on the premises and were moved by the purchasers.

Appellants contend the price of the fixtures were made attractive enough that the buyer was willing to move the item bought. The fixtures, however, were priced by an expert and there is no indication in the record that the price did not reflect the then value. If appellants had moved them to another location and had been reimbursed for the moving expense, there is no indication in the record that the items would have been priced differently than they were. Appellants clearly were entitled to the recovery of the $35 paid for the moving of the dairy case, which is the only item they admittedly paid to remove. The court directed on this item.

The appellee, in the cross-examination of appellants' witnesses, as well as in the direct examination of its own witnesses, put into the record the names of the witnesses who appeared for the appellants before the board

of appraisers. These included one Lewis C. Sholes who did not appear at the district court hearing. Appellee then adduced evidence as to the qualifications of Lewis C. Sholes as an expert appraiser. This testimony was admitted over objection. At the close of the testimony, appellants moved to strike all of it and to instruct the jury to disregard it. The motion was overruled. There is no question this testimony was incompetent, irrelevant, and immaterial, and did not tend to prove or disprove any issue in the case. The issue was the value of the property taken and not who may or may not have appeared before the board of appraisers or what evidence if any was adduced before the board. The constant reiteration of the name of Lewis C. Sholes was clearly an attempt on the part of appellee to get before the jury the fact that appellants had used an expert appraiser before the board of appraisers but for some reason failed to produce him at the trial. Appellee argues that: "* * * Lewis C. Sholes is not just a possible witness picked out of the blue. He is an expert real estate appraiser hired by plaintiffs, for the express purpose of testifying in behalf of plaintiffs. Therefore, when such a witness is not called to testify during trial, that fact does, indeed, give rise to some justifiable speculation."

It is true that in certain situations, the unexplained failure to call a witness who possesses peculiar qualifications may give rise to an inference that the testimony of the uncalled witness would not sustain the contention of the party. Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328. This, however, is not one of those instances. The meeting of the board of appraisers to assess the damages affords the condemnee and condemner a chance to produce evidence of value, but the appraisers are also required to inspect the premises and because of their special qualifications are not bound by the testimony adduced at the hearing. We have heretofore changed the rule so that the evidence of the award of appraisers cannot be ad-

duced in the district court trial. Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201. What transpired before the board of appraisers is not competent testimony in the district court hearing unless in the proper situation it is adduced in a legal manner as impeachment testimony. It is only right that we should not permit inferences, proper or otherwise, to be drawn from the failure to use the same alleged experts who appeared before the board. If a condemnee does not feel he wishes to rely on an alleged expert he consulted, by calling him as a witness, he should not be required to explain his action.

Because this judgment is to be reversed, we note a more serious error which appellants do not assign. That is the admission over objection of impeaching testimony without the laying of a proper foundation for its admission. A proper motion was made to strike this testimony, and was overruled. The motion should have been sustained. As we view this record, the actions of appellee prevented appellants from having a fair trial, and for that reason the judgment must be reversed and the cause remanded for a new trial in conformity with the law.

REVERSED AND REMANDED.

FIRST BAPTIST CHURCH OF MAXWELL, NEBRASKA, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
135 N. W. 2d 756

Filed June 18, 1965. No. 35920.

1. **Eminent Domain: Witnesses.** Ordinarily, a resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation.
2. ———: ———. Mere membership in a church or an organization does not bring a lay witness into such relationship with property that he may testify as to its value without further foundation.

3. ———: ———. As a general rule, a witness need not be an expert to testify as to the value of land. The admission of such testimony rests in the sound discretion of the court.
4. ———: ———. A witness' testimony as to value is ordinarily received if he shows an acquaintance with the property and is informed as to the state of the market.
5. ———: ———. Mere familiarity with the physical structure and location of the property is not sufficient foundation to render a lay witness competent to testify as to valuation.
6. **Eminent Domain: Evidence.** Testimony as to the cost of property or as to the cost of remodeling property 8 to 14 years prior to the time of the taking is not competent evidence of market valuation because of its remoteness in point of time.
7. ———: ———. Where there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, the general rule is that resort may be had to some other method of fixing the value of the property.

Appeal from the district court for Lincoln County: JOHN H. KUNS, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and James F. Petersen, for appellant.

Beatty & Morgan and Leonard P. Vyhnalek, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

WHITE, C. J.

This is an action in eminent domain against a church property in Maxwell, Nebraska. In order to straighten a state highway that formerly jogged at right angles, the State condemned one-half of the church parking lot (80 feet x 148 feet), so that the new road ran diagonally from the northwest corner to the southeast corner of the lot. The church was located on a lot of the same size immediately to the west. The church also owned a lot immediately to the south of the one from which the diagonal strip was taken. The taking was on March 18, 1961. The amount of land actually taken was 0.14

acres. About 10 cars could be parked in the lot after the taking and about 28 before the taking. The jury found the value of the diagonal strip taken as $200 and found the difference in value of the remainder before and after the taking as $10,750. The court made the computation from the special findings of the jury and entered judgment for $10,950. The State appeals. The sole question presented on appeal is the sufficiency of foundation and the competency of two of the church's witnesses, Frank Christensen and Loren Hall.

Christensen and Hall are both lay witnesses, are long-time members of the church, and are farmers living near Maxwell. Christensen had been an officer of the church. The church is situated in the village of Maxwell, was built in 1905, was originally a cement block structure, was remodeled between the years 1947 to 1953, and both Christensen and Hall helped in the remodeling. The building was extended to the south, new floors were installed, the outside was finished in brick veneer, and other changes were made. Christensen, over objection, testified as to the cost of remodeling as being $44,281.06 between the years 1947 and 1953. Both Christensen and Hall attend church and are familiar with the physical structure of the property. There is no evidence in the record that they are acquainted with the state of the real estate market, or with the market value of properties in the vicinity, or have any further foundation for their testimony, other than their membership and familiarity with the property. Hall was not interrogated as to whether he had a knowledge of real estate or market values of property in the area, and Christensen, when asked if he kept track generally of values, answered, "Not very much." There is no evidence that either Christensen or Hall were property owners.

We have said many times that a resident owner who is familiar with his property and knows its worth may testify as to value without further foundation. Lans-

man v. State, 177 Neb. 119, 128 N. W. 2d 569; Missouri Pacific Ry. Co. v. Coon, 15 Neb. 232, 18 N. W. 62; Johnson v. City of Lincoln, 174 Neb. 837, 120 N. W. 2d 297; Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N. W. 571; Schmailzl v. State, 176 Neb. 617, 126 N. W. 2d 821.

Membership in the church does not bring these witnesses into a relationship with the property so they may testify as to valuation without foundation. An officer or president of a corporation is not an owner of property belonging to the corporation in the sense of the word when applied to an individual owner. There is no presumption in his favor as in the case of an individual owning property, and in order to qualify he must be shown to be familiar with the property and have such a knowledge as to qualify him to testify because of his knowledge of values generally in the vicinity. Omaha Loan & Trust Co. v. Douglas County, 62 Neb. 1, 86 N. W. 936. We come to the conclusion that membership in the church does not qualify them to testify as to the value of the church without further foundation.

Our cases have permitted considerable latitude in the admission of lay testimony as to valuation. See, Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; Whalgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833; Johnson v. City of Lincoln, *supra*. But, a jury verdict in an eminent domain case may not be based on conjecture and speculation derived from opinion evidence as to valuation without any foundation. It is clear that some foundation must be laid for a lay witness to testify and his opinion must have some basis on which he can make an intelligent estimate of the value of the property. This, generally, as appellee points out, must be based on his *knowledge of the property* and *his knowledge of values*.

The proper rules are comprehensively stated in Evans v. State, 176 Neb. 156, 125 N. W. 2d 541, as follows: "It is the general rule that a witness need not be an expert

to testify to the value of land. Market value is not a question of science or skill upon which experts alone may give an opinion. Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N. E. 486. It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge *of the nature and kind of property* in controversy, and *of its value.* City and County of Denver v. Lyttle, 106 Colo. 157, 103 P. 2d 1. It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value. Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S. W. 2d 22, 65 A. L. R. 440. It is most difficult to state an all-inclusive rule fixing the qualification of witnesses to give their opinions as to the market value of land. Their testimony is ordinarily *received if they show an acquaintance with the property and are informed as to the state of the market,* the weight and credibility of their evidence being for the jury. Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Beebe & Runyan Furniture Co. v. Board of Equalization, 139 Neb. 158, 296 N. W. 764; 1 Orgel on Valuation Under Eminent Domain (2d Ed.), §§ 132 and 135, pp. 564 and 580, respectively." (Emphasis supplied.)

We have recently restated the same rules in Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291, and Dawson v. City of Lincoln, 176 Neb. 311, 125 N. W. 2d 908.

There is no evidence that either Christensen or Hall were property owners. The theory on which the trial court received this evidence, over objection, was that these two witnesses were qualified in the same manner as owners, since they were members. This was error as we have seen. The lack of foundation otherwise is almost apparent. There is a total absence of testimony that they were familiar with real estate values; that they were informed as to the state of the market; or that they kept track of sales or any other pertinent in-

formation usable as a basis for an intelligent estimate of value. Mere familiarity with the physical structure and location of the church does not automatically render them competent to testify as to value, nor does participation in the remodeling activities beginning 14 years prior to the taking furnish an adequate basis. Testimony as to the cost of remodeling the property 8 to 14 years ago is not competent evidence of market valuation because it is not relevant and is too remote in point of time. See, Dietrichs v. Lincoln & Northwestern R. R. Co., 12 Neb. 225, 10 N. W. 718; Omaha Southern Ry. Co. v. Todd, 39 Neb. 818, 58 N. W. 289; Raapke & Katz Co. v. Schmoller & Mueller Piano Co., 82 Neb. 716, 118 N. W. 652; 5 Nichols on Eminent Domain (3d Ed.), § 21.2, p. 410.

Appellee also argues that knowledge of the market is not essential; that the church property is unique and peculiar in nature; that there are no comparable sales in the area; and that it is necessary to look to the intrinsic value of the property or some other means of fixing its valuation. On this point this court said in Graceland Park Cemetery Co. v. City of Omaha, 173 Neb. 608, 114 N. W. 2d 29, as follows: "The fair market value of property implies proof of sales of similar property in the community as a means of fixing the value of the property taken. When the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised. This is true, as we view it, of such properties as school yards, church yards, college campuses, buildings under construction, and cemeteries. 1 Orgel on Valuation under Eminent Domain, § 38, p. 175."

Where there is proof that there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, the general rule is that resort may be had to some other method of fixing the value of property. Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 335 Mass.

189, 138 N. E. 2d 769. See, 4 Nichols on Eminent Domain (3d Ed.), § 12.32, pp. 217 to 228; 5 Nichols on Eminent Domain (3d Ed.), § 18.41 (3), p. 230, § 18.42, p. 234; Jahr, Eminent Domain, §§ 71, 78, 82, pp. 102, 111, 116 (specialty uses), §§ 83, 84, pp. 117, 118 (properties of nonprofit organizations); 1 Orgel on Valuation under Eminent Domain (2d Ed.), §§ 30, 37 to 40, especially at pp. 177 to 179, 181 to 183; Manify, Elements of Damages in Eminent Domain, 34 B.U.L. Rev. 146, 151, 152; McCormick, The Measure of Compensation in Eminent Domain, 17 Minn. L. Rev. 461, especially at pp. 467 to 470.

Depending on the nature of the property, the authorities have supported different methods of determining value in these situations. Expert testimony as to reproduction or replacement cost, less depreciation, has been approved in many cases as competent foundation evidence to support an opinion as to valuation. See 4 Nichols on Eminent Domain (3d Ed.), § 12.32, notes 18 and 19, pp. 227, 228, and cases cited thereunder.

The difficulty with appellee's position in this respect is the total absence of qualifications or foundation testimony by these witnesses supporting foundational facts for any other method of valuation of the property. These witnesses were not examined in the area of the total cost of the property, its reproduction or replacement cost with allowances for depreciation. Their valuation testimony was based on conjecture and speculation. The prejudicial nature of this testimony is demonstrable from the record. The appellee called three expert witnesses who gave valuations of $60,000 to $65,000 before the taking, with opinions as to remainder damage ranging from $6,150 to $7,200. Both Christensen and Hall fixed the value before the taking at $80,000, with opinions as to remainder damage at $20,000 and $30,000, respectively. It is conceded by the State that the testimony of the three experts of the appellee was competent. In each case their testimony was supported by their estimate of reproduction and replacement cost, less depreciation.

The judgment of $10,950 was $3,750 above the upper limit of the appellee's competent valuation testimony. While the jury is not bound by the testimony of any particular witness, it does not appear that it was not influenced by the incompetent opinions as to valuation by the witnesses Christensen and Hall. Quite the opposite conclusion is more agreeable to reason. In any event error in the admission of evidence is presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted. Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co., 177 Neb. 287, 128 N. W. 2d 773; Grantham v. Farmers Mutual Ins. Co., 174 Neb. 790, 119 N. W. 2d 519. We come to the conclusion that prejudicial error was committed in the admission of the opinons of the witnesses Christensen and Hall as to valuation. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ANNA GORMAN, APPELLANT, V. WORLD PUBLISHING CO., A CORPORATION, APPELLEE.

135 N. W. 2d 868

Filed June 25, 1965. No. 35899.

1. **Negligence.** The mere fact that an invitee falls at the entrance of a building where a difference in levels is present does not raise any presumption of negligence on the part of the owner and the doctrine of res ipsa loquitur does not apply.
2. ———. The owner of the building has a legal duty to exercise ordinary care to keep the premises reasonably safe for the use of a business invitee. The defendant is not an insurer of the safety of invitees.
3. ———. Negligence and a duty to use due care does not exist in the abstract, but must be considered against a particular set of facts and circumstances. The mere fact that there is a slight difference between levels in different parts of a building or on premises outside the building which the public is

invited to enter does not, in itself, constitute negligence.

4. ———. A change of level in the entrances or exits of buildings is to be expected and sidewalk and entrance elevations to most places, public and private, are quite without uniformity.

5. ———. Where there is no evidence of an unusual change in elevation, nor one at a place not to be expected; where a change in level extended uniformly and continuously for 30 feet across the entire entrance, with variations in color and texture of surfaces at the junction; where there is no evidence of unusual distractions and the fall occurs outside the entrance of a building in broad daylight; and where the plaintiff is familiar with the entrance and particular approach used, it is not a trap, and motion for directed verdict should have been sustained.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Martin A. Cannon, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotch, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

MCCOWN, J.

This is a negligence action brought by a business invitee against the owners of a building for injuries suffered in a fall near the entrance. The jury returned a verdict for the defendant and the plaintiff has appealed.

On March 30, 1961, at 1:30 p.m., on a sunny day, the plaintiff, a woman 66 years of age, came by automobile to the Doctors' Building in Omaha, Nebraska, to consult her physician, a tenant in the building. The defendant owned and maintained the building as an office building for physicians and others connected with the healing arts. Access to the defendant's building was provided by an entrance approximately 30 feet wide, with two revolving doors in the center and a regular door on either side. A driveway came up from the street and

extended across the entryway, and provided access for all traffic, wheeled or afoot. A roof or marquee extended over the driveway for the width of the entrance. The inside lobby floor was of terrazzo and extended about 18 inches outside the doors where it ended against an aluminum strip that joined the concrete driveway, which served for both pedestrian and auto traffic. At the junction of these two surfaces, and 18 inches outside the doors, there was a difference in level. The driveway was one-half inch lower than the terrazzo. The ridge or seam was square because of the aluminum edge on the terrazzo surface. The terrazzo was a light tan in color, smooth and polished in texture, and the driveway was concrete.

The plaintiff got out of the car driven by her husband at a point in front of the entrance, walked around on the driveway behind the car, and approached the doors. Her toe hit something which she identified as the joining where the terrazzo joined the concrete. It threw her forward into the door and she sustained severe personal injuries.

There is no question but that the plaintiff was an invitee. The defendant had a legal duty to exercise ordinary care to keep the premises reasonably safe for the use of the invitee. The defendant is not an insurer of the safety of invitees. The liability of the defendant is for its own negligence. Jeffries v. Safeway Stores, Inc., 176 Neb. 347, 125 N. W. 2d 914; Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648.

The mere fact that an invitee falls at the entrance of a building where a difference in levels is present does not raise any presumption of negligence on the part of the owner and the doctrine of res ipsa loquitur does not apply. Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Sipprell v. Merner Motors, *supra*.

In such cases negligence and the duty to use due care does not exist in the abstract, but must be measured

against a particular set of facts and circumstances. The mere fact that there is a slight difference between levels in different parts of a building or on the premises outside the building which the public is invited to enter, does not in itself constitute negligence. See Kelley v. Luke, 140 Neb. 283, 299 N. W. 593. Our cases have previously drawn a distinction between conditions existing inside and outside the inviter's place of business. We have held that the duty as to maintenance of floor conditions is higher inside the inviter's place of business for the reason that the invitees are examining merchandise and that the inviter invites a condition in which their attention is diverted to the inspection of merchandise and the other ordinary incidents of the inviter's business. Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578. These differences do not affect the legal duty to exercise ordinary care, but recognize that all the facts of location and surrounding circumstances enter into the determination of what is reasonable in a particular case.

At this point, we revert to a more detailed examination of the facts as to the particular difference in levels which is the sole basis for the claim of negligence against the defendant. The plaintiff and her witnesses testified as to the appearance of the seam between the terrazzo and the concrete, and two photographs were introduced in evidence, one showing the seam or joinder from the front, the direction from which the plaintiff approached, and the other laterally. The plaintiff testified that she had been in and out of the building many times; that she had noticed the line where the terrazzo and concrete met many times; that she had seen the ridge or seam many times before; but that she did not know of the difference in levels. Her husband and son both testified that they could see the seam or ridge, but could not tell the difference in levels looking down at it, except upon close examination. They identified the seam or ridge by marking or identifying it on the photographs.

It has been stated by many courts and on many occa-

sions that it is a matter of common knowledge that a change of level at the entrances or exits of buildings is to be expected, and that sidewalk and entrance elevations to most places, private and public, are quite without uniformity. See, Sullivan v. Chicago & Northwestern Ry. Co., 128 Neb. 92, 258 N. W. 38; Cates v. Evans (Mo. App.), 142 S. W. 2d 654; Dominguez v. South Western Greyhound Lines, 49 N. M. 13, 155 P. 2d 138; Hoyt v. Woodbury, 200 Mass. 343, 86 N. E. 772, 22 L. R. A. N. S. 730.

Jones v. Great Atlantic & Pacific Tea Co., 9 N. Y. S. 2d 81, involved a fall on a sidewalk near the entrance to the defendant's store. The opinion does not state the exact difference in levels on which the plaintiff fell. The court affirmed the dismissal of plaintiff's complaint and stated: "The difference in elevation between the sidewalk and the concrete slab forming the entrance to defendants' store was so slight that a reasonably prudent person would not have anticipated that it would be the cause of an accident such as happened in this case." That case cites several cases involving minor differences in elevation, varying from $\frac{3}{8}$ to $\frac{3}{4}$ of an inch, both inside and outside of buildings, in all of which the petitions were dismissed.

It is the plaintiff's contention that the difference in level was so slight as to be unnoticeable and, therefore, that it constituted a trap. A careful examination of the cases cited and relied upon by the plaintiff in her able brief does not reveal a case directly in point upon its facts. Here there is simply no evidence that this was an unusual change in elevation; nor one at a place not to be expected; nor a situation in which the danger is accentuated by either too much light in the wrong place or too little where it could have afforded protection. It cannot be said to present a hidden or concealed danger for any person using it in broad daylight, where it extended uniformly and continuously for 30 feet across the entire entrance, with variations in color and tex-

ture of surfaces at the junction, and where there is no evidence of unusual distraction. See Holmes v. State of New York, 5 Misc. 2d 838, 161 N. Y. S. 2d 913.

The rule is, of course, well established that it is not negligence to maintain, under appropriate circumstances, different levels in approaches to places of business. The plaintiff had visited this building many times before and must have been, and concededly was, familiar with the entrance and particular approach used, which we cannot say was unusual nor that it presented a trap for business patrons. From the particular facts here, it must be said as a matter of law that the defendant's motion for directed verdict should have been sustained.

In view of this determination, the plaintiff's assignments of error relating to evidence as to the repairable nature of the defect charged and assignments of error relative to instructions become immaterial and it is, therefore, unnecessary to consider them.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

MICHAEL GORMAN, APPELLANT, V. WORLD PUBLISHING CO., A CORPORATION, APPELLEE.
135 N. W. 2d 871

Filed June 25, 1965. No. 35947.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Martin A. Cannon, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotch, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

McCOWN, J.

This is a companion case to that of Gorman v. World Publishing Co., *ante* p. 838, 135 N. W. 2d 868. It involves the husband's action for medical expenses and loss of consortium arising out of a fall by his wife at the entrance to a building. The jury was unable to agree and thereafter the district court sustained a motion of the defendant for judgment.

The facts of the Anna Gorman case and the ruling therein are controlling and dispositive of this case.

The judgment of the district court is affirmed.

AFFIRMED.

FRED VAP ET AL., APPELLEES, V. CITY OF McCOOK, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, STATE OF NEBRASKA, DEPARTMENT OF ROADS, INTERVENER-APPELLANT.

136 N. W. 2d 220

Filed July 2, 1965. No. 35902.

1. **Municipal Corporations.** Unless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers.
2. ———. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.
3. **Municipal Corporations: Highways.** The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto, where a matter of statewide policy and concern are involved.
4. **Highways.** Parking on the state highway system is a matter of statewide concern.

5. **Municipal Corporations.** Parking in a city is a privilege and subject to regulation by proper authorities.
6. **Municipal Corporations: Streets.** One has no legal right to appropriate a part of the street to the purpose of his private business or to be used as a part of or to improve and make more useful a facility used in the conduct of his business.
7. **Municipal Corporations: Highways.** Under section 39-1307, R. R. S. 1943, the Legislature has expressly authorized and delegated to the Department of Roads on behalf of the state and any political or governmental subdivision of the state authority to enter into agreements with each other respecting the planning, designating, financing, establishing, constructing, improving, maintaining, using, altering, relocating, regulating, or vacating of highways, roads, streets, or connecting links.
8. ———: ———. The city may under section 39-1307, R. R. S. 1943, contract with the state through the Department of Roads to prohibit parking on a street which forms a connecting link on the state highway system. In so doing the police power of the city is not bartered away but only limited in its exercise as specifically authorized by law.

Appeal from the district court for Red Willow County: NORRIS CHADDERDON, Judge. Reversed and remanded with directions.

Russell & Colfer and Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellants.

Marti, O'Gara, Dalton & Bruckner, for appellees.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Warren D. Lichty, Jr., for intervener-appellant.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

The plaintiffs, Fred Vap, Ralph Miller, and others, all residents and taxpayers of the City of McCook, brought this action in the district court for Red Willow County. Its purpose was to enjoin the defendants, City of McCook, its mayor, and council, from carrying out the provisions of two contracts entered into April 9, 1963, between the

City of McCook and the State of Nebraska, Department of Roads, and to declare null and void the provisions thereof prohibiting parking on B Street. The contracts relate to U. S. Highways Nos. 6, 34, and 83 as they pass through that city on B Street. The State of Nebraska, Department of Roads, filed a petition in intervention opposing the plaintiffs' action.

The trial court found that provisions in each of the contracts which provided that the city would prohibit parking on B Street were illegal, null, and void. It entered judgment permanently enjoining the city from enforcing the particular no-parking provisions.

Motions for new trial of the defendants and intervener respectively being overruled, they both bring the matter to this court by appeal.

The parties will be designated as they were in the trial court except when the defendants and intervener are both referred to when they will be designated as appellants.

The alleged errors complained of by the appellants which are determinative of the cause before us are that the trial court erred in finding that the City of McCook had no power to enter into contracts to prohibit parking on the streets in question or that the contracts because thereof were void, and that the judgment of the trial court was for that reason contrary to the law and the evidence.

We sustain the assignments.

There is little dispute as to the facts herein. U. S. Highways Nos. 6 and 34 pass entirely through McCook from the east to the west on B Street which appears to be the city's principal business street. U. S. Highway No. 83 extends in a general north-south direction. It, however, intersects U. S. Highways Nos. 6 and 34 at East Sixth and B Streets where it turns west and continues on B Street to and beyond the western city limits. These numbered highways are all a part of the state

highway system. All traffic on these highways travel upon B Street and no by-pass has been provided.

Traffic on B Street is shown to be heavy. Traffic counts had been made in 1960 and 1961. Towards the center of the city the average count per day was from 6,900 to 8,250 vehicles. Proceeding westward the count diminished by stages to 2,560 vehicles on the west city limits and to the east city limits it was 2,275.

B Street as it runs through McCook before the contemplated improvement is 47 feet wide in places and in other portions 40 feet, measured from the back of the curb of the paving on each side of the street.

There has been considerable traffic congestion on B Street. This has been increased by parallel parking which has prevailed in the past. Vehicles backing into and moving out of parking spaces have held up traffic. The drivers of cars which were parked have had difficulty in driving out of the parking spaces because of the traffic. Drainage problems have arisen on B Street. Water stands in pools on portions of the street after rains, and in winter ice forms thereon causing hazardous driving and deterioration of the paving.

Meantime, the Department of Roads in conjunction with the federal government had made plans for widening B Street. The plans were in connection with the extensive rebuilding of U. S. Highways Nos. 6 and 34 approaching and passing through McCook. They involve changing the grades on B Street and making provisions for drainage. Changes in the grade of cross-streets at intersections are required. The moving of water service lines and fire hydrants are required, many of which changes have already been made at great expense by the city.

Negotiations ensued between the Department of Roads and the mayor and city council of McCook, and the contracts in question between the city and the department were agreed upon, duly authorized, and entered

into. Both contracts were executed by the city on April 9, 1963, and by the state on April 17, 1963.

The contract marked as exhibit 1-A involves project Nos. U-68(17) and U-68(18), providing for the improvement of B Street from West Tenth Street to West Fifth Street, and from East Fifth Street eastward to the city limits. The city agrees to be obligated for $80,000, the balance to be borne by the state and federal governments. They have allocated more than $60,000 therefor. The contract set out at exhibit 1-B concerns project No. U-68(23), which involves new construction from West Tenth Street to the western city limits. The whole expense of this is to be borne by the state and federal governments which have allocated over $160,000 therefor. The projects connect with other improvements to the same highways leading to McCook from the east and west for which considerably more than $1,000,000 has been allocated by the state and federal governments. No widening or other improvements are presently contemplated between West Fifth Street and East Fifth Street, a distance of 10 blocks, and in this area the street will continue to be 47 feet wide in places and elsewhere 40 feet in width.

Both contracts contained a provision by which the city agreed to prohibit parking on B Street to be effective immediately upon completion of the work. Expert witnesses from the Department of Roads testified this was necessary because four 12-foot traffic lanes were to be built, two going each way separated by a median; that the present and projected future traffic required such construction; that the width of the right-of-way would not permit parking in addition to the contemplated construction even after widening the street; and that unless parking is prohibited it will result in traffic being funneled into a bottleneck.

The witnesses for the plaintiffs were generally owners of land fronting on B Street or persons engaged in business enterprises thereon. They testified at consider-

able length to the effect that their property would depreciate in value and their profits from their businesses would be lessened if parking were prohibited on B Street.

The trial court found the mayor and city council of the City of McCook did not have the right or power to enter into contracts insofar as the contracts attempt to regulate parking on the streets in the city by contract. It was for this reason the defendants were permanently enjoined from carrying out the particular provisions of the contracts prohibiting parking on B Street.

It is conceded by all parties that authority is given to cities of the first class under sections 16-609 and 16-610, R. R. S. 1943, together with sections 19-2301 to 19-2304, R. R. S. 1943, to regulate parking of vehicles on the streets of the city and that under these provisions the power is exercised by ordinance.

The plaintiffs, however, maintain and the trial court evidently concurred in their contention that by contracting to prohibit parking on B Street the city has bartered away its police power to regulate parking in the future. They assert the city's attempt to so do is contrary to public policy, illegal, and void. They contend a municipality has no power to enter into contracts which curtail or prohibit the free exercise of its legislative power and such contracts are void, citing City of Nebraska City v. Nebraska City Speed & Fair Assn., 107 Neb. 576, 186 N. W. 374. There this court held: "A city cannot by lease, estoppel, or otherwise, grant to any person or association the use and control of such part of its public park as to practically deprive the public continuously of its enjoyment, nor delegate the use and control thereof to private individuals or associations. * * * A city may be estopped from denying the validity of a contract, irregularly made by it, with reference to matters concerning its business of a proprietary character, when it has received benefits from such contract, if it had authority to make such contract in the first

instance. But a city cannot be estopped from denying the validity of a contract which it had no authority to make." It is to be noted in the cited case that an attempt was made to bargain away the rights of the public to private persons and further that it was done without legislative authority. We think the case is not applicable to the present one. Other cases cited on this proposition have been examined and are found equally inapplicable. Plaintiffs do refer to 10 McQuillin, Municipal Corporations (3d Ed.), § 29.101, p. 408, where the general rule is laid down that municipalities cannot make contracts which will embarrass or control them in performing their legislative powers or duties. No reference is there made with respect to special legislative authorization. We feel the text is speaking of a general rule in the absence of such specific authority. Indeed, in the footnotes to this section, authority is cited which qualifies the rule to the case where there is no specific authority. That the rule is different where legislation permits such contracts appears from the same work in Vol. 2, § 10.38, p. 668, where it is said in part: *"Unless authorized by statute or charter,* a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers. For instance, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power or its delegated power of eminent domain or taxation, or to regulate rates of a public utility, *unless so authorized by statute or charter.*" (Italics supplied.)

In the case before us the appellants call particular attention to sections 39-1306 and 39-1307, R. R. S. 1943, which read as follows: "Any political or governmental subdivision or any public corporation of this state shall have the authority to enter into contracts through or with the department to enable them to participate in all the benefits to be secured from federal aid funds, or

funds made available from the federal government to be used on roads and streets. The department may negotiate and enter into contracts with the federal government, or any of its constituted agencies, and take all steps and proceedings necessary in order to secure such benefits for such political or governmental subdivisions or public corporations." § 39-1306, R. R. S. 1943.

"The department, on behalf of the state, and any political or governmental subdivision or public corporation of this state shall have the authority to enter into agreements with each other respecting the planning, designating, financing, establishing, constructing, improving, maintaining, *using,* altering, relocating, *regulating,* or vacating of highways, roads, streets, or connecting links." § 39-1307, R. R. S. 1943. (Italics supplied.)

Appellants argue that these statutes clearly authorize the contracts in question, and that contracts with respect to "using" and "regulating" the highways, streets, or connecting links clearly embrace the regulation of parking.

The quoted sections are a part of Chapter 39, article 13, R. R. S. 1943. The Legislature in this article has provided a system of state highways. Section 39-1301, R. R. S. 1943, clearly shows the intention of the Legislature with respect thereto. It recognizes therein that such a system is of great importance to the people of the state. It asserts that adequate highways are essential to low-cost motor vehicle traffic and to protect the health and safety of the citizens. It states in part: "In designating the highway system of this state, as provided by the provisions of sections 39-1301 to 39-1362, the Legislature places a high degree of trust in the hands of those officials whose duty it shall be, within the limits of available funds, to plan, develop, construct, operate, maintain, and protect the highway facilities of this state, for present as well as for future uses. * * * The design, construction, maintenance, operation, and protection of adequate state highway facilities sufficient to meet the

present demands as well as future requirements will, of necessity, require careful organization, with lines of authority definitely fixed, and basic rules of procedure established by the Legislature." It thereafter designates the State Engineer and the Department of Roads, acting under his direction as custodian of the state highway system: "* * * with full authority in all departmental administrative details, in all matters of engineering design, and in all matters having to do with the construction, maintenance, operation, and protection of the state highway system." In section 39-1302, R. R. S. 1943, terms are defined, including the following: "(5) Connecting link shall mean the roads, streets, and highways designated as part of the state highway system and which are within the corporate limits of any city or village in this state; * * * (25) * * * The state highway system shall include, but not be limited to, rights-of-way, connecting links, drainage facilities, and the bridges, appurtenances, easements, and structures used in conjunction with such roads, streets, and highways; * * *." No contention is made by the plaintiffs that the Legislature did not give the complete administration of the state highway system under this article to the Department of Roads of the state.

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." Lang v. Sanitary District, 160 Neb. 754, 71 N. W. 2d 608. "The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto * * *, where a matter of

state-wide policy and concern are involved." Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862. Parking on the state highway system is a matter of statewide concern.

One has no legal right to appropriate a part of the street to the purpose of his private business or to be used as a part of or to improve and make more useful a facility used in the conduct of his business. Hillerege v. City of Scottsbluff, 164 Neb. 560, 578, 83 N. W. 2d 76. Parking in a city is a privilege and subject to regulation by proper authorities. 7 McQuillin, Municipal Corporations (3d Ed.), § 24.643, p. 688. This power to contract between the Department of Roads and political subdivisions appears necessary both in respect to the administration of the state highway system provided for in Chapter 39, article 13, R. R. S. 1943, and to assist in the procurement of federal funds by the subdivisions themselves as set out in section 39-1306, R. R. S. 1943.

We conclude under section 39-1307, R. R. S. 1943, the Legislature has expressly authorized and delegated to the Department of Roads on behalf of the state and any political or governmental subdivision of the state authority to enter into agreements with each other respecting the planning, designating, financing, establishing, constructing, improving, maintaining, using, altering, relocating, regulating, or vacating of highways, roads, streets, or connecting links. Further, that the words "using" and "regulating" as therein contained include the right to conclude agreements with respect to parking.

Cases are cited by the appellants where the courts of other states have upheld contracts of this nature between the state authorities and municipalities. Among them is Bidlingmeyer v. City of Deer Lodge, 128 Mont. 292, 274 P. 2d 821. In the cited case the city had by resolution, in order to secure federal funds, agreed among other things to require vehicles to stop at all intersections entering the street being improved and to modify its ordinances to require parallel parking on that

street. The Montana court there held: "Subject to constitutional limitations, the state has absolute control of the highways, including streets, within its borders, even though fee is in municipality, and such power of supervision and control may be exercised directly by legislature or may be delegated by it to subordinate or local governmental agencies, and any such delegation may be revoked or changed at will. * * * Even if municipality, in adopting a resolution agreeing to certain conditions so as to effectuate plan for making Main Street of municipality a part of a federal aid highway, surrendered some of city's police power, municipality had right to do so, in view of statute authorizing State Highway Commission to enter into contracts with United States Government relative to construction and maintenance of highways, and in view of Commission's assent to the conditions prescribed by federal works agency for the right of state to participate in federal aid. * * * Resolution adopted by municipality in order to comply with requirements relating to the making of municipality's Main Street a part of federal aid highway did not surrender police power of municipality, but merely placed limitation upon method or means by which such police power might be exercised." See, also, Farnsworth v. City of Roswell, 63 N. M. 195, 315 P. 2d 839, a case where the New Mexico court followed the case of Bidlingmeyer v. City of Deer Lodge, *supra*, holding: "A city had power to enter into a cooperative agreement with the state through its highway commission for improvement and widening of a portion of a state highway traversing the city by which the city would prohibit the parking of motor vehicles on the portion of the street highway to be improved, where by the ordinance, city was saved a large sum of money, which but for the opportunity, the city would have had to pay for the improvement, in its entirety."

The plaintiffs contend that in order for sections 39-1306 and 39-1307, R. R. S. 1943, to have the effect of permitting

a contract to be validly entered into between the city and the state through the Department of Roads in respect to parking, sections 16-609 and 16-610, R. R. S. 1943, giving the supervision and control of the streets to the mayor and city council had to be repealed or modified. It is sufficient to refute this contention to point out that Chapter 39, article 13, R. R. S. 1943, and the sections quoted therefrom were part of one act, Laws 1955, chapter 148, page 414, which does not purport to be amendatory of sections 16-609 or 16-610, R. R. S. 1943, but is original and independent legislation complete in itself. It is not therefore within the constitutional requirements concerning amendments although it may by implication modify or repeal prior acts or parts thereof. Omaha Parking Authority v. City of Omaha, *supra.*

Neither can it be inferred as the plaintiffs contend that parking is prohibited for all time. It is not to be supposed that if future conditions justify or require a change the state through the Department of Roads and the city would always remain adverse to joining in subsequent appropriate agreements. The state has placed trust and confidence in the department as well as the city to act in the best interest of the public. We conclude that the city may under section 39-1307, R. R. S. 1943, contract with the state through the Department of Roads to prohibit parking on a street which forms a connecting link on the state highway system. In so doing the police power of the city is not bartered away but only limited in its exercise as specifically authorized by law.

It follows that the trial court erred in holding the contract prohibiting parking was illegal and void, and its judgment is reversed and the cause remanded with directions to dismiss the plaintiffs' petition

REVERSED AND REMANDED WITH DIRECTIONS.

ESTHER L. MEADOWS, APPELLANT, V. SKINNER MANUFACTURING CO., A CORPORATION, APPELLEE.

136 N. W. 2d 184

Filed July 2, 1965. No. 35904.

1. **Evidence.** Evidence may be destitute of persuasiveness, although it is uncontradicted directly.
2. **Workmen's Compensation.** If conflicting evidence on rehearing in the Nebraska Workmen's Compensation Court was specially resolved according to the demeanor of witnesses, the resultant findings will be considered correct on de novo review in this court.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Eugene D. O'Sullivan and Eugene D. O'Sullivan, Jr., for appellant.

Joseph P. Cashen and Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

SMITH, J.

The Nebraska Workmen's Compensation Court by a two-to-one vote on rehearing dismissed the present claim that an injury in the lumbar region was caused by a stumble during work. The district court affirmed.

No eyewitness directly contradicts testimony that plaintiff was hurt in her employment on Wednesday, February 14, 1962. More than that, her description of events is partially corroborated by testimony of a coworker, Neva Bellows.

We first discuss this side of the case. While carrying a commodity container from a table to a skid, plaintiff stumbled over a protruding leg of the skid and slowly fell with the package in her arms. The force was broken when her knee struck the lumber bed of the skid.

She cried out because sharp pains were shooting through her lower back and left leg.

The size of the package was 4 cubic feet, its weight, 22 pounds. The height of plaintiff was 5 feet 2 inches, her weight, 105 pounds, and her age, 37 years.

Neva, whose attention had been attracted by the exclamation, turned in time to see plaintiff in a kneeling position. Plaintiff immediately complained of the injury and remarked that she ought to tell her supervisor, Ida Calabro.

Far apart are the times fixed by witnesses in dating the first report to defendant. They agree that notice was not given the day of the accident. In a conversation with Ida the next morning both plaintiff and Neva expostulated against the heavy work. Some parts of their testimony disclose notice at this time. Other parts indicate March 12, 1962, or later. Ida, who testified by deposition, denied receiving the information prior to May.

Other testimony of plaintiff is significant as to nonoccurrence of the accident. In spite of pain she resumed her duties after the fall but avoided lifting heavy packages. She was absent on account of the back injury Monday through Wednesday of the following week. In a telephone call to Ida on Monday she mentioned illness but omitted particulars. When she returned on Thursday, nothing was said. Her employment ended March 2, 1962.

Between March 10 and 20, 1962, plaintiff consulted a physician on five occasions for treatment of a cold and pleurisy. She testified that she had related a history of back injury but that he had intended to postpone examination of her back until disappearance of the other condition. We are left in doubt whether the history included the accident as well as the symptoms. Furthermore there is no mention of either one in the physician's notes, and he testified to no independent recollection.

On July 6, 1962, plaintiff underwent surgery. The fourth lumbar intervertebral disk was debrided and the

adjoining fifth lumbar nerve decompressed. The origin or development of the condition could not be traced medically except for a history in which plaintiff had connected the injury with her employment.

Two other circumstances affect the weight of evidence. The first is plaintiff's knowledge. At the time of the fall she knew the importance of notice, for she had obtained medical aid through defendant and her husband had been a party plaintiff in two actions for recovery of workmen's compensation on account of back injuries.

The second circumstance points up an interest of Neva. A day or so after February 14, 1962, she quit because the work was too heavy.

The compensation court observed the demeanor of plaintiff and Neva on the witness stand. It discredited their testimony that the disability had arisen out of and in the course of employment. Evidence may be destitute of persuasiveness, although it is uncontradicted directly. See Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

If conflicting evidence on rehearing in the compensation court was specially resolved according to the demeanor of witnesses, the resultant findings will be considered correct on de novo review in this court. See Klentz v. Transamerican Freightlines, Inc., *supra*. That rule controls this decision.

The judgment is affirmed.

AFFIRMED.

WILLIAM P. TOBER ET AL., APPELLANTS, V. WAYNE HAMPTON ET AL., APPELLEES.

136 N. W. 2d 194

Filed July 2, 1965. No. 35906.

1. **Trial. The purpose of a pretrial conference is to simplify the**

issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial.

2. ———. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented.

3. ———. Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection.

4. ———. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal.

5. ———. If at a pretrial conference it appears there are issues which might be determinative of the cause although not then within the pleadings, they should be stated in the pretrial order which should thereafter govern the proceeding in that respect.

6. **Torts.** Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tort-feasor may be held for the entire damage, not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury.

7. **Actions: Judgments.** Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had.

8. **Torts: Compromise and Settlement.** If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.

9. ———: ———. The injured party can have only one satisfaction for the injury and if the amount received was not in full satisfaction it is a pro tanto bar to an action against the other wrongdoer.

10. **Compromise and Settlement: Evidence.** If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement.

11. **Indemnity: Contribution.** The word "indemnity" as used in connection with law relating to tort-feasors means a shifting of the entire loss, while the word "contribution" means a sharing of the loss.

12. **Torts: Indemnity.** Indemnity between tort-feasors is generally restricted to cases where actual fault is attributed to one party and the other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong.

13. **Torts: Contribution.** Apart from statute, the general rule is that one of several wrongdoers, who has been compelled to pay the damages for the wrong committed, cannot compel contribution from the others who participated in the commission of the wrong.
14. ———: ———. The use of a legal device, proper in its setting, should not be extended to a situation foreign to its nature for the purpose of thwarting the decisions of the courts.
15. ———: ———. As used in the present case, the loan receipts are being used to thwart the law of Nebraska relating to indemnification and contribution among tort-feasors.
16. **Parties.** Whether plaintiff is the real party in interest ordinarily is a question of law for the court.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed.

Sidner, Lee, Gunderson & Svoboda and McGinley, Lane, Mueller & Shanahan, for appellants.

Arthur R. Johnson and Baskins & Baskins, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BROWER, J.

Plaintiffs William P. Tober and Louise Tober, husband and wife, brought this action in the district court for Keith County, Nebraska, against the defendants, Wayne Hampton and H. D. Rowley, doing business as Hampton & Rowley, to recover damages to real and personal property caused by a gas explosion which occurred November 22, 1960, in a house at 104 East H Street, in Ogallala, Nebraska. The petition alleges defendants' employees, while operating a ditch digging machine in constructing a sewer line, negligently allowed it to come into forcible contact with a gas line at the front of the premises, damaging it and causing a leak. It further alleged defendants failed to inspect the line thereafter to determine the amount of damage and covered the ditch without making repairs or reporting what had happened to the proper authorities.

The amended petition consisted of two causes of action, the first being for damages to plaintiffs as owners of the premises, and the second consisting of a claim for damages to personalty of the resident tenants, H. L. Robinette and Sunya Robinette, which had been assigned to plaintiffs.

Following a pretrial conference held March 4, 1964, the trial court made an order which set forth the issues as follows: "1. The ownership of the claims involved in the action. 2. Negligence of the defendants, if any. 3. Contributory negligence, if any. 4. The proximate cause, including the theory by the defendants that the conduct on the part of the gas company was the sole cause. 5. Damages. A. The amount thereof. B. The effect of contracts with the gas company. C. Rental losses." The order further stated: "In view of the fact that it appears to the Court that there is a dispute over the effect of the loan agreements between the plaintiff, his assignees and the gas company, involving consideration of certain agreements, depositions and other evidence, IT IS THEREFORE ORDERED that the matter be submitted to the Court without a jury, for an advance decision upon the construction and effect of said agreements upon the issue of the owner to the claim of damages. * * * Trial is set for April 2, 1964, at 10:00 o'clock, A.M., for the disposition of the non-jury issues." The order stated its provisions should constitute part of the record and would be final unless excepted to by either party within 10 days from March 17, 1964. No exceptions were filed.

On April 2, 1964, the matter came for trial to the court without a jury as ordered. Evidence was taken and the cause argued and submitted. On May 14, 1964, the court decided the matter, finding generally for the defendants and specially: "* * * that the alleged Loan Agreements were in the truth and in fact a settlement by the plaintiffs of their claim and the assigned claim of the Robinettes with the Natural Gas Distributing Company; that

said Loan Agreements were in truth and in fact, in addition to being a settlement, an assignment of the rights of the plaintiffs on their own claim and the claim of the Robinette's to the Natural Gas Distributing Company; that the settlement and assignment of the plaintiffs and the Robinette's as drawn and drafted were placed in the form of a Loan Agreement for the sole purpose of enabling the Natural Gas Distributing Company to avoid its liability to the plaintiffs and Robinette's in whole or in part and to impose full liability for said damages upon the defendants for the benefit of the Natural Gas Distributing Company and the plaintiffs. That said alleged Loan Agreement is a full and complete assignment of all claims of the plaintiffs to the Natural Gas Distributing Company and that the plaintiffs are not the owners of said claims." The plaintiffs' cause of action was thereupon dismissed.

Plaintiffs' motion for a new trial having been overruled, the case is brought to this court by appeal.

Plaintiffs first contend the trial court erred in ordering a hearing and receiving evidence on issues not set forth in the pleadings. They contend that defendants' answer failed to allege plaintiffs were not the real party in interest or that the plaintiffs and their assignees had settled their actions. This requires us to consider the effect of the pretrial order which set forth those particular issues for determination. It is governed by the rule set out in the 1963 Revised Rules of the Supreme Court at page 35. It provides in part as follows:

"(a) In any civil action in the district court after issues have been joined the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

"(1) The simplification of issues;

"(2) The necessity or desirability of amendments to the pleadings; * * *

"(5) The advisability of a preliminary reference of

issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall at the time of the pre-trial hearing make a record of the proceedings which recites the action taken at the conference, the amendments allowed to the pleadings, and the amendments made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreement of counsel; that counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

In Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245, this court held: "The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. * * * The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented. * * * Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. * * * The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal."

It appears in the cited case the issues were narrowed by the pretrial conference. It is the apparent contention of the plaintiffs that only issues that are within the ambit of the pleadings may be formulated and adopted at the pretrial conference. The pretrial rule of this court hitherto set out is substantially the same as rule 16 governing procedure in the federal district courts. This rule is discussed at length in 3 Moore's Federal

Practice (2d Ed.), pages 1101 to 1125. On page 1118, section 16.12, it is considered with respect to its relation to the pleadings in the case as follows: "Where there has been a pre-trial conference, there are not likely to be requests for permission to amend at the trial; and permission to amend at the trial should ordinarily not be granted when such amendment will result in a delay of the trial, except when relevant matters have arisen after the pre-trial conference, or when matters existing at the time of that hearing were not discovered until afterwards and the attorney was not negligent in failing to obtain the information earlier. Since the pre-trial order controls the future course of the action, however, failure to amend the pleadings to reflect the issues stated in the order should be immaterial." See, also, McComb v. C. A. Swanson & Sons, 77 F. Supp. 716; Low v. Davidson Mfg. Co., 113 F. 2d 364; American Surety Co. of New York v. Williford, 243 F. 2d 494. If at a pre-trial conference it appears there are issues which might be determinative of the cause although not then within the pleadings, they should be stated in the pretrial order which should thereafter govern the proceeding in that respect. The interpretation placed on rule 16 by the federal courts is applicable to that adopted by this court. In the pre-trial order before us the issues involved and later considered were plainly stated. No exceptions were taken by the parties. The contention of the plaintiffs cannot be sustained.

Plaintiffs further assign error to the trial court in dismissing the plaintiffs' petition which action is asserted to be contrary to the law and the evidence. These contentions will be considered together. At the trial the so-called loan agreements were introduced by the plaintiffs. That signed by both plaintiffs involved in the first cause of action is as follows:

"LOAN AGREEMENT

"Received from Natural Gas Distributing Company the sum of $3,500.00 as a loan repayable only

out of any net recovery that the undersigned may make from Hampton Construction Company or any persons or corporations upon or by reason of any claim for loss of or damage to the property described below or from any insurance effected by said Hampton Construction Company or others which might be obligated or used in the payment of such loss. We hereby pledge any recovery to Natural Gas Distributing Company on such claims that we may now have against the above mentioned parties or any of them and any recovery thereon or therefrom. * * * We hereby guarantee that we are the persons entitled to enforce the claim against said Hampton Construction Company or any other persons or corporations responsible for the loss or damage to the hereinafter described premises, and we hereby appoint the officers of Natural Gas Distributing Company and their successors, severally, our agents and attorneys in fact with irrevocable power to collect such claim and to begin, prosecute, compromise or withdraw in our name, but at the expense of said Natural Gas Distributing Company any and all legal proceedings which they may deem necessary to enforce such claim or claims and to execute in our name any documents which may be necessary to carry into effect the purposes of this agreement. We further specifically agree to cooperate in the prosecution of the claim above mentioned and render all assistance incidental thereto. * * * The description of the property herein referred to and the damage to and loss of which is the basis of the claim above described is as follows: * * * (Legal description of the premises here set out.) The accident referred to occurred on or about November 22, 1960, at the above described premises when an explosion occurred causing some damage to the house and personal property contained therein which said house and personal property were lo-

cated on the aforedescribed real estate. * * * Dated this 1st day of June, 1961."

A similar loan agreement, except for the amount which was $400, was executed by both Robinettes on May 31, 1961. It was shown the recited sums were paid by the Natural Gas Distributing Company, hereinafter at times referred to as the Gas Company.

On June 3rd thereafter the Robinettes executed an assignment to the Tobers for the recited consideration of $1. The testimony shows the assignment was given solely for convenience in bringing suit and no consideration passed. The present action was thereafter filed July 26, 1961.

The testimony showed that the explosion took place November 22, 1960. The damages to the plaintiffs' house and to the Robinettes' personal property therein were caused by the same explosion. From the evidence it appears the defendants dug a sewer on the north of the house in question on October 29, 1960. While digging, the bucket machine struck the gas line although with what force and effect is not shown. They laid the sewer and closed the trench the same day. The evidence shows that the Gas Company was notified several times of the odor of gas in the house, the first occasion being October 31, 1960. Employees, including the foreman of the service crew, had been to the premises to answer calls on several occasions. Two were at the home the day of the explosion. One had made two trips that day. The two were on the premises between 3 and 3:30 p.m., before the explosion which occurred about 5 o'clock. Some of the employees had tested several appliances and found leaks. The heating stove was leaking gas quite badly and was replaced but the odor continued. No tests, however, were made outside the house or along the gas mains or lines.

After the explosion the plaintiffs and Robinettes employed Murl M. Maupin, an attorney at North Platte, to represent them. He testified he took the matter up with

representatives of the Gas Company and they worked out a disposition of the matter. He authorized his clients to sign the loan agreements heretofore mentioned and the money was loaned, or paid, to them. He appears to have been away when the papers were signed. After the signing and delivery of the checks, Maupin was paid by the plaintiffs and the Robinettes and appeared no further in the matter. This action was thereafter brought for the plaintiffs by the attorneys who had represented the Gas Company.

The plaintiffs in their brief state the questions involved in this action are between two independent tort-feasors. From the contentions throughout the brief it may be said that they admit that in respect to the plaintiffs herein the Gas Company and the defendants were tort-feasors. The duties of the Gas Company to the general public to operate its business and maintain its pipes so as to prevent the escape of gas therefrom are set out in Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862.

In this state, the rule is: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage, not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." Barry v. Moore, 172 Neb. 57, 108 N. W. 2d 401.

The opinion of this court in Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612, 33 L. R. A. N. S. 983, throws considerable light on the questions before us. In that case an employee of the Chicago, Burlington and Quincy Railroad worked in the yard at South Omaha as a switchman. While engaged in adjusting a chain used in fastening the tender to the locomotive, made necessary because of a defective coupling, the Union Stock Yards drove a train of cars against that on which he was working, forcing the car and locomotive together and killing him instantly. The administratrix

of his estate had received $4,400 from the railroad company and signed a release reciting it was in full settlement for all damages arising from death caused by the railroad. Subsequently the action was brought against the Union Stock Yards. This court in its syllabus stated: "Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had. * * * If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury. * * * If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers. * * * If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement; * * *." The opinion states it cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writing, contrary to the truth through the ignorance, carelessness, or fraud of the parties, and who therefore ought not to be precluded from proving the truth however contradictory to the written statements of others. In the body of the opinion the court held further that in any event the injured party can have only one satisfaction for the injury and if the amount received was not in full satisfaction it was a pro tanto bar to an action against the other wrongdoer. In so doing the court followed the rule adhered to by many courts. This is shown by the note at 104 A. L. R. 931, at page 932 thereof. It is based on the fact that one injured by tort can have only one full satisfaction. 52 Am. Jur., Torts, § 117, p. 455. The rule of pro tanto reduction as applied in the Fitzgerald case has been thereafter followed in Hauth v. Sambo, 100 Neb. 160, 158 N. W. 1036; Tankersley v. Lincoln Traction Co., 101 Neb. 578, 163 N. W. 850; Menking v. Larson, 112 Neb. 479, 199 N. W. 823; and it has become

the law in many jurisdictions. Annotation, 80 A. L. R. 477.

In the case before us the loan receipts were given by the plaintiffs and Robinettes as hereinbefore set forth. Loan receipts are quite common between insurer and insured. Their use stems from the early case of Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522. A history of the early cases is contained in a note to that case in 1 A. L. R. 1528. Since then their use has been greatly extended by insurance carriers but rarely have they been used between joint tort-feasors. A later discussion of loan receipts is set out in the annotation at 157 A. L. R. 1261. As between an insurer and an insured, they have generally been held to be valid. In Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366, it is stated: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest." The same rule was applied in Shiman Bros. & Co. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807, and in Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692. These were all insurance cases involving a contractual relationship where by the policy or by law the insurance company was subrogated to the extent of payment.

The plaintiffs' apparent contention is that where they received the payment from a tort-feasor under a loan agreement, that loan is valid, and that they are entitled to pursue their action against the other tort-feasor and collect the full amount of their damages. Under the loan agreement it is apparent that if the plaintiffs prevail in their recovery and if the agreement is followed, the Gas Company will be indemnified thereunder. De-

fendants contend neither indemnification nor contribution is allowed between tort-feasors in Nebraska.

We are cited to no decisions of this court permitting indemnification. In the early case of Union Stock Yards Co. v. Chicago, B. & Q. R.R. Co., 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, the Supreme Court of the United States, in a case originating from Nebraska on inquiry by a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, held that a terminal company whose negligence toward one of its employees in failing, by a proper inspection, to discover a defective brake on a car delivered to it by a railroad company has been established by a competent tribunal, cannot enforce contribution or recover indemnity from the railroad company because of the latter's like neglect of duty. In the discussion contained in the opinion, cases are cited in which other courts have permitted indemnification between tort-feasors under certain conditions. These decisions were not necessary for the determination of that case and are not necessary for consideration by this court in the present case.

The cases from courts of other states which have allowed indemnification between tort-feasors have not generally allowed it in a case such as is now before us.

In Winn-Dixie Stores, Inc. v. Fellows (Fla.), 153 So. 2d 45, the court, in discussing the rights of the parties, stated: "On the basis of the foregoing proof coming from the mouths of Winn-Dixie's own employees, none of which was contradicted by other evidence, the jury could have reached no other lawful conclusion but that Winn-Dixie had actual knowledge of the dangerous manner in which the Pepsi-Cola display had been constructed for a sufficient period of time prior to the accident to have taken such steps as were necessary to correct the condition and protect the safety of its customers. Because of Winn-Dixie's failure to use due care in the premises its negligence in the transaction was not secondary or passive, but constituted primary and active negligence

of the same degree for which Pepsi-Cola was guilty. There being no conflict in the evidence on this point, no jury issue on the question was created, and Winn-Dixie was not entitled as a matter of law to recover over from Pepsi-Cola as indemnity any loss it may suffer as a result of such judgment as may be rendered against it in favor of plaintiffs."

In the case of Bolton v. Ziegler, 111 F. Supp. 516, there was a loan receipt given to the injured party by one tort-feasor with an agreement to be repaid only out of the recovery from the other. It was accompanied by a covenant not to sue the tort-feasor that had advanced the payment. In that case the injured party brought action and the questions both of indemnity and contribution were discussed. The Iowa law was there interpreted by the United States district court and it was there held: "* * * the word 'indemnity' as used in connection with law relating to tort-feasors means a shifting of the entire loss, while the word 'contribution' means a sharing of the loss. * * * The common law rule against contribution between joint tort-feasors prevails in Iowa, but one tort-feasor may secure indemnity from another tort-feasor in a proper case, unless the party claiming indemnity owed a duty to the injured party equal to that owed by party from whom indemnity is sought. * * * operator of automobile and operator and owner of truck with both of which vehicles automobile of plaintiffs collided owed plaintiffs duty of observing law of Iowa governing operation of motor vehicles upon highways, and such equality of duty would preclude operators and owners of truck from obtaining indemnity from operator of automobile with which plaintiffs' automobile collided."

The case of United Gas Corp. v. Guillory, 206 F. 2d 49, involved a gas explosion also. Litigation ensued between those claiming it was caused from prior leakage attributable to the fault of the gas company and those asserting it arose from the negligent operations of the in-

tervener Gulf States Utilities Company through its employees in building a manhole. The federal court held: "Under Louisiana law, indemnity is restricted to cases where actual fault is attributed to one party and other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong." We think most courts which permit indemnity between tort-feasors follow this rule. It appears from the record that the Gas Company was more than technically or constructively at fault and would not be allowed indemnity in those states which permit it, and it should not be permitted here. See, also, Standard Brands, Inc. v. Bateman, 184 F. 2d 1002, interpreting the law of Missouri.

The decisions of this court do not present a definite and unquestionable rule with respect to the right of contribution as applied between negligent tort-feasors. In Johnson v. Torpy, 35 Neb. 604, 53 N. W. 575, 37 Am. S. R. 447, this court reversed and remanded for trial a judgment of the district court which had allowed contribution against defendant saloonkeeper in favor of another who had paid a judgment recovered by the widow of a deceased habitual drunkard. In the opinion the court stated: "In determining whether the right of contribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy." In the second trial of the case the district court directed a verdict and entered judgment for the defendant thereon. This judgment was affirmed by this court in Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253, holding it conclusively appeared from the evidence that the plaintiff saloonkeeper knew the wrongful character of his sales and would not be permitted contribution. The opinion, however, adhered to the rule previously stated.

Thereafter in First Nat. Bank of Pawnee City v. Avery Planter Co., 69 Neb. 329, 95 N. W. 622, 111 Am. S. R. 541, contribution was allowed to one of three creditors against the other two who joined with it in an unsuccessful support of separate attachment suits as against a chattel mortgage given by the debtor to secure all its creditors. The court in the opinion stated: "When such judgment is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass." The basis of contribution therein was held to be the ratio the claims of the attaching creditors bore to each other. Thereafter in Schappel v. First Nat. Bank, 80 Neb. 708, 115 N. W. 317, this same matter was returned to this court for consideration of additional and supplemental litigation. In the affirmance of the subsequent decision of the trial court, the same result was reached but the opinion does contain a discussion which casts same doubt as to whether the court would have, at least wholeheartedly, adhered to its former decision if it were not the law of the case.

The previously cited cases of this court with respect to contribution between negligent tort-feasors have been given only a cursory review here. For an extended and painstaking résumé of the cases mentioned and others decided by this court, reference may be had to the opinion of Judge Delehant in Andromidas v. Theisen Bros., 94 F. Supp. 150. In that case the federal court concluded that this court would thereafter in such cases apply the general rule stated in 18 C. J. S., Contribution, § 11, p. 14: "Apart from statute, the general rule * * * is that one of several wrongdoers, who has been compelled to pay the damages for the wrong committed, cannot compel contribution from the others who participated in the commission of the wrong. This is a rule not only of the common, but of the civil, law, and it obtains in equity as well as at law." The rule agrees in substance with that set forth in Restatement, Restitution, § 102, p. 429.

We think the rule is sound and is amply sustained by the reasons therefor set out immediately following it in 18 C. J. S., Contribution, § 11, p. 14. It is adopted by this court and insofar as the cases of First Nat. Bank of Pawnee City v. Avery Planter Co., *supra,* and Schappel v. First Nat. Bank, *supra,* conflict therewith, they are overruled.

The question of considerable import is presented in this case because of the ruling of this court in Fitzgerald v. Union Stock Yards Co., *supra,* requiring a pro tanto reduction of the amount previously received from a tort-feasor in the subsequent suit brought against another tort-feasor as the rule is applied to the case before us where loan receipts were given. The only case we have found discussing this situation is the case of Bolton v. Ziegler, *supra.* In that case there were a loan receipt given the one tort-feasor, Denver-Chicago Trucking Co., and a covenant by the injured party, Bolton, not to sue that company with whom the loan agreement was executed. In the suit against the other tort-feasor, Ziegler, the question of the application of the rule of pro tanto reduction was reviewed by the court as applied to that situation. In the opinion the court stated: "The plaintiffs also argue that if the covenants not to sue stood alone, and no applications were made, they would be receiving double satisfaction, but since under the loan receipt agreements the sums received under the covenants not to sue are repayable to the Denver-Chicago Trucking Company or its liability insurer, they will only receive the amount of damages to which they are entitled. * * *

"There is no claim made by the plaintiffs that they are not bound by the covenants not to sue. They make no claim that the Denver-Chicago Trucking Corporation or its liability insurer has elected to waive their rights under the covenants not to sue and stand only upon the loan receipt agreements. If the loan receipt agreements stood alone and were, under the circumstances of the

present case, valid as against the defendant, Ziegler, then the sums referred to would not have to be applied by the plaintiffs upon their recoveries. If the covenants not to sue stood alone, the sums referred to would undoubtedly have to be applied upon such recoveries. In legal effect, the two agreements are repugnant one to the other. The question would seem to be, which of the two repugnant provisions is to prevail? The Iowa Supreme Court has not passed upon the question. The question has not been discussed in any of the cases cited nor in any of the literature on loan receipts referred to. The basis of the Iowa rule of pro tanto reduction is the prevention of unjust recoveries. There is no reason for assuming that the Iowa Supreme Court is concerned only with the prevention of unjust recoveries by claimants and has no concern as to unjust recoveries by joint tort-feasors. As heretofore noted, the recovery of indemnity or contribution, from the defendant Ziegler, under the situation in the present cases would constitute an unjust recovery in light of the Iowa law. It is believed that the doctrine of pro tanto reduction is also applicable to prevent unjust recoveries of indemnity or contribution by joint tort-feasors. In a note in 95 University of Pennsylvania Law Review 231 (1946), discussing the device of a loan receipt, at page 234 the following statement appears: '* * * But the use of a legal device, proper in its setting, should not be extended to a situation foreign to its nature for the purpose of thwarting the decisions of the courts.'

"It is the view of this Court that it would thwart Iowa law and Iowa policy to permit the loan receipt agreements in question to have the effect of preventing the application of the sums of $9,000 and $3,000 upon the recoveries of the plaintiffs against the defendant Ziegler, and that the documents in question should, as to the defendant Ziegler, have the status of covenants not to sue. * * * However, as noted, many courts have held their use to be proper in certain settings. In the present

cases the loan receipt agreements are being used in an attempt to thwart the law of Iowa relating to contribution among joint tort-feasors. The holding of the Court herein is limited to the holding that such use is not proper. It is not a holding as to the validity of loan receipt agreements in other situations, either under the law generally or under the law of Iowa." See, also, Trampe v. Wisconsin Telephone Co., 214 Wis. 210, 252 N. W. 675.

In the case before us there was no covenant not to sue as in the cited case of Bolton v. Ziegler, *supra*, there being only the loan receipts. The Gas Company is not a party to the suit and it was not asked to be made a party. Here, also, the plaintiffs make no claim that the Gas Company has elected to waive its right under the agreement and to be reimbursed thereunder. If the action would proceed to judgment and recovery herein, the effect would be to indemnify the Gas Company in the same manner as was sought in Bolton v. Zeigler, *supra*. As used in the present case, the loan receipts are being used to thwart the law of Nebraska relating to indemnification and contribution among tort-feasors.

Even in insurance cases where the matters were considered in regard to the real party in interest courts have looked through the form of these receipts and found them to be payments. In Yezek v. Delaware, L. & W. R.R. Co., 176 Misc. 553, 28 N. Y. S. 2d 35, the court said: "Every action must be prosecuted in the name of the real party in interest. (Civ. Prac. Act, § 210.) One of the real parties in interest here is the Universal Insurance Company. It is entitled to receive $245 of any recovery. It was absolutely, not contingently, liable to the plaintiff therefor. It paid him. It required repayment only if he recovered from the railroad company. It provided for no interest. It took no security. It controls the action to recover. On paying the plaintiff, it is entitled to a receipt and release. It elected to take a loan agreement. However, it was 'payment without

regard to its form.' The so-called loan was a fiction, a subterfuge unnecessary either to protect the insurer or to secure prompt payment to the insured." The quotation was approved in the Alabama Supreme Court in McKenzie v. North River Ins. Co., 257 Ala. 265, 58 So. 2d 581. See, also, Scarborough v. Bartholomew, 22 N. Y. S. 2d 635, affirmed in 263 App. Div. 765, 30 N. Y. S. 2d 971. The questions presented here require us likewise to consider the purpose and effect of the loan agreements without regard to their form.

In the case before us the plaintiff William P. Tober testified with respect to the claim in the first cause of action that he made a settlement with the Gas Company although he stated it did not pay him anything because he got a loan from it although he received $3,500. He signed some papers but said he did not know what they were. He had a copy of a contract, or something of the kind, but he did not have it with him and did not know if he could find it. He had not asked the Gas Company for the loan; his lawyer handled it but he did not know what the lawyer did. He paid his attorney for making the settlement. Judgment on the first cause of action was asked in the sum of $6,540.31. If the plaintiffs receive all they ask and pro tanto reduction is made, there would only be left $3,040.31 to be applied on the note to the Gas Company. This would be insufficient to pay it. If the loan agreement here was held valid and to be only a loan and followed literally, and the plaintiffs were allowed to recover in full herein and on repayment of the loan to bring action against the Gas Company in the absence of a covenant not to sue it, the recovery herein would bar further recovery as effectually in such a proceeding. It is difficult to see how there remains any real interest that the plaintiffs have in this cause of action. The plaintiffs' attorney who made the settlement stated that he had effected a "disposition" with the Gas Company's attorneys and was then paid his fee.

With respect to the second cause of action, Mrs. Robinette, called by the defendant, testified that they received two checks, "one for $200.00 for the children showing that there was no harm done to them and to release all claim, that they weren't hurt in any way; and then a $400.00 check for our damages that we received in the explosion." She said they signed no notes but did sign some papers that day "they gave us the check." Mr. Maupin represented them and they paid him for his services. She testified she understood that they were settling their end of it in full and she never expected to get any more from it. On cross-examination she said she had read the agreement and knew its terms but did not understand it was a loan, but she did understand they would have a right to proceed against Hampton & Rowley Construction Company. On redirect examination she reiterated that she did not know it was a loan and never expected to receive anything further. This procedure went through recross, re-redirect, and re-recross-examination. She did at times state it was explained that she might get something more although she reiterated that she never expected anything. The suit on the second cause of action was for $1,114.08. If reduced pro tanto by the $400 paid and the loan were repaid to the Gas Company, there would be some recovery to the Robinettes. A list of personal property was attached to the petition showing a complete loss of goods in the amount of $505.60, but from its arrangement it would appear that the original cost is sought to be recovered. Another list sets out goods apparently valued at $347.50, and opposite the price is $29.25 for drycleaning. Goods marked washable followed in the amount of $260.98. To arrive at the sum claimed, it is necessary to take the value of the drycleaned goods and not the drycleaning bill and to take the total value of the washable goods. There are no allegations to explain which is to be taken as the damages suffered or the reasonable value of any of the property listed. Moreover,

in view of the testimony which indicates the children were not harmed, the payment of $200 for them is significant.

Applicable to both causes of action are the loan agreements themselves which were arranged by the lawyer of those injured and the Gas Company. Quite decisive of the question involved are its provisions giving the officers of the Gas Company and their successors irrevocable power to collect the claims, or to bring, prosecute, compromise, or withdraw all legal proceedings in the name of the injured party but at the expense of the Gas Company. It is apparent considering the agreements and the surrounding circumstances the whole proceedings are in the hands of the Gas Company and the arrangements were made for its benefit alone.

Whether plaintiff is the real party in interest ordinarily is a question of law for the court. 67 C. J. S., Parties, § 116, p. 1118. The trial court held that the alleged loan agreements were in truth and in fact an assignment of the rights of the plaintiffs on their own claim and the claim of the Robinettes to the Natural Gas Distributing Company; that the settlement and assignment of the plaintiffs and Robinettes as drawn and drafted were planned in the form of a loan agreement for the sole purpose of enabling the Natural Gas Distributing Company to avoid its liability to the plaintiffs or the Robinettes in whole or in part and to impose full liability for said damages on the defendants for the benefit of the Natural Gas Distributing Company; and that the plaintiffs were not the owners of said claims. It in effect held that they were not the real parties in interest and had no right to bring the suit. Under the circumstances in this case, was this ruling of the court wrong? We think not.

It follows that the judgment of the trial court should be and is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the result which the court has reached in this case, but I respectfully submit that the decision should be based upon a different ground.

The trial court found that the alleged loan agreements were in truth and in fact a settlement by the plaintiffs of their claim and the assigned claim of the Robinettes with the Natural Gas Distributing Company. The evidence sustains this finding and is sufficient to sustain a further finding that the settlement was received by the plaintiffs as full compensation for all damages sustained. Such a settlement effects a release of the defendants from any liability to the plaintiffs in this action. Fitzgerald v. Union Stock Yards Co., 89 Neb. 393, 131 N. W. 612, 33 L. R. A. N. S. 983. It would seem to me that this is the proper ground upon which to base the dismissal of the action.

If the Natural Gas Distributing Company has no right to contribution or indemnity from the defendants in this action, then the assignment of the plaintiffs' rights to the Natural Gas Distributing Company was ineffective and the plaintiffs remain as the real parties in interest. If their cause of action against the defendants has not been satisfied by the settlement which the plaintiffs made with the Natural Gas Distributing Company, the action should be allowed to proceed. In the event of a recovery by the plaintiffs in this action, the defendants would be entitled to the benefit of the partial satisfaction which the plaintiffs have received from the Natural Gas Distributing Company.

SMITH, J., dissenting.

Plaintiffs are the real parties in interest. The ordinary loan receipt will not change the status of a borrower in this respect. See Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366. The rule reaches a transaction in which the lender is a putative tort-feasor or his insurer. See, Klukas v. Yount, 121 Ind. App. 160, 98 N. E. 2d 227; Crocker

v. New England Power Co. (Mass.), 202 N. E. 2d 793.

The majority opinion warrants a look through the form to the substance of the documents in reliance on Yezek v. Delaware L. & W. R.R. Co., 176 Misc. 553, 28 N. Y. S. 2d 35. There a loan receipt given by one insured under an automobile collision policy was said to have been a receipt for payment; therefore, the court held that the insured was not the sole party in interest. We held otherwise in the Bozell case.

The instruments under review have not discharged defendants from liability. See, Western Spring Service Co. v. Andrew, 229 F. 2d 413; Wilson v. Anderson, 113 Colo. 396, 157 P. 2d 690; Crocker v. New England Power Co., *supra*. In any event, with the preliminary issue limited to ownership of the claim we have no passport to the issue of discharge.

It is unnecessary to discuss other rights and obligations of plaintiffs, the Robinettes, and the gas company inter se. It is unnecessary to consider questions of indemnity, contribution, or pro tanto reduction in damages. The hypothesis that the loans are greater than any possible judgment does not militate against my conclusions. See Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., *supra*.

For these reasons I vote to reverse and remand.

JAMES DAILEY ET AL., APPELLANTS, V. A. C. NELSEN CO., A NEBRASKA CORPORATION, APPELLEE.
136 N. W. 2d 186

Filed July 2, 1965. No. 35934.

1. **Interest: Usury.** By the enactment of L. B. 17, Seventy-fourth (Extraordinary) Session, the Legislature intended that usurious contracts or indebtedness should be collectible to the extent of the principal, but that any usurious interest or other charges should be forfeited to the borrower.
2. ———: ———. The provisions of L. B. 17 extend the bor-

rower's right to recover usurious interest and charges even though the entire contract or loan has been fully paid.

3. ———: ———. Where an installment contract or loan is usurious and where installment payments are not specifically allocated to principal or interest in the contract or by agreement, installment payments will be credited as payments on principal or so much thereof as remains unpaid and not on any illegal interest or other charges on the loan involved.

4. ———: ———. The right to recover illegal interest or other charges granted to the borrower by L. B. 17 of the Seventy-fourth (Extraordinary) Session of the Legislature may not be exercised as long as any part of the principal debt justly due remains unpaid.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Barney, Carter & Buchholz and Herbert M. Brugh, for appellants.

Luebs, Elson, Tracy & Huebner and Edward Shafton, for appellee.

Heard before WHITE, C. J., BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

MCCOWN, J.

This action was originally filed September 6, 1963, to void a conditional sales contract and other documents executed under the 1959 Nebraska Installment Sales Act; to obtain a certificate of title to the mobile home involved; and to recover all payments made under the contract.

Thereafter, L. B. 17 of the Seventy-fourth (Extraordinary) Session of the Legislature was passed, effective November 15, 1963, which applied retroactively to transactions prior to its effective date. On June 1, 1964, an amended petition was filed asking a declaratory judgment determining the respective rights and liabilities of the parties. The district court, after hearing and trial, entered its order dismissing the plaintiffs' amended petition, and plaintiffs have appealed.

The basic issue in this case involves the application and effect of L. B. 17 which, as to matters relevant here, amended sections 45-138, 45-154, and 45-155, R. R. S. 1943.

Section 45-138, R. R. S. 1943, as to its relevant amended provisions reads: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall not on that account be void, but the licensee shall have no right to collect or receive any interest or charges on such loan. If any interest or other charges have been collected, the licensee shall forfeit and refund to the borrower all interest and other charges collected on the loan involved."

Section 45-154, R. R. S. 1943, as amended reads: "Any contract of loan, in the making or collection of which any act is done which constitutes a misdemeanor under section 45-153, shall not on that account be void, but the lender shall have no right to collect or receive any interest or charges whatsoever. If any interest or other charges have been collected, the lender shall forfeit and refund to the borrower all interest and other charges collected on the loan involved."

Section 45-155, R. R. S. 1943, as amended reads: "Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall not render such indebtedness void and uncollectible. If however, any interest or other charges have been collected on such indebtedness, all interest and other charges shall be forfeited and refunded."

L. B. 17 has been sustained by this court as constitutional. Davis v. General Motors Acceptance Corporation, 176 Neb. 865, 127 N. W. 2d 907.

This court previously held that a contract in compliance with the 1959 Nebraska Installment Sales Act was not a bona fide time sale under circumstances similar to those in the case here. See Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528.

Section 5 of L. B. 17 provides that except as to those transactions on which an action at law or in equity has been reduced to a final judgment as of the effective date of the act, the penalty provisions of L. B. 17 shall apply to all transactions made prior to its effective date. Here the transaction had not been reduced to final judgment and L. B. 17 specifically applied.

It is the contention of the plaintiffs here that where the rate of interest is in excess of the allowable legal rate, the ordinary rule applied to contracts generally requires that each payment on the contract or debt shall be applied first to the interest then due at the rate revealed by the contract, and the remaining balance applied to the reduction of principal to determine what amount shall be forfeited and refunded to the borrower under the provisions of L. B. 17.

The particular contract in question merely provided for specific amounts of monthly installment payments to be made on the contract with no reference as to whether such installments were principal or finance charges or interest. The contract does contain a provision that the buyer may prepay the contract in full or in part at any time before maturity and upon any such payment shall receive a refund credit as provided by the Nebraska Installment Sales Act.

By the enactment of L. B. 17, it is clear that the Legislature intended that usurious contracts or indebtedness should be collectible to the extent of the principal, but that any usurious interest or other charges should be forfeited to the borrower. This is in accordance with section 45-105, R. R. S. 1943, dealing with the general usury penalty.

The provisions of L. B. 17 requiring the forfeiture and refund to the borrower of all interest and other charges does specifically grant a right of recovery more extensive than provided in section 45-105, R. R. S. 1943. This court held early that under the provisions of section 45-105, R. R. S. 1943, an action could not be maintained to

recover usurious interest after a note had been paid, and that usury once paid could not be recovered in an independent action. The provisions of L. B. 17 clearly now extend the borrower's right to recover usurious interest and charges even though the entire contract or loan has been fully paid.

The essential point of the controversy here is how each installment payment, required to be made under a usurious contract or loan, shall be applied, as between interest and principal, where the contract is silent on the point, and there is no evidence of any agreement between the parties.

It is quite true that the general rule is that on an installment debt or contract, each payment is ordinarily applied first to the interest due and the balance to principal. There is, however, a specific and very well recognized exception to this rule which applies in usury cases. In the instant case, the plaintiffs' pleading is, of course, that the contract here constituted a usurious installment loan within previous opinions of this court, and this opinion proceeds on the assumption that it was.

The general rule which applies in usury cases where the statute provides for forfeiture of all interest has been stated as follows: "Where the statute declares that the penalty of usury shall be the forfeiture of all interest contracted to be paid, the lender has a right of action on the usurious contract, and may, in such action, recover the sum actually lent or paid, but can recover no interest, and any payments already made on the usurious contract will be credited as payments on the amount legally due, that is, on the principal. This rule holds good as long as any part of the debt remains unpaid, even though the statute makes no provision for recovering usurious interest voluntarily paid." 91 C. J. S., Usury, § 80, p. 659. See, also, 55 Am. Jur., Usury, § 151, p. 428; 91 C. J. S., Usury, § 92, p. 675.

In 40 Am. Jur., Payment, § 136, p. 808, it is stated: "The principle of law which applies unappropriated pay-

ments first to discharge the interest due, and then to reduce the principal, ordinarily does not operate in the case of usurious interest, for all interest usually is forfeited, eo instanti, by an agreement to pay interest at an illegal rate, and payments will not be applied by operation of law to the discharge of unlawful obligations in preference to debts justly due. On the contrary, where the interest on the debt is usurious, payments made generally will be applied to discharge the principal."

This court long ago adopted the rule that all sums paid as usury will be applied to the discharge of the principal, and not on the usury. See, First National Bank of North Bend v. Miltonberger, 33 Neb. 847, 51 N. W. 232; Tomblin v. Higgins, 58 Neb. 336, 78 N. W. 620.

We hold that where an installment contract or loan is usurious and where installment payments are not specifically allocated to principal or interest in the contract or by agreement, installment payments will be credited as payments on principal or so much thereof as remains unpaid and not on any illegal interest or other charges on the loan involved. To the extent that State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55, and Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87, may be in conflict herewith, they are overruled.

The plaintiffs take the position that since the language of L. B. 17 specifically provides for "forfeit and refund" of all interest and other charges, they are entitled to recover without payment of the portion of the debt legally due.

In 91 C. J. S., Usury, § 97, p. 682, it is provided: "As a general rule the right to recover usury paid may not be exercised as long as any part of the debt justly due, principal and legal interest, remains unpaid, unless the statute so provides." Previous to L. B. 17, penalties for usurious contracts or loans of the nature involved here were to void the contracts, to permit the borrower to

retain any property received, and to recover back all payments made. We believe that the Legislature clearly intended that these previous penalties be wiped out retroactively, and supplanted by the penalty of the loss of all interest and charges by the lender, but permitting the recovery of all principal. The right to recover illegal interest or other charges granted to the borrower by L. B. 17 of the Seventy-fourth (Extraordinary) Session of the Legislature may not be exercised as long as any part of the principal debt justly due remains unpaid.

The order of the district court dismissed the plaintiffs' petition for declaratory judgment without declaring the rights and obligations of the respective parties under the contract, and its failure to declare such rights is specifically raised on appeal. The parties were entitled to a judgment that all payments made by the plaintiffs upon the contract in the total sum of $1,383.82 were to be applied upon the principal of the contract; that the total original principal indebtedness on the contract was the sum of $3,525; and that the remaining principal indebtedness of the plaintiffs to the defendant was $2,141.18.

The order of dismissal is, therefore, reversed and the cause remanded with directions to enter a judgment in accordance with this opinion. Each party is to pay its own costs.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DONALD BREAKER, APPELLANT.
136 N. W. 2d 161

Filed July 2, 1965. No. 35967.

1. **Criminal Law.** Under section 28-201, R. R. S. 1943, whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal defendant.
2. ———. To constitute one an accomplice, the party must take some part in crime, perform some act, or owe some duty to the

person in danger that makes it incumbent upon him to prevent commission of crime. Mere presence, acquiescence, or silence in the absence of a duty to act is not enough to constitute one an accomplice, and the knowledge that a crime is being or about to be committed does not constitute one an accomplice.

3. ———. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.

4. ———. The advice or encouragement which will render one an accessory before the fact may be by acts, or words, but it must, to create guilt, be used with the intent to encourage and abet the crime.

5. ———. The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime.

6. **Criminal Law: Evidence.** In a criminal case a confession of guilt alleged to have been made by the defendant is not competent evidence unless first shown to have been voluntarily made.

7. ———: ———. Where an oral admission or confession has been received in evidence, its voluntary character is still a question of fact for the jury.

8. **Criminal Law: Trial.** It is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not, and an instruction or instructions, which, by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case, is prejudicially erroneous.

9. ———: ———. Where the trial court admits a confession which is challenged as involuntary by the defendant's evidence, it is prejudicial error for the court to not submit to the jury for its determination under appropriate instructions, the question of whether the defendant's alleged oral admission or confession is voluntary.

10. ———: ———. It is the duty of the trial court to instruct a jury to disregard an alleged confession or oral admission of guilt if found to be involuntary.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Reversed and remanded.

George D. McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and McCOWN, JJ., and WESTERMARK, District Judge.

WHITE, C. J.

One James Kubicka burglarized his brother's house at 610 North Lexington Street, Hastings, Nebraska, about 6 p.m., July 4, 1964. Defendant Donald Breaker was prosecuted in this action for the crime as an aider, abettor, or procurer under the terms of section 28-201, R. R. S. 1943, which provides that such aider or abettor shall be guilty as a principal. The defendant was found guilty by a jury and appeals from the conviction and sentence, asserting the insufficiency of the evidence and error by the trial court in not instructing on its own motion as to the issue of voluntariness of an oral confession received in evidence over objection. We reverse the judgment and remand the cause for a new trial.

The state's evidence supporting the conviction rests on the testimony of one James Kubicka, who alone broke into the house and took two wrist watches, an electric razor, thirty silver dollars, and two two-dollar bills, and on the oral confession of the defendant to one Bobby Henry, a deputy sheriff. The evidence shows that the defendant, his wife, and James Kubicka were together on the afternoon of July 4, 1964, at Ingleside Hospital at Hastings, Nebraska. Kubicka testified that he had a conversation with the defendant about 5 p.m. that afternoon; that they were both low on money; and that they talked the "break-in" over together. This conversation and the related events in the execution of the plans were testified to by Kubicka as follows: "Q Jim, tell the Court what was said at that conversation, would you? A Well, I told him I was running kind'a low on money, and he asked me if I knew where I could get any; and I said, 'well, my brother has a silver dollar collection,' so we decided that we'd go into my brother's house; so he took me up to my folk's house,

I went in, changed clothes, got something to eat, and then I went over to my brother's house, picked the lock on the back door; I went in; I picked up the silver dollars, two two-dollar bills, electric razor, and one man's wrist watch, and a lady's wrist watch; he was supposed to pick me up at seven o'clock, down in front of the Silver Grill; I left my brother's house, and I went over on Burlington, as — and I seen him turn north going on Seventh, and I hollered at him, and he turned around and came back; then I got in the car, and he asked me how much I got, and I told him I didn't know that I would count it; then I gave him two dollars to get some gas, and we went and got two dollars worth of gas; * * * Q Jim, calling your attention to the time that you had this conversation out at Ingleside, did the defendant state that he would pick you up at the Silver Grill? A Yes, he did. Q After you had taken the articles? A Yes sir, he did. * * * Q What was your purpose of going down there? A Well, I told Don to see if he could sell that silver dollar; and I gave it to him, and he sold it. * * * Q Did he attempt to get them sold at a pawn shop? A Yes sir. Q Did he name the pawn shop? A No sir. Q Did he state why he couldn't get rid of them? A He told me that they wouldn't give him enough money. Q And all the time he knew that these were the articles that you had taken from your brother's house? A Yes sir. * * * Q What was the conversation then? A About this break-in at my brother's house. Q Did you admit it at that time? A Yes sir, I did. Q And at that time didn't you say that Mr. Breaker helped plan it? Did you state, Jim, that the defendant Breaker helped plan it at that time? A Yes sir, I did."

The testimony is undisputed that defendant was not present at the scene of the crime. Kubicka burglarized the house sometime between 6 p.m. and 7 p.m. Defendant went to the Silver Grill about 7 p.m., and, not finding Kubicka, drove down the street and picked him up

at about Seventh and Burlington. This is what the defendant was to do in the plan testified to by Kubicka. The evidence shows that the defendant sold an 1897s silver dollar and tried to dispose of other articles at a pawn shop in Grand Island but was unable to do so because he could not get the right price for them.

The evidence shows that Kubicka and Breaker started to spend and dispose of the proceeds immediately after they met. Kubicka bought the defendant some gas, they bought liquor two different times which they consumed during the evening of July 4, 1964, and they were together and the defendant furnished the transportation both before and after the commission of the burglary. Some of the stolen articles were kept in the defendant's car.

The deputy sheriff, Bobby Henry, testified that the defendant, in a conversation at the county courthouse on the evening of July 10, 1964, in the presence of James Kubicka and sheriff Anderson, admitted that the burglary was planned at Ingleside and that he was to pick up Kubicka at 7 p.m. at the Silver Grill in order to establish an alibi for Kubicka.

We think the evidence was sufficient for the jury to infer that the defendant aided and abetted the commission of the crime and therefore was guilty as a principal under the terms of section 28-201, R. R. S. 1943, which abolished the common law distinction between accessories before the fact and principals and made all guilty as principals.

It is not necessary for defendant to be present at the scene of the crime, either actually or constructively. Neal v. State, 104 Neb. 56, 175 N. W. 699; Lamb v. State, 69 Neb. 212, 95 N. W. 1050. See, also, Skidmore v. State, 80 Neb. 698, 115 N. W. 288. On the other hand, it may be conceded that mere presence or knowledge alone is not sufficient to warrant a conviction as an aider and abettor. Quoting with approval, 14 Am. Jur., Criminal Law, § 110, p. 841, we recently said in Wilson v. State,

170 Neb. 494, 103 N. W. 2d 258, as follows: " 'To constitute one an accomplice he must take part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice * * *.' "

In 22 C. J. S., Criminal Law, § 88 (2), p. 261, it is stated: "As used in the criminal law, aiding and abetting means to assist the perpetrator of a crime and comprehends all assistance rendered by acts or words of encouragement, incitement, or support, or presence actual or constructive with preconcert with the intention of rendering assistance, if necessary." And, later in the same section quoted from above, pp. 262, 263, it is stated: "Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed." And, in 14 Am. Jur., Criminal Law, § 101, p. 836, it is said: "The advice or encouragement which will render one an accessory before the fact may be by acts or words, but it must, to create guilt, be used with the intent to encourage and abet the crime. The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime. Nor is the time of rendering the advice, aid, or encouragement an important element."

There is testimony that both Kubicka and the defendant needed money; that the crime was planned to solve their mutual need; and that their planning resulted in an agreement to meet afterwards at the Silver Grill to help establish an alibi. The jury was entitled to con-

sider all inferences to be drawn from the defendant's active and immediate participation in the spending, using, and the selling of some of the proceeds of the crime. There was evidence that this was not a case of mere knowledge and acquiescence. The jury could reasonably infer that the defendant rendered, by both words and acts, encouragement and assistance in the overall plan for the commission of the burglary. There is testimony that as soon as the defendant met Kubicka after the burglary that he inquired as to how much Kubicka got, and then, as mentioned, the defendant immediately proceeded to jointly participate in the proceeds and tried to sell and dispose of some of the articles. The evidence is that Kubicka stayed in the defendant's house until the Monday morning after the crime was committed. We think there was sufficient evidence for the jury to find beyond a reasonable doubt, under the applicable rules, that he aided and abetted the burglary committed by Kubicka and was therefore guilty as a principal.

The defendant asserts error in the failure of the court to instruct on and submit to the jury the issue of the voluntariness of the oral confession or admission of the defendant to the deputy sheriff Bobby Henry. Henry had taken the defendant to the courthouse for interrogation on the evening of July 10, 1964. It appears that sheriff Anderson and Kubicka were also present. Over objection Henry testified that defendant said they planned the burglary and that defendant would pick Kubicka up at the Silver Grill at 7 p.m. and establish an alibi for Kubicka. The record shows that defendant's counsel cross-examined as to foundation for this testimony, and after doing so, repeatedly objected on several grounds, including the general one that the testimony sought to be elicited was in violation of the defendant's constitutional rights. The following colloquy took place: "MR. MCARTHUR: Your Honor, we object to any of the proposed testimony this witness would give as to what the defendant said as having been given

at a time when he had no counsel, and was not apprised of his constitutional rights not to testify against himself; it being our point that this witness giving that testimony would defeat the amendment of the United States Constitution by the giving of testimony indirectly. MR. CONNOLLY: Your Honor, if the Court please, it will be shown that Mr. Breaker went voluntarily, and volunteered this information."

Objection was made for the same reason to the specific questions of the county attorney of this witness that produced the oral confession or admission referred to. The court overruled all objections and admitted the testimony referred to. The defendant testified in substance that upon being taken to the courthouse by Henry, he was questioned and was addressed by sheriff Anderson as follows: "'* * * let's play "truth or consequences"; you tell me the truth, or you get the consequences.'" He further testified that the remark was made as the sheriff was taking off his jacket and laying it in his car; that he was frightened by this act; and that he believed he was going to be shoved around. Sheriff Anderson was not called by the State as a witness. The record does not reveal interrogation affirmatively establishing that the confession was voluntarily made and excluding the hypothesis of improper inducements or threats. This was necessary. State v. Longmore, *ante* p. 509, at p. 518, 134 N. W. 2d 66; Holthus v. State, 138 Neb. 200, 292 N. W. 603; Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1, affirmed, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86. And, in a criminal trial, a confession of guilt alleged to have been made by the defendant is not competent evidence unless first shown to have been voluntarily made. State v. Longmore, *supra;* Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

We point out that the repeated objections made to this evidence were broad enough to call the attention of the trial judge to the issue of voluntariness of the oral admission. This is especially true in light of the

construction put on the objections by the county attorney in promising to supply the missing foundation by showing the statement to be voluntary. We further point out that even if the trial judge properly admitted the testimony of Henry at this time, the defendant's own evidence as to the threat by Anderson was adequate to challenge the voluntariness of the confession. It could not be denied that this oral confession was vital and an essential part of the State's evidence. And, as we have said, it may not be used unless it is first shown to be voluntary. We recently held in State v. Longmore, *supra,* as follows: "The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury." See, also, Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323; Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283.

We have also held that where the trial court admits a confession challenged as involuntary by defendant's evidence, it is prejudicial error to refuse to submit to the jury for its determination under appropriate instructions the question of whether defendant's alleged confession was voluntary. Kitts v. State, *supra.* And, the rule is well established that it is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not, and an instruction or instructions, which, by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case, is prejudicially erroneous. Jones v. State, 147 Neb. 219, 22 N. W. 2d 710; Young v. State, 74 Neb. 346, 104 N. W. 867, 2 L. R. A. N. S. 66; Dolan v. State, 44 Neb. 643, 62 N. W. 1090.

While our previous cases, such as Kitts v. State, *supra,* deal with this question when there has been a request

for an instruction by the defendant, it is claimed that the absence of such a request in this case relieves the trial court of the responsibility. As we have seen, the question of the voluntariness of an oral or written confession is an essential fact issue. Our law requires its ultimate resolution by the jury. We feel that the failure of the court to instruct on this material issue, when the defendant's evidence raised the question, amounted to a withdrawal by the trial court of this vital issue from the consideration of the jury. The issue of whether the admission or confession was coerced is vital to the preservation of the defendant's constitutional rights. The use of a coerced confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains. State v. Longmore, *supra*. The general rule is that when the issue of voluntariness of an admission or confession is raised, the court should give appropriate instructions on the issue. See 23A C. J. S., Criminal Law, § 1232, p. 586. And, when the issue is raised the court should properly instruct as to what constitutes a voluntary confession. See 23A C. J. S., Criminal Law, § 1232, p. 589, note 45. A case quite similar is People v. Bevins, 54 Cal. 2d 71, 351 P. 2d 776. In that case the defendant testified with regard to her confession that she made it as a result of long questioning by the officers; that she did it "in order to be left alone"; and that she did it to absolve several friends and relatives who were with her at the time of her arrest and whom she feared were being detained. On the other hand, there was testimony on the part of the state as to the voluntary character of the confession. The court, after stating the applicable rule as to the duty of the court to instruct as to the law on its own motion, the same rule that we have in this jurisdiction, held that it was the duty of the court to instruct on the issue of voluntariness on its own motion. The court said: "In the case at bar the testimony as to the circumstances surrounding the manner

in which defendant's confession was obtained was in direct conflict, thus directing to the attention of the trial judge that, under familiar rules, while it was within his discretion to permit the confession to be read to the jury, *he was also required to submit to the jury for its determination under proper instructions the question whether under all the circumstances the confession was made freely and voluntarily.* (People v. Gonzales, supra, 24 Cal. 2d 870, 876.)" (Emphasis supplied.)

We will not belabor the authorities further. An oral admission or confession of the defendant was not competent evidence unless the jury first found factually that it was voluntary. It was the duty of the court to instruct as to what constituted a voluntary confession and also to instruct the jury to disregard the alleged confession if found to be involuntary. See Heddendorf v. State, 85 Neb. 747, 124 N. W. 150. This is not a case of a confession being received wholly without objection or one where the defendant, by his own testimony, raises no issue of voluntariness. The objections raised the issue of whether its reception violated the defendant's constitutional rights. The objections were construed by the State's counsel as relating to the voluntariness of the giving of the confession. The defendant's affirmative evidence raised the issue of whether the confession or admission was received as the result of threats and fear generated by the acts and conduct of the officer. A vital fact issue as to the voluntariness of the oral admission or confession of the defendant was clearly raised in the record of this case. The failure of the trial court to instruct thereon amounted to a withdrawal of this issue from the jury's consideration. We hold that under these circumstances it is unnecessary that a defendant request an instruction upon the issue. The fundamental fact issue was presented and it was necessary for the court to instruct on this issue to protect the defendant's basic constitutional rights not to have the alleged admission or confession considered unless the jury first found said confession

or admission to be voluntary under the applicable principles of law.

There is another reason that further leads us to the conclusion we come to in this case. The testimony in this case is undisputed that the defendant was mentally defective and easily influenced by other people. In Shellenberger v. State, 97 Neb. 498, 150 N. W. 643, L. R. A. 1915C 1163, in speaking of an alleged confession of a defendant charged with murder, the court said as follows: "If he is a degenerate or defective, there is the more reason for care and caution that every provision which the law offers for the protection of those accused of a crime should be allowed. * * * It is true the confession *may* be competent evidence, but this can only be so if the jury are satisfied that the defendant made it voluntarily and understandingly, and not by reason of mental weakness or obliquity."

In light of our holding herein, it becomes unnecessary to discuss the other assignments of error. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

INDEX

Actions.

1. The Uniform Declaratory Judgments Act is procedural and the venue of a declaratory judgment action is governed by the rules relating to venue of civil actions generally. Father Flanagan's Boys' Home v. Graybill ---------- 79
2. The venue of a declaratory judgment action brought in the district court for the sole purpose of construing a will is in the county in which the defendant, or some one of the defendants, resides or may be summoned. Father Flanagan's Boys' Home v. Graybill ---------- 79
3. A bill of discovery may be brought which seeks the disclosure of facts resting in the knowledge of defendant in aid of the prosecution of some other proceeding. Stastny v. Tachovsky ---------- 109
4. The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. ---------- 226
5. Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. 226
6. Where evidence is adduced in a law action, whether by stipulation or otherwise, issues of fact are tried and determined. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. ---------- 226
7. A party has a right to bring an action on a note for advances made by one party to another for the purpose of carrying on the partnership. Fleischer v. Broders ---------- 723
8. A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection and use by an adverse party pursuant to discovery statute. Rhodes v. Edwards ---------- 757
9. Under statute, a party refusing to obey a discovery order may suffer the dismissal of the action or proceeding. Rhodes v. Edwards ---------- 757
10. Several actions may be brought and several judg-

ments recovered against several wrongdoers, although but one satisfaction can be had. Tober v. Hampton 858

Adverse Possession.

1. The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. Mentzer v. Dolen ------ 42
   Converse v. Kenyon ---------- 151
   Linch v. Nichelson ---------- 679
2. Adverse possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. Mentzer v. Dolen ---------- 42
   Converse v. Kenyon ---------- 151
3. The law does not require that possession shall be evidenced by a complete enclosure nor by persons remaining continuously on the land and constantly performing acts of ownership thereon. Mentzer v. Dolen ---------- 42
4. What is sufficient to meet the requirements for actual possession depends upon the character of the land and all of the circumstances of the case. Mentzer v. Dolen ---------- 42
   Converse v. Kenyon ---------- 151
5. Acts of dominion over land must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Mentzer v. Dolen -- 42
   Converse v. Kenyon ---------- 151
6. Where one, by mistake as to the boundary line, constructs a fence upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. Mentzer v. Dolen ---------- 42
   Converse v. Kenyon ---------- 151
7. It is the intent with which possession is held, by a person claiming title to land, rather than the intention to hold in accordance with his deed, that is controlling. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto. Mentzer v. Dolen ---------- 42
8. The mere failure to dispute the use of the land or

bring an action to eject an adverse possessor is not sufficient to defeat title, or to bring into operation the doctrine of estoppel. Swanson v. Dalton 55

9. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling. Converse v. Kenyon 151

10. After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. Converse v. Kenyon ---------- 151

11. The burden of proving adverse possession is on the person asserting it. He must recover upon the strength of his own claim and not upon the weakness of his adversary's title. Linch v. Nichelson -- 679

Affidavits.

A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause. Storz Brewing Co. v. Kuester ---------- 135

Animals.

1. As a general rule, a person in charge of animals has a right to lead or drive them along the highway and is not negligent as a matter of law for so doing, but in doing so, he must exercise reasonable care to avoid injury from motor vehicles using the highway. Guynan v. Olson ---------- 335

2. A person leading animals is entitled to assume that approaching motorists will use due care and obey the rules of the road. Guynan v. Olson ---- 335

3. There is no duty as a matter of law on the part of a person driving or leading cattle to maintain an advance guard to herald the approach of cattle, but the question of his contributory negligence in not doing so is ordinarily for the jury under all of the circumstances. Guynan v. Olson ---------- 335

Appeal and Error.

1. The writ of error coram nobis is not a substitute for a writ of error brought to correct errors of law apparent on the record. It does not permit

a defendant to retry his case again and again. Parker v. State ---------- 1
2. The issuance of a certificate of public convenience and necessity based on evidence is ordinarily binding on appeal to the Supreme Court, but the failure of an applicant to sustain the burden of showing that the issuance of the certificate was not arbitrary and unreasonable destroys its validity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
3. When the evidence on material questions of fact is in irreconcilable conflict, the Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Vollbrecht v. Vollbrecht ---------- 31
4. Rule for trial of equity case upon appeal de novo in Supreme Court stated. Mentzer v. Dolen ---- 42
Lortscher v. Winchell ---------- 302
Muller Enterprises, Inc. v. Gerber ---------- 463
5. In an appeal to the Supreme Court in a divorce action the cause is tried de novo. Hall v. Hall -- 91
6. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Caves v. Barnes ---------- 103
7. In a proceeding for a change in the boundaries of a school district, it is presumed that the evidence before the county superintendent was sufficient to support the order which was made if the evidence was not preserved in a proper bill of exceptions. Retzlaff v. Synovec ---------- 147
8. For an error at law occurring at the trial to be considered by the Supreme Court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal. Zavoral v. Pacific Intermountain Express ---------- 161
9. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and the failure in this respect is prejudicial error. Zavoral v. Pacific Intermountain Express ---------- 161
10. A motion to dismiss a cause is not a prerequisite to

appellate review of the sufficiency of the evidence to sustain a decree. Bankers Life Co. v. Peterson 205

11. Unless a motion for a new trial is filed in an action at law, review of the judgment in the Supreme Court will be limited to the sole question as to whether the pleadings support the judgment. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. 226

12. Rule for consideration upon appeal of ruling by trial court refusing to sustain motion for directed verdict stated. Middleton v. Nichols ---------- 282

13. An order sustaining an objection to personal jurisdiction is not appealable. Erdman v. National Indemnity Co. ---------- 312

14. An ambiguous instruction on the risk of nonpersuasion is not prejudicially erroneous where other instructions definitely and correctly cover the subject. Hansen v. Strohschein ---------- 367

15. A refusal of requested instructions is not erroneous where the instructions given by the court have the same effect. Hansen v. Strohschein ---------- 367

16. The discretion implicit in statute relating to bail bond is committed to the district court and its exercise by that court will not be interfered with by the Supreme Court unless the action of the former is arbitrary and capricious. State v. Reed 370

17. When jurisdiction of a cause becomes vested in the Supreme Court on appeal, a bill of exceptions already filed may be amended by order of the district court in order to properly reflect the true status of the record, but it may not be amended to introduce new and additional evidence or to raise new issues in the case. State v. Reed ---------- 370

18. Ordinarily, alleged errors in the admission of evidence are not considered by the Supreme Court where the review is de novo upon the record. Murphy v. Hi-Way G.M.C. Sales & Service Corp. 397

19. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Schmeeckle v. Peterson ---------- 476

20. To justify the Supreme Court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the Supreme Court to correct the mistake. Schmeeckle v. Peterson ---------- 476

21. An order overruling a motion for a new trial and placing the defendant on probation is a final appealable order. State v. Longmore ---------- 509
22. Neither a request for, nor an acceptance of, an order of probation is, in itself, a voluntary waiver of the right of appeal. State v. Longmore ------ 509
23. A defendant must appeal from the order within the statutory time. He may not take the benefit of his probation and hold off on his appeal. State v. Longmore ---------- 509
24. Whether requested to do so or not, the trial court has the duty of instructing on issues presented by the pleadings and the evidence, and failure to do so constitutes prejudicial error. Brown v. Kaar -- 524
25. Under the terms of statute applicable to appeals from county court, it is the mandatory duty of the county judge to sign and certify a transcript of his proceedings within the time allowed by the statute. Liljehorn v. Fyfe ---------- 532
26. The oversight of a county judge in failing to attach his signature to the certification of a transcript cannot be charged to an appellant, and he may not be deprived of his right to be heard on appeal because of the omission on the part of the county judge. Liljehorn v. Fyfe ---------- 532
27. Official neglect in signing and certifying a transcript may not be excused by saying that a properly certified transcript would have been ready had the appellant called and made a demand for the same. Liljehorn v. Fyfe ---------- 532
28. A party cannot be deprived of his right to appeal by the wrong of an officer when he is without fault himself. Liljehorn v. Fyfe ---------- 532
29. In a trial on appeal, the trial court may properly consider all applicable elements of actual value which are supported by evidence of probative force bearing upon the actual value of the property for tax purposes. Richards v. Board of Equalization 537
30. Powers of Supreme Court in reviewing action of State Board of Equalization and Assessment outlined. Carpenter v. State Board of Equalization & Assessment ---------- 611
31. It is only in situations where the record is conclusive that the action of the State Board of Equalization and Assessment was illegal, contrary to law, arbitrary, and capricious that the Supreme Court has any power to interfere with its findings and

orders. Carpenter v. State Board of Equalization & Assessment ---------- 611
32. Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld. Eden v. Asa ---------- 651
33. Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted. Eden v. Asa ---------- 651
34. Appeals to the Supreme Court in probate matters are heard and determined de novo. Eden v. Asa -- 651
35. Jurisdiction of a proceeding in error is not defeated by an omission of the phrase "in error" from the reference in the summons to the petition. Campbell v. City of Ogallala ---------- 663
36. Where a case is tried in the district court on a mutual theory of the parties, the Supreme Court will dispose of it on appeal on the same theory whether correct or not. Fulmer v. State ---------- 664
37. An order sustaining a special appearance is not an appealable order. Ruse v. Navajo Freight Lines, Inc. ---------- 670
38. Rule as to consideration given to view of the premises by trial court stated. Linch v. Nichelson 682
39. In an action for the disconnection of lands from a city or village, the decree of the district court is reviewable as in equity and will be tried de novo in the Supreme Court. Shelton Grain & Supply Co. v. Village of Shelton ---------- 695
40. Where the evidence is contradictory, the verdict of the jury will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination and not for the court. Sall v. Schnackenberg ---------- 699
41. On appeal, the Supreme Court will decide the case upon the theory on which it was tried in the district court. Mathis v. State ---------- 701
42. Public interest requires that there shall be an end to litigation. When a cause has received the consideration of the Supreme Court, has had its merits determined, and has been remanded with

specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate. Berg v. Midwest Laundry Equipment Corp. 770

43. The appellate court may, on the second appeal between the same parties, if justice requires, review and reverse its former decision; but the parties are not entitled to such review as a matter of right. Such practice will be resorted to sparingly, and only in cases where cogent reasons exist therefor. Berg v. Midwest Laundry Equipment Corp. ---------- 770

44. The appellate court, on a second appeal between the same parties, will not ordinarily reexamine questions of law presented in the first appeal, as the matters decided therein come within the rule of stare decisis, and become the law of the case. Berg v. Midwest Laundry Equipment Corp. ------- 770

45. Rule to be applied on second appeal seeking merely to relitigate questions settled by the first appeal stated. Berg v. Midwest Laundry Equipment Corp. 770

46. The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion. State v. Hunt ---------- 783

47. On appeal to the Supreme Court from an order of the railway commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Andrews v. Nebraska State Railway Commission ---------- 799

48. An appellant who withdraws $200 from a former jointly held account assigned by the divorce decree to him is not estopped from appealing from the decree on the ground that the property division awarded him was insufficient. Kassebaum v. Kassebaum ---------- 812

Appearances

1. A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant appearing. Eden v. Asa ---------- 651

2. Where the trial court has jurisdiction of the subject matter in dispute and parties enter a general appearance and invoke the decision of the court on the merits of the controversy, in the absence of error being made to appear upon the record, the judgment will be upheld. Eden v. Asa ---------- 651

3. An order sustaining a special appearance is not an appealable order. Ruse v. Navajo Freight Lines, Inc. ---------- 670

Architects.

1. The regulation and registration of persons engaging in the practice of professional architecture is a proper exercise of the police power. State ex rel. Meyer v. Knutson ---------- 375
2. Purpose and effect of grandfather clause in act regulating practice of engineering and architecture stated. State ex rel. Meyer v. Knutson ---------- 375

Arrest.

1. Where a person is lawfully arrested, law enforcement officers may, without a search warrant, make a contemporaneous search of the person of accused for weapons, and fruits of or implements used to commit the crime. State v. Putnam ---------- 445
2. The right to search and seize without a search warrant when the person is lawfully arrested extends to things under such person's immediate control and, depending on the circumstances, to the place and time of arrest. State v. Putnam ------ 445
3. If knowledge of facts warranting the arrest of a person is gained from an independent source from that gained by an unlawful search, such facts may be proven the same as any other fact. State v. Putnam ---------- 445
4. Where a person was arrested, his automobile taken into custody and searched, and stolen goods were found in it, the fact that law enforcement officers transported such person and his automobile to a convenient place and there removed the stolen property in the presence of the defendant is not so remote from the arrest as to make the search and seizure unlawful. State v. Putnam ---------- 445

Attorney and Client.

Where a party is entitled to recover an attorney's fee to be taxed as costs, the amount to be allowed is within the discretion of the trial court. Kasparek v. May ---------- 425

Automobiles.

1. There is nothing in the statutory conditions relative to implied consent which has the effect of

changing the foundation requirements for the admission of the results of tests of body fluids to determine intoxication that are performed pursuant to the express consent of the accused. State v. Seager ---------- 51
2. When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence. Caves v. Barnes 103
3. The reasonable value of the use of a motor vehicle for commercial purposes is the reasonable net rental value upon the market at the place in question of the vehicle involved or a vehicle of like capacity and performance, the lessee bearing all such expenses as he would have to bear in the operation of his own vehicle. Caves v. Barnes ---------- 103
4. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. Caves v. Barnes ---------- 103
5. Duty of driver of motor vehicle approaching, entering, and crossing an intersection protected by an automatic traffic signal stated. Zavoral v. Pacific Intermountain Express ---------- 161
6. The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. Zavoral v. Pacific Intermountain Express ---------- 161
7. Usually a yellow light following the green at an automatic signal controlled intersection warns that the red light is about to appear, and its purpose is to permit the clearance of vehicles from the intersection so that cross traffic may proceed. Zavoral v. Pacific Intermountain Express ---------- 161
8. In the absence of statute, the display of a yellow light following the green on an automatic signal requires vehicular traffic to stop or to proceed carefully if stop cannot be made. Zavoral v. Pacific Intermountain Express ---------- 161
9. A "go" or green signal at an automatic signal controlled intersection is a grant of permission to drivers to proceed lawfully and carefully. Zavoral v. Pacific Intermountain Express ---------- 161

10. The question of whether a driver should anticipate a change in lights as he approaches an intersection on a "go" or green signal generally is for the jury under all of the circumstances, evidence, and facts of the case. Zavoral v. Pacific Intermountain Express ---------- 161
11. The driver of a motor vehicle entering an intersection of two streets is obligated to look for approaching vehicles and to see those within that radius which denotes the limit of danger. Hellmeier v. Policky ---------- 170
12. When the driver of a motor vehicle entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Hellmeier v. Policky ---------- 170
13. A left-hand turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. Hoffman v. Jorgensen Awnings, Inc. ---------- 261
14. The negligence of the driver is ordinarily not imputed to the guest. Hoffman v. Jorgensen Awnings, Inc. ---------- 261
15. Before a verdict can be directed against a driver for his failure to see another vehicle approaching a nonprotected intersection, the evidence must show without dispute that the other vehicle was located in a favored position and within the radius of danger. Sanderson v. Westphalen ---------- 298
16. Where a driver looks but fails to see an approaching vehicle which is not shown to be in a favored position his negligence is usually a question for the jury. Sanderson v. Westphalen ---------- 298
17. The general rule is that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Guynan v. Olson ---------- 335
18. The exceptions to the general rule embrace conditions under which reasonable minds may differ as to whether or not the driver was able to see in the exercise of ordinary care the situation with which he was confronted. Guynan v. Olson ---------- 335

19. Exceptions to the general rule do not extend to that which is clearly seen in time to avoid a collision or which, in the exercise of ordinary care, would or should have been seen. Guynan v. Olson 335
20. Ordinarily, conditions such as frost, ice, snow, mist, or fog are not intervening causes excusing the exercise of ordinary care by a driver but are conditions that require a driver to exercise a degree of care commensurate with the circumstances. Guynan v. Olson ---------- 335
21. A person leading animals is entitled to assume that approaching motorists will use due care and obey the rules of the road. Guynan v. Olson ------ 335
22. The failure of a driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law, and defeats recovery. Schmeeckle v. Peterson ---------- 476
23. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence that there is danger of collision if he proceeds. Schmeeckle v. Peterson ---------- 476
24. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection at approximately the same time. Schmeeckle v. Peterson ---------- 476
25. The Iowa guest statute, although in derogation of common law, is to be liberally construed with a view to promote its objects and assist the parties in securing justice. Cappellano v. Pane ---------- 493
26. Under the Iowa guest statute, in determining whether the occupant is a guest, each case must be decided in the light of its own facts. It is always important to ascertain, if possible, what it was that primarily motivated the undertaking. Cappellano v. Pane ---------- 493
27. Circumstance necessary to remove passenger in automobile from guest category under Iowa statute stated. Cappellano v. Pane ---------- 493
28. Under the Iowa guest statute, there is a rebutta-

ble presumption that an occupant riding in a car operated by another person is a guest and he has the burden of proving otherwise in an action predicated upon negligence of the operator. Cappellano v. Pane ---------- 493

29. Under the Iowa guest statute, defendant in an automobile negligence action is not required to raise the question of the passenger's status as a guest as an affirmative defense, but plaintiff, if a passenger, must prove as part of his main case that he was riding in the automobile in some relationship other than as a guest. Cappellano v. Pane ---------- 493

30. What constitutes a guest under Iowa guest statute stated. Cappellano v. Pane ---------- 493

31. The mere division of expenses among members of a party riding in an automobile does not render the person so contributing a passenger for hire as regards applicability of the Iowa guest statute. Cappellano v. Pane ---------- 493

32. Meaning of term "reckless operation" under Iowa guest statute stated. Cappellano v. Pane ---------- 493

33. Under the Iowa guest statute the actions and conduct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences. Cappellano v. Pane ---------- 493

34. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest. Cappellano v. Pane ---------- 493

35. Requirements necessary to establish "reckless operation" under Iowa guest statute stated. Cappellano v. Pane ---------- 493

36. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. Snelling v. Pieper ---------- 818

37. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation. Snelling v. Pieper ---------- 818

38. The benefit or compensation accruing to the owner

or operator need not be in cash or its equivalent and the benefit or compensation to the owner or operator need not pass from the passenger to the driver. Snelling v. Pieper ---------- 818

39. In an action under the automobile guest statute, each individual case must be determined separately and the answer ascertained from the relationship between the parties and the purposes to which the transportation is incident. Snelling v. Pieper -- 818

40. Where the owner or operator of an automobile transports a minor child, with the consent of the child's parents and pursuant to and in performance of a contract for the care of said child, such carriage confers a tangible and substantial benefit upon such owner and operator beyond those merely incidental to hospitality and social relationship. Snelling v. Pieper ---------- 818

Bail.

1. If the surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. State v. Reed ------ 370

2. Nature and extent of the liability upon a bail bond stated. State v. Reed ---------- 370

3. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Reed ---------- 370

4. The discretion implicit in statute relating to bail bond is committed to the district court and its exercise by that court will not be interfered with by the Supreme Court unless the action of the former is arbitrary and capricious. State v. Reed -------- 370

5. In a proceeding for the recovery of judgment on a bail bond, there is no duty on the part of the State to prove damages. State v. Reed ---------- 370

6. Ordinarily an escape by the principal during the time for trial affords no excuse to the surety. State v. Reed ---------- 370

7. Generally relief or remission of a bail bond will be refused where the defendant is at large on the date of the default of appearance on the bond and then becomes arrested or imprisoned in another state after the default and the forfeiture of the bond. State v. Reed ---------- 370

Bills and Notes.

A note reciting "for value received" is evidence not only of a promise but constitutes prima facie evidence of consideration. The burden of showing payment is a matter of defense which the defendant must affirmatively establish at trial. Fleischer v. Broders ---------- 723

Boundaries.

1. Where one, by mistake as to the boundary line, constructs a fence upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. Mentzer v. Dolen ---------- 42
   Converse v. Kenyon ---------- 151
2. In the case of a change in the general course of a river, the better rule is that the frontage of each riparian owner on the new river bank should be divided in proportion to his frontage on the original bank. Swanson v. Dalton ---------- 55
3. Two adjoining property owners may agree upon their respective interests in accretion adjoining their lands and fix the boundary lines by agreement, regardless of their exact legal rights. Swanson v. Dalton 55
4. In order that a boundary line may be established by a parol agreement, a mutual intention of the parties to determine the boundary line must be shown. Swanson v. Dalton ---------- 55
5. Under statute, a boundary line may be established by mutuality of recognition and acquiescence of the parties, but such mutuality of recognition and acquiescence must exist for a period of 10 consecutive years. Swanson v. Dalton ---------- 55
6. Under circumstances outlined in opinion, reformation of deed should be granted for mutual mistake of the parties. Lippire v. Eckel ---------- 643
7. An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line. Linch v. Nichelson ---------- 679
8. A general rule cannot be followed in dividing accretion among riparian landowners under all circumstances. Osgood-Lewis-Perkins, Inc. v. Green ---- 807
9. Under exceptional circumstances and in order to

do equity, an incomplete meander line may be used as the old bank to be measured pursuant to the frontage-to-frontage method of apportioning accretion among landowners. Osgood-Lewis-Perkins, Inc. v. Green ---------- 807

Breach of the Peace.

1. The terms "disorderly conduct" and "breach of the peace" are defined. State v. Sukovaty ---------- 779
2. Ordinarily, misconduct of the complaining witness is not a defense to a charge of disturbing the peace by disorderly conduct through the use of profane and abusive language. State v. Sukovaty 779

Burglary.

1. The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building is a "breaking" within the accepted definition of burglary. State v. Sedlacek ---------- 322
2. Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case of burglary. State v. Sedlacek ---- 322

Cancellation of Instruments.

1. In a confidential or fiduciary relationship in which confidence is rightfully reposed, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred. Cunningham v. Quinlan 687
2. Where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain a deed, a presumption of undue influence arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Cunningham v. Quinlan ---------- 687

Carriers.

1. Unequal charges for transportation of property by a common carrier are not unjustly discriminatory if they are legitimately referable to transportation conditions. United Mineral Products Co. v. Nebraska Railroads ---------- 640
2. Relative costs of service for different hauls of a commodity are a basic determinant of the reason-

ableness of rate relationships. United Mineral Products Co. v. Nebraska Railroads ---------- 640
3. Railroads may not reduce rates to meet competition at one point and refuse to meet it at another where the circumstances are substantially similar. United Mineral Products Co. v. Nebraska Railroads ------ 640

Compromise and Settlement.

1. The law favors and encourages settlements. In the absence of fraud, error, or mistake, they should not be set aside. Lortscher v. Winchell --------- 302
Fleischer v. Broders ---------- 723
2. Where the evidence shows a meeting of the parties, a presentation, examination, and adjustment of their accounts, and the making of a note for the estimated balance and the surrender of the notes, such acts constitute settlement between the parties. Fleischer v. Broders ---------- 723
3. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers. Tober v. Hampton 858
4. The injured party can have only one satisfaction for the injury and if the amount received was not in full satisfaction it is a pro tanto bar to an action against the other wrongdoer. Tober v. Hampton -- 858
5. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement. Tober v. Hampton ---------- 858

Conservators.

1. Statute providing for the appointment of a conservator is for the benefit of any adult who is not a spendthrift, mentally ill, or mentally incompetent, but who considers himself unfit by reason of infirmities of age or physical disability to manage his estate. Eden v. Asa ---------- 651
2. The county court has original jurisdiction with respect to the appointment and settlement of accounts of conservators and may apply equitable principles to matters within the jurisdiction when necessary. Eden v. Asa ---------- 651
3. The county court has power to adjudicate the authority of the conservator as against the claims of

another who has appeared in the proceeding and challenged it. Eden v. Asa ---------- 651

Conspiracy.

Conspiracy to injure another's business is actionable if induced by malice, without the justification of competition, the service of any lawful purpose, or if its object was accomplished by fraud or other illegal means. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 329

Constitutional Law.

1. By the Constitution of the State of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor. Fulmer v. State ---------- 20
2. The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. W.E.W. Truck Lines, Inc. v. State ---------- 218
3. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement which he cannot be deprived of without due process of law and compensation for his loss. W.E.W. Truck Lines, Inc. v. State ---------- 218
   Swanson v. State ---------- 671
4. Opinion in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475, is controlling in these cases. Skag-Way, Inc. v. Douglas ---------- 290
   Plucknett v. Morrision ---------- 292
5. The constitutional prohibition against special legislation does not prevent the Legislature from dividing a subject into classes, and a classification made pursuant to a public purpose which has a rational basis is not invalid. State ex rel. Meyer v. Knutson ---------- 375
6. A statute bearing alike upon all individuals of each class is not a discrimination forbidden by the state Constitution, nor by the Fourteenth Amendment to the Constitution of the United States. State ex rel. Meyer v. Knutson ---------- 375
7. The statute regarding a criminal sexual psychopathic person is a valid and proper exercise of the police power of the state as a measure of public safety. State v. Madary ---------- 383

8. The statute providing for commitment of sexual psychopaths does not deny equal protection of the laws. State v. Madary ---------- 383
9. The sexual psychopath statute providing for investigation and commitment does not deprive the accused of his liberty without due process of law. State v. Madary ---------- 383
10. A statute providing for detention, investigation, and commitment of alleged sexual psychopaths does not place the accused who has been previously convicted of sexual offenses in double jeopardy. State v. Madary ---------- 383
11. The sexual psychopath law requires the person against whom the petition is filed to submit to an examination by physicians appointed by the court upon petition by the county attorney without notice or right to be heard at the examination. Such a provision does not violate the constitutional requirement of due process of law. State v. Madary 383
12. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the railway commission is subject to and governed by the provisions of such enactment. Sherdon v. American Communication Co. ---------- 454
13. The use of any confession obtained in violation of the due process clause of the state and federal Constitutions requires reversal of the conviction even though unchallenged evidence adequate to convict remains. State v. Longmore ---------- 509
14. A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights. State v. Longmore -- 509
15. A confession obtained in violation of the defendant's constitutional rights is involuntary and inadmissible in evidence. State v. Longmore ---------- 509
16. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. Markham v. Brainard ---------- 544
17. A penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid is invalid. Markham v. Brainard -- 544
18. The Constitution of this state provides that the

necessary revenue for the maintenance of state government shall be raised by taxation in such a manner as the Legislature may direct. Carpenter v. State Board of Equalization & Assessment 611

19. The Constitution of this state provides that taxes shall be levied uniformly and proportionately upon all tangible property and that the Legislature may prescribe standards and methods for the determination of the value of tangible property uniformly and proportionately. Carpenter v. State Board of Equalization & Assessment 611

20. Both the county board of equalization and the State Board of Equalization and Assessment must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. Carpenter v. State Board of Equalization & Assessment 611

21. An order to produce copies of income tax returns pursuant to state discovery statute is not violative of the due process clauses of the state and federal Constitutions. Rhodes v. Edwards 757

Contempt.

1. Costs and expenses incurred by an injured party and which are essential to the litigation may be recovered from the contemner in a civil contempt proceeding. Kasparek v. May 425

2. In the absence of the showing of an abuse of discretion, an allowance to the injured party for costs and expenses in a civil contempt proceeding will not be disturbed. Kasparek v. May 425

Contracts.

1. Where parties reduce an agreement to writing, in the absence of fraud, mistake, or ambiguity, the writing is the only competent evidence of the contract. Schommer v. Bergfield 140

2. Where the existence of a written contract has been induced by prior and contemporaneous oral agreements, parol evidence is not admissible to add to or contradict terms of the written contract. Schommer v. Bergfield 140

3. The placing of a downpayment in escrow by a buyer, when the written contract for the sale of real estate provides that it shall be paid to the seller, ordinarily constitutes a material breach of the contract. Schommer v. Bergfield 140

4. Time is not of the essence of a contract unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. Schommer v. Bergfield ---------- 140
5. The acknowledgment of the receipt of consideration, in whole or in part, in a written contract, is a recitation of fact and may be explained or contradicted by parol evidence. Schommer v. Bergfield 140
6. In the absence of fraud, a person who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of its contents. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211
7. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211
8. The law presumes that parties understand the import of their contracts and that they had the intention which the contract terms manifest. Transport Indemnity Co. v. Seib ---------- 253
9. The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder. Currency Services, Inc. v. Passer -- 286
10. If a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the contract. Currency Services, Inc. v. Passer ---------- 286
11. An indemnity contract should be construed so as to ascertain and give effect to the parties' intention, if that can be done consistently with legal principles. Currency Services, Inc. v. Passer ---------- 286
12. Rule for construction of indemnity contract stated. Currency Services, Inc. v. Passer ---------- 286
13. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. Currency Services, Inc. v. Passer -- 286
14. The interpretation given a contract by the parties themselves, while engaged in the performance of it,

is one of the best indications of their true intent and courts should enforce such construction. Lortscher v. Winchell ---------- 302
Muller Enterprises, Inc. v. Gerber ---------- 463
15. If payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof. Houser v. Houser ---------- 401
16. The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely rebuttable by circumstantial as well as direct evidence. Houser v. Houser ---------- 401
17. The presumption of gratuity is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay. Houser v. Houser ---------- 401
18. The law presumes that a person who makes a contract understands its meaning and effect and that he has the intention which its terms manifest. Muller Enterprises, Inc. v. Gerber ---------- 463
19. It is sufficient if an instrument states the essential terms by which the parties intended to be bound with sufficient definiteness and clarity that a court by interpretation with the aid of the existing or contemplated circumstances may enforce it. Muller Enterprises, Inc. v. Gerber ---------- 463
20. Contracts to continue, not until a fixed date but until the happening of an event which is certain to occur sooner or later, are ordinarily enforceable and not void as to the uncertainty as to the time of performance. Muller Enterprises, Inc. v. Gerber 463
21. A contingent liability for payment of an obligation becomes absolute when the event fixed by the contract for its payment occurs. Muller Enterprises, Inc. v. Gerber ---------- 463
22. The construction of a written contract is ordinarily a question of law. Omaha Public Power Dist. v. Travelers Ind. Co. ---------- 709
23. Negotiations and conversations leading up to a written contract are merged therein. Evidence of such negotiations and conversations is not admissi-

ble to vary, modify, or contradict the written contract. Spellman v. State ---------- 738
24. In the absence of fraud, mistake, or ambiguity, the written instrument is the only competent evidence of the agreement. Spellman v. State ---------- 738

Contribution.

1. The word "indemnity" as used in connection with law relating to tort-feasors means a shifting of the entire loss, while the word "contribution" means a sharing of the loss. Tober v. Hampton ---------- 858
2. Apart from statute, the general rule is that one of several wrongdoers, who has been compelled to pay the damages for the wrong committed, cannot compel contribution from the others who participated in the commission of the wrong. Tober v. Hampton 858
3. The use of a legal device, proper in its setting, should not be extended to a situation foreign to its nature for the purpose of thwarting the decisions of the courts. Tober v. Hampton ---------- 858
4. As used in the present case, loan receipts are being used to thwart the law of Nebraska relating to indemnification and contribution among tort-feasors. Tober v. Hampton ---------- 858

Coram Nobis.

1. The common law writ of error coram nobis exists in this state under the terms of statute. Parker v. State ---------- 1
2. The purpose of the writ of error coram nobis stated. Parker v. State ---------- 1
3. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff. The alleged error of fact in a criminal proceeding must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result. Parker v. State ---------- 1
4. All presumptions exist in favor of the regularity and correctness of the judgments of courts of general jurisdiction. The burden is on the plaintiff in a proceeding for a writ of error coram nobis to produce substantial and credible evidence sufficient to overcome the presumption that the judgment of conviction was correct. Parker v. State ---------- 1
5. Ordinarily, the writ of error coram nobis does not lie to test the credibility of witnesses in a criminal trial and cannot be invoked upon the ground

that an important witness testified falsely about a material issue in the case. Parker v. State 1
6. The writ of error coram nobis is not a substitute for a writ of error brought to correct errors of law apparent on the record. It does not permit a defendant to retry his case again and again. Parker v. State 1

Corporations.

1. Before any state can subject a foreign corporation to the jurisdiction of that state, such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction. Dale Electronics, Inc. v. Copymation, Inc. 239
2. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts. Dale Electronics, Inc. v. Copymation, Inc. 239
3. The filling of orders solicited by an independent contractor does not bring a foreign corporation within the orbit of doing business in Nebraska sufficient to warrant service of process by publication upon it. Dale Electronics, Inc. v. Copymation, Inc. 239

Costs.

1. Ordinarily, the successful party is entitled to a judgment for costs. Kasparek v. May 425
2. Costs and expenses incurred by an injured party and which are essential to the litigation may be recovered from the contemner in a civil contempt proceeding. Kasparek v. May 425
3. Where a party is entitled to recover an attorney's fee to be taxed as costs, the amount to be allowed is within the discretion of the trial court. Kasparek v. May 425
4. In the absence of the showing of an abuse of discretion, an allowance to the injured party for costs and expenses in a civil contempt proceeding will not be disturbed. Kasparek v. May 425

Courts.

1. A county court has jurisdiction to construe wills when necessary for the benefit of the executor in

carrying out the terms of the will. Father Flanagan's Boys' Home v. Graybill ---------- 79
2. The district court has exclusive jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Father Flanagan's Boys' Home v. Graybill 79
3. The orders of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground. Stastny v. Tachovsky --------- 109
4. The exhumation of a corpse, often of material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity and propriety. Stastny v. Tachovsky ---------- 109
5. The juvenile court had its origin in the protection that is due the innocent or helpless. It was never intended that the method provided for its operation should be a trap to prevent such protection. Stewart v. McCauley ---------- 412
6. Rule for construction of juvenile court laws stated. Stewart v. McCauley ---------- 412
7. When the court takes jurisdiction of a child, that child becomes a ward of the court, and the court's primary consideration will always be the best interest and welfare of the child. Stewart v. McCauley ---------- 412
8. Courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court. Muller Enterprises, Inc. v. Gerber ---------- 463
9. On its probate side a county court lacks competency to determine disputed title to personal property except as an incident to its jurisdiction over settlement and distribution. Lambie v. Stahl ---------- 506
10. On a claim by a legal representative of a decedent's estate, the coincidence that the alleged debtor with an adverse defense is also named a legatee, without other circumstances, does not establish probate jurisdiction to render a personal judgment against him. Lambie v. Stahl ---------- 506
11. Under the terms of statute applicable to appeals from county court, it is the mandatory duty of the

county judge to sign and certify a transcript of his proceedings within the time allowed by the statute. Liljehorn v. Fyfe ---------- 532

12. The oversight of a county judge in failing to attach his signature to the certification of a transcript cannot be charged to an appellant, and he may not be deprived of his right to be heard on appeal because of the omission on the part of the county judge. Liljehorn v. Fyfe ---------- 532

13. The district court may, by proper order, compel an inferior court or tribunal to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission. Liljehorn v. Fyfe ---------- 532

14. A litigant who has invoked the jurisdiction of the court upon a matter of which it has power to take cognizance cannot thereafter object thereto. Eden v. Asa ---------- 651

15. The county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. Eden v. Asa ---------- 651

16. The county court has original jurisdiction with respect to the appointment and settlement of accounts of conservators and may apply equitable principles to matters within the jurisdiction when necessary. Eden v. Asa ---------- 651

17. The county court has power to adjudicate the authority of the conservator as against the claims of another who has appeared in the proceeding and challenged it. Eden v. Asa ---------- 651

Criminal Law.

1. The common law writ of error coram nobis exists in this state under the terms of statute. Parker v. State ---------- 1

2. The purpose of the writ of error coram nobis stated. Parker v. State ---------- 1

3. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff. The alleged error of fact in a criminal proceeding must be such as would have prevented a conviction. It

is not enough to show that it might have caused a different result. Parker v. State ---------- 1
4. Ordinarily, the writ of error coram nobis does not lie to test the credibility of witnesses in a criminal trial and cannot be invoked upon the ground that an important witness testified falsely about a material issue in the case. Parker v. State -------- 1
5. That part of statute, which prohibits keeping for sale or gratuitous distribution any secret nostrum, drug, or medicine for the purpose of procuring miscarriage, is not violated if the nostrum, drug, or medicine is not secret. State v. Lauritsen ---------- 230
6. A penal law which is equally susceptible of more than one construction will ordinarily receive that construction which is more favorable to the accused. State v. Lauritsen ---------- 230
7. An incriminating statement or accusation, made in the presence of an accused, which he has the opportunity to deny, but does not, may be admissible as an exception to the hearsay rule. State v. Worley 232
8. Before an incriminating statement or accusation made in the presence of an accused is admissible, the evidence must establish that the defendant heard the incriminating statement. State v. Worley 232
9. A declaration to be competent evidence as a part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. State v. Worley ---------- 232
10. To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. State v. Sedlacek ---------- 322
11. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it. State v. Sedlacek ---------- 322
12. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. State v. Sedlacek 322
13. In a criminal action, the Supreme Court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is in-

sufficient to support a finding of guilt beyond a reasonable doubt. State v. Sedlacek ---------- 322
14. Where punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Sedlacek ------ 322
15. A proceeding for investigation and for commitment of an alleged sexual psychopath is civil in nature, and the person committed is not confined for commission of a criminal offense. State v. Madary ---- 383
16. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. State v. Archbold ---------- 433
17. It is a general rule that evidence of other crimes, even by the instrumentality of a confession, is not admissible to prove the guilt of the defendant of the particular crime charged. State v. Putnam -- 445
18. In order for evidence of another independent offense to be admissible it must appear that the crime charged has an element of motive, criminal intent, or guilty knowledge necessary to be established. State v. Putnam ---------- 445
19. In a criminal case a confession of guilt alleged to have been made by the defendant is not competent evidence unless first shown to have been voluntarily made. State v. Longmore ---------- 509
State v. Breaker ---------- 887
20. Procedure necessary to be followed to permit introduction of confession in evidence outlined. State v. Longmore ---------- 509
21. Rights of counsel for defendant to cross-examine and to introduce other evidence before admission of confession in evidence outlined. State v. Longmore ---------- 509
22. The admission of a confession in evidence constitutes the court's independent determination that the confession is voluntary. State v. Longmore ------ 509
23. The extent to which defendant's right to consult counsel, during the period prior to and during the interrogation, was delayed or denied is clearly proper to be shown. State v. Longmore ---------- 509
24. The question of whether or not in the first instance

the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury. State v. Longmore ---------- 509

25. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. Markham v. Brainard ---------- 544

26. A penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid is invalid. Markham v. Brainard ---------- 544

27. A person charged with crime may be convicted on circumstantial evidence. State v. Ohler ---------- 596

28. In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged. State v. Ohler ---------- 596

29. Requirements stated for conviction based solely on circumstantial evidence. State v. Ohler ---------- 596

30. It is the province of the jury to determine the circumstances surrounding the alleged crime. If, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. State v. Ohler ---- 596

31. After a jury has considered the evidence in the light of applicable rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Ohler ---------- 596

32. The purpose of a preliminary hearing is to ascertain whether there is evidence which justifies holding an accused for trial. Skinner v. Jensen ------ 733

33. Before an accused can be held to answer to an information, he is entitled to a preliminary exam-

ination, and there must be proof and a judicial determination that an offense has been committed and that there is probable cause to believe that the accused committed the offense. Skinner v. Jensen -- 733

34. A preliminary hearing is not a prosecution or trial. Evidence which will justify a finding by a committing magistrate that probable cause exists for the detention of a defendant need not be sufficient to sustain a verdict of guilty or show guilt beyond a reasonable doubt. Skinner v. Jensen ---------- 733

35. A death certificate is not competent evidence of the cause of death in a controversy where the cause of death is a material issue. Skinner v. Jensen ---- 733

36. A preliminary hearing which results in the discharge of the accused because of a defect in proof is not a bar to a second preliminary hearing upon a new complaint charging the same offense. Skinner v. Jensen ---------- 733

37. The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case. State v. Sukovaty ---------- 779

38. The instructions in a criminal case may describe the offense in the language of the statute. State v. Sukovaty ---------- 779

39. Where competent evidence is adduced to support every element of the offense charged, it is ordinarily for the jury to determine if the offense has been proven by evidence beyond a reasonable doubt. State v. Hunt ---------- 783

40. The Supreme Court will not interfere with a verdict of guilty in a criminal action based upon conflicting evidence in the absence of prejudicial error at the trial unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Hunt ---------- 783

41. Where a voluntary written statement is obtained from a defendant in a criminal proceeding, admissions against interest contained therein are ordinarily admissible against him as evidence-in-chief, even though such written statements are not in evidence. State v. Hunt ---------- 783

42. Where an exhibit, alleged to be incompetent and and prejudicial, is offered in evidence and refused or withdrawn, the defendant has no cause for complaint where the request of defendant as to the

manner of correcting the claimed error is fully complied with by the trial court. State v. Hunt ---- 783

43. It is not error for a prosecutor to argue to the jury that it is its sworn duty to find a defendant guilty under the evidence adduced at the trial. State v. Hunt ---------- 783

44. Under statute, whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal defendant. State v. Breaker ---------- 887

45. An accomplice is defined. State v. Breaker ------ 887

46. An aider and abettor is defined. State v. Breaker 887

47. The advice or encouragement which will render one an accessory before the fact may be by acts, or words, but it must, to create guilt, be used with the intent to encourage and abet the crime. State v. Breaker ---------- 887

48. The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime. State v. Breaker ---------- 887

49. Where an oral admission or confession has been received in evidence, its voluntary character is still a question of fact for the jury. State v. Breaker ---- 887

50. It is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not. An instruction, which, by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case, is prejudicially erroneous. State v. Breaker ------ 887

51. Where the trial court admits a confession which is challenged as involuntary by the defendant's evidence, it is prejudicial error for the court to not submit to the jury for its determination under appropriate instructions, the question of whether the defendant's alleged oral admission or confession is voluntary. State v. Breaker ---------- 887

52. It is the duty of the trial court to instruct a jury to disregard an alleged confession or oral admission of guilt if found to be involuntary. State v. Breaker ---------- 887

Damages.

1. When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence. Caves v. Barnes ---------- 103

2. The reasonable value of the use of a motor vehicle for commercial purposes is the reasonable net rental value upon the market at the place in question of the vehicle involved or a vehicle of like capacity and performance, the lessee bearing all such expenses as he would have to bear in the operation of his own vehicle. Caves v. Barnes ---------- 103
3. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment. Jensen v. Barnett ---------- 429
4. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated plus the difference between the fair and reasonable market value of the remainder of the land before and after the taking. Swanson v. State ---------- 671
5. In eminent domain proceedings, everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property. Swanson v. State ---------- 671
6. Where the testimony of all the witnesses in a condemnation case showed some consequential damage to the remainder of the land, a special finding by the jury that there was no such damage was not sustained by the evidence. Swanson v. State ------ 671
7. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway. Swanson v. State ------ 671
8. In condemnation proceedings, the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages. Mathis v. State 701
9. When the State takes control of outside advertising, the measure of damages of the landowner is the difference in the value of his land before and after the taking. Mathis v. State ---------- 701
10. Nominal damages are those awarded, not as compensation for pecuniary loss, but in recognition of a legal wrong, where there is no proof of actual damages. Mathis v. State ---------- 701
11. It is the owner's loss, and not the taker's gain, which is the measure of compensation for property taken. Mathis v. State ---------- 701
12. If what a condemnee has given up has no value,

an award of compensation is unnecessary. Mathis v. State ---------- 701

13. When the State takes control of outside advertising on land, the owner is not entitled to substantial compensation in the absence of proof of pecuniary loss. Mathis v. State ---------- 701

Dead Bodies.

1. The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned. Stastny v. Tachovsky ---------- 109
2. The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good or where the demands of justice require such subordination. Stastny v. Tachovsky ---------- 109
3. The exhumation or the autopsy of a corpse, when useful to ascertain facts in litigation, should be performed. Stastny v. Tachovsky ---------- 109
4. The orders of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground. Stastny v. Tachovsky ---------- 109
5. The exhumation of a corpse, often of material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity and propriety. Stastny v. Tachovsky ---------- 109

Deeds.

1. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery and the burden of proof is on him who disputes this presumption. Hansen v. Ladenburger ---------- 571
2. A deed delivered to grantee in grantor's lifetime is operative, although enjoyment of the estate conveyed is postponed until grantor's death, as a present estate or interest is transferred by such delivery. Hansen v. Ladenburger ---------- 571
3. In a suit to set aside a deed to defendant for want of delivery, plaintiffs have the burden of proving nondelivery of the deed and producing evidence to overcome the presumption of delivery due to defend-

ant's possession of the deed. Hansen v. Ladenburger ---------- 571
4. The presumption of delivery is not conclusive but it raises a strong implication which can only be overcome by clear and satisfactory proof. Hansen v. Ladenburger ---------- 571
5. The Supreme Court has from an early date consistently held that delivery is largely a question of intent to be determined from the facts and circumstances of the given case. Hansen v. Ladenburger 571
6. Under circumstances outlined in opinion, reformation of deed should be granted for mutual mistake of the parties. Lippire v. Eckel ---------- 643
7. In a confidential or fiduciary relationship in which confidence is rightfully reposed, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred. Cunningham v. Quinlan 687
8. Where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain a deed, a presumption of undue influence arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Cunningham v. Quinlan ---------- 687

Descent and Distribution.

1. Under statute referred to in opinion, the title to all wearing apparel, ornaments, and household furniture of a deceased person passes immediately to the surviving spouse, or, if there be no surviving spouse, to the child or children of the deceased, if any. Ballard v. Davenport ---------- 293
2. Under statute referred to in opinion, wearing apparel, ornaments, and household furniture allowed to the surviving spouse, and, if there be no spouse surviving, to the surviving children of the deceased spouse, are not assets in the hands of the executors or administrators when a described recipient survives the deceased spouse. Ballard v. Davenport ---------- 293
3. Where personal property allowed to a surviving spouse or children by statute referred to in opinion, passes to a survivor named therein, an executor or administrator has no ownership or interest in, or a right of possession in, such property sufficient

to sustain an action in replevin. Ballard v. Davenport ---------- 293
4. On its probate side a county court lacks competency to determine disputed title to personal property except as an incident to its jurisdiction over settlement and distribution. Lambie v. Stahl ---------- 506
5. On a claim by a legal representative of a decedent's estate, the coincidence that the alleged debtor with an adverse defense is also named a legatee, without other circumstances, does not establish probate jurisdiction to render a personal judgment against him. Lambie v. Stahl ---------- 506
6. A "widow's allowance" or a "family allowance" out of the estate of a decedent is of purely statutory origin. Thomas v. Sternhagen ---------- 578
7. Statutes providing for allowance or exemptions to surviving spouses or families of decedents are based on sound public policy and will generally be liberally construed for the purpose of effecting the objective intended. Thomas v. Sternhagen ------ 578
8. The basis of the allowance is to substitute the estate for the decedent so far as support is concerned. Thomas v. Sternhagen ---------- 578
9. Except in cases where it is established that the decedent has not furnished any support, the widow's allowance is a right which it is mandatory upon the court to recognize, even though the widow has property and income of her own. The allowance is not intended to be limited to those in necessitous circumstances. Thomas v. Sternhagen ---------- 578
10. A widow is not entitled to claim all farm machinery as tools of the trade of one engaged in the business of agriculture. She may, however, claim the property described in specific subdivision of exemption statute, if there is any such property. Thomas v. Sternhagen ---------- 578

Discovery.

1. Discovery is the disclosure of facts, deeds, documents, or other things in the exclusive knowledge or possession of one party, which are necessary to the party seeking discovery as a part of a cause of action or defense in an action pending, or to be brought in another court, or as evidence of his rights or title in such proceedings. Stastny v. Tachovsky ---------- 109
2. A bill of discovery may be brought which seeks

the disclosure of facts resting in the knowledge of defendant in aid of the prosecution of some other proceeding. Stastny v. Tachovsky ---------- 109

Disorderly Conduct.

1. The terms "disorderly conduct" and "breach of the peace" are defined. State v. Sukovaty ---------- 779
2. Ordinarily, misconduct of the complaining witness is not a defense to a charge of disturbing the peace by disorderly conduct through the use of profane and abusive language. State v. Sukovaty 779

Disturbance of Public Meetings.

1. "To disturb" means: To throw into disorder or confusion; to interrupt. State v. McNair -------- 763
2. Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance. State v. McNair ---------- 763
3. Disturbance of public assemblies is that conduct which, being contrary to the usages of the particular meeting and class of people assembled, interferes with its due progress, or is annoying to the assembly in whole or in part. State v. McNair ---- 763

Divorce.

1. Extreme cruelty, whether practiced by using personal violence or by any other means, is a statutory ground for divorce. Vollbrecht v. Vollbrecht ------ 31
2. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious. Vollbrecht v. Vollbrecht ---------- 31
3. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the wife toward the husband, and is corroborated as required by law, the action of the district court in granting a divorce to the husband is proper and ordinarily will not be interfered with by the Supreme Court. Vollbrecht v. Vollbrecht ---------- 31
4. In a divorce suit in which the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with

due regard for the superior rights of fit, proper, and suitable parents. Vollbrecht v. Vollbrecht -- 31
Hall v. Hall ---------- 91
5. Rule for determination of alimony in divorce case stated. Vollbrecht v. Vollbrecht ---------- 31
Hall v. Hall ---------- 91
Overton v. Overton ---------- 267
6. In an appeal to the Supreme Court in a divorce action the cause is tried de novo. Hall v. Hall -- 91
Overton v. Overton ---------- 267
7. Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor child of the parties, the welfare and best interest of the child will constitute the sole consideration in determining the right of custody. Hall v. Hall ---------- 91
8. Under statute, where the parents of a minor child are unfit or unsuitable to have its custody, the separate juvenile court may properly place its legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe. Hall v. Hall ---------- 91
9. Where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. Hall v. Hall ---------- 91
10. There is no exact mathematical formula by which property division or alimony can be determined. As a general rule in cases of this type, awards vary from one-third to one-half of the value of the property, depending upon the facts and circumstances of each particular case. Overton v. Overton ---------- 267
11. The district court has authority to make temporary allowances in divorce cases pending appeal. Overton v. Overton ---------- 267
12. Where the district court has awarded the care and custody of minor children to their grandparents by a decree that has become final, a change of such custody can be made only on evidence of changed circumstances, or that it shall be to the best interests of the children. Pollard v. Galley ---------- 587
13. Where the proof does not establish the basis for a final judgment awarding custody of minor children to their grandparents, the evidence is ordinarily

insufficient to establish changed conditions within the meaning of the statute. Pollard v. Galley ---- 587
14. Ordinarily, acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Clark v. Clark ---- 796
15. There is no general rule as to the degree of corroboration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case. Clark v. Clark ---- 796
16. In a divorce action where no supersedeas bond is furnished, the payment of attorneys' fees and costs, and the payment of a judgment for child support, do not deprive the payor of his right of appeal. Kassebaum v. Kassebaum ---- 812
17. An appellant who withdraws $200 from a former jointly held account assigned by the divorce decree to him is not estopped from appealing from the decree on the grounds that the property division awarded him was insufficient. Kassebaum v. Kassebaum ---- 812
18. A division of property in approximately equal amounts, which includes property inherited by the husband during the marriage, was not improper under the circumstances. Kassebaum v. Kassebaum 812
19. An allowance of $70 per month child support for each of two children, where the husband's income was $6,850 a year, was not excessive under the circumstances. Kassebaum v. Kassebaum ---- 812

Drains.

1. When surface waters concentrate and gather in volume so as to lose their character as diffused surface waters and flow into a natural drainageway, the flow may not be arrested or interfered with to the injury of an adjoining proprietor. Linch v. Nichelson ---- 682
2. Where a landowner by dike, dam, or ditch diverts water from a natural drainageway and causes it to be discharged in volume on a lower or servient estate to its damage, injunction is an appropriate remedy for the protection of the rights of the owner of the lesser or servient estate. Linch v. Nichelson 682

Easements.

1. The measure of damages for the taking of an

easement is the difference in the reasonable market value of the property before and after the taking of the easement. Fulmer v. State ---------- 664
2. When an easement is taken, which leaves the landowner with property rights of material and measurable value, the compensation due the landowner is the damage to the entire property which is attributable to the taking of the easement and not the separate value of the easement. Fulmer v. State ---------- 664
3. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking, and not by separately valuing the easement or right that is taken. Fulmer v. State ---------- 664
4. Where the record is barren of any evidence to prove actual damages from the taking of an easement, the question of damages should not be submitted to the jury other than to direct the assessment of nominal damages. Mathis v. State ---------- 701

Elections.

1. A legal voter within the meaning of section of statute referred to in opinion is one who is eligible to vote at an election for school district officers in the district affected. Harnapp v. Bigelow 440
2. While a transfer for school purposes is in effect, the parent of a pupil so transferred is not a legal voter for school purposes of the district from which the transfer has been made. Harnapp v. Bigelow 440
3. Under section of statute referred to in opinion, a legal voter of a district affected may add his name to the petition at any time before the petition is filed with the county superintendent. Harnapp v. Bigelow ---------- 440

Eminent Domain.

1. By the Constitution of the State of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor. Fulmer v. State ---------- 20
2. In a condemnation proceeding where an easement, as distinguished from property, is taken the owner thereof prior to the taking is entitled to compensation or damages in the amount of its value, if value is proved, and the failure to so instruct the jury is prejudicial error. Fulmer v. State ------ 20

3. The free use of land is a property right, and whatever infringes on that must be paid for as damaging the land. Fulmer v. State ---------- 20
4. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser would be an element in determining damage. Fulmer v. State --- 20
5. The ordinary rule on measure of damages does not apply to an instance where the damage arises from a peculiar value for special reasons to the owner. Fulmer v. State ---------- 20
6. The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. W.E.W. Truck Lines, Inc. v. State ---------- 218
7. An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land. W.E.W. Truck Lines, Inc. v. State ------ 218
8. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. W.E.W. Truck Lines, Inc. v. State ---------- 218
9. Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings. W.E.W. Truck Lines, Inc. v. State ---------- 218
10. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway. W.E.W. Truck Lines, Inc. v. State ---------- 218
Swanson v. State ---------- 671
11. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon

the particular facts in each case. W.E.W. Truck Lines, Inc. v. State ---------- 218
12. In a condemnation action when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. W.E.W. Truck Lines, Inc. v. State ---------- 218
13. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Fulmer v. State ---------- 664
14. When an easement is taken, which leaves the landowner with property rights of material and measurable value, the compensation due the landowner is the damage to the entire property which is attributable to the taking of the easement and not the separate value of the easement. Fulmer v. State -- 664
15. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking, and not by separately valuing the easement or right that is taken. Fulmer v. State ---------- 664
16. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated plus the difference between the fair and reasonable market value of the remainder of the land before and after the taking. Swanson v. State ---------- 671
17. In eminent domain proceedings, everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property. Swanson v. State ---------- 671
18. Where the testimony of all the witnesses in a condemnation case showed some consequential damage to the remainder of the land, a special finding by the jury that there was no such damage was not sustained by the evidence. Swanson v. State ------ 671
19. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement which he cannot be deprived of without due process of law and compensation for his loss. Swanson v. State ---------- 671
20. Reasonable ingress and egress under all of the circumstances is the measure of the right of an

owner of property abutting on a street. Swanson v. State ---------- 671
21. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. Swanson v. State 671
22. In an eminent domain proceeding, the owner of real estate taken can testify as to its value. Swanson v. State ---------- 671
23. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership. Swanson v. State ---------- 671
24. Rule as to admissibility of evidence of other sales in eminent domain proceeding stated. Swanson v. State ---------- 671
25. In condemnation proceedings, the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages. Mathis v. State ------ 701
26. The taking of control of outside advertising on land is compensable and entitles the owner to compensation for pecuniary loss. Mathis v. State --------- 701
27. When the State takes control of outside advertising, the measure of damages of the landowner is the difference in the value of his land before and after the taking. Mathis v. State ---------- 701
28. Where the record is barren of any evidence to prove actual damages from the taking of an easement, the question of damages should not be submitted to the jury other than to direct the assessment of nominal damages. Mathis v. State ---------- 701
29. It is the owner's loss, and not the taker's gain, which is the measure of compensation for property taken. Mathis v. State ---------- 701
30. If what a condemnee has given up has no value, an award of compensation is unnecessary. Mathis v. State ---------- 701
31. When the State takes control of outside advertising on land, the owner is not entitled to substantial compensation in the absence of proof of pecuniary loss. Mathis v. State ---------- 701
32. When land occupied for business purposes is taken by eminent domain, anticipated profits from the carrying on of the business in its established location cannot be considered in estimating the damages. Bickels v. State ---------- 825
33. Statute on damages recoverable in eminent domain

proceedings has not changed rule as to recovery of anticipated profits. Bickels v. State ---------- 825
34. Rule as to use of names and qualifications of witnesses before the board of appraisers stated. Bickels v. State ---------- 825
35. Ordinarily, a resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation. First Baptist Church v. State ---------- 831
36. Mere membership in a church or an organization does not bring a lay witness into such relationship with property that he may testify as to its value without further foundation. First Baptist Church v. State ---------- 831
37. As a general rule, a witness need not be an expert to testify as to the value of land. The admission of such testimony rests in the sound discretion of the court. First Baptist Church v. State 831
38. Testimony of a witness as to value is ordinarily received if he shows an acquaintance with the property and is informed as to the state of the market. First Baptist Church v. State ---------- 831
39. Mere familiarity with the physical structure and location of the property is not sufficient foundation to render a lay witness competent to testify as to valuation. First Baptist Church v. State ---------- 831
40. Testimony as to the cost of property or as to the cost of remodeling property 8 to 14 years prior to the time of the taking is not competent evidence of market valuation because of its remoteness in point of time. First Baptist Church v. State ---------- 831
41. Where there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, resort may be had to some other method of fixing the value of the property. First Baptist Church v. State ---------- 831

Equity.

1. Where an owner of real estate entered into a binding contract for the sale thereof prior to his death, equity will treat the realty as personalty in distributing his estate. Father Flanagan's Boys' Home v. Graybill ---------- 79
2. Equity will decree reformation of a contract only if the mistake is mutual, or for fraud or inequitable conduct. Lortscher v. Winchell ---------- 302
3. A prayer for general relief in an equity action is

sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Lippire v. Eckel ---------- 643

Escrows.

The placing of a downpayment in escrow by a buyer, when the written contract for the sale of real estate provides that it shall be paid to the seller, ordinarily constitutes a material breach of the contract. Schommer v. Bergfield ---------- 140

Estoppel.

1. Ordinarily, title to real estate may not be created by estoppel. Swanson v. Dalton ---------- 55
2. The mere failure to dispute the use of the land or bring an action to eject an adverse possessor is not sufficient to defeat title, or to bring into operation the doctrine of estoppel. Swanson v. Dalton ---- 55
3. Ordinarily, estoppel must arise as the result of misrepresentations of the party against whom the estoppel is claimed. Swanson v. Dalton ---------- 55
4. The doctrine of estoppel cannot be applied against the state in enforcing a criminal statute on the ground that the violation is of long duration. State ex rel. Meyer v. Knutson ---------- 375

Evidence.

1. Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. Caves v. Barnes -------- 103
2. While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. Caves v. Barnes ---------- 103
3. Where parties reduce an agreement to writing, in the absence of fraud, mistake, or ambiguity, the writing is the only competent evidence of the contract. Schommer v. Bergfield ---------- 140
4. Where the existence of a written contract has been induced by prior and contemporaneous oral agreements, parol evidence is not admissible to add to or contradict terms of the written contract. Schommer v. Bergfield ---------- 140
5. The acknowledgement of the receipt of consideration, in whole or in part, in a written contract, is

a recitation of fact and may be explained or contradicted by parol evidence. Schommer v. Bergfield ---------- 140

6. Requirements for establishing a cause of action by circumstantial evidence stated. Sears v. Mid-City Motors, Inc. ---------- 175

7. The burden of proof of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies. Sears v. Mid-City Motors, Inc. ---------- 175

8. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury. Sears v. Mid-City Motors, Inc. ---------- 175

9. In absence of opposing evidence or in light of surrounding circumstances, an admission against interest may be sufficient to establish fact admitted, but other evidence in the case may render the admission wholly insufficient to establish such fact. Sears v. Mid-City Motors, Inc. ---------- 175

10. To be competent as an admission against interest a statement must be one of fact. A statement which is a mere opinion or a conclusion or law is as a rule inadmissible. Sears v. Mid-City Motors, Inc. 175

11. An incriminating statement or accusation, made in the presence of an accused, which he has the opportunity to deny, but does not, may be admissible as an exception to the hearsay rule. State v. Worley ---------- 232

12. Before an incriminating statement or accusation made in the presence of an accused is admissible, the evidence must establish that the defendant heard the incriminating statement. State v. Worley 232

13. A declaration to be competent evidence as a part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. State v. Worley ---------- 232

14. In questioning an expert witness on an appropriate subject, a party may choose a hypothesis based upon his theory of evidence which raises an issue of fact. Campbell v. City of North Platte ------ 244

15. An opinion responsive to a proper hypothetical question will ordinarily sustain a jury verdict on that issue of fact unless probative value is destroyed by impeachment. Campbell v. City of North Platte -- 244
16. A trial court exercises a discretion in overruling a general objection to a hypothetical question, and abuse may not be predicated solely upon minor inaccuracies in the hypothesis. Campbell v. City of North Platte ---------- 244
17. Rule stated as to the admissibility of a business record under statute. Transport Indemnity Co. v. Seib ---------- 253
18. The purpose of the Business Records as Evidence Act was to permit the admission in evidence of systematically entered records made in the usual course of business, without the necessity of identifying, locating, and producing as witnesses the individuals who made the original entries in the records. Transport Indemnity Co. v. Seib ------ 253
19. No particular mode or form of record is required, and a record prepared by electronic equipment and stored on tape, if it complies with the requirements of the statute, is as admissible as a book account or record recording the same information and calculations. Transport Indemnity Co. v. Seib -------- 253
20. The business record statute was intended to bring the realities of business and professional practice into the courtroom. The statute should not be construed narrowly to destroy its usefulness. Transport Indemnity Co. v. Seib ---------- 253
21. Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case of burglary. State v. Sedlacek -------- 322
22. In diagnosing a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. State v. Madary ---------- 383
23. It is a general rule that evidence of other crimes, even by the instrumentality of a confession, is not admissible to prove the guilt of the defendant of the particular crime charged. State v. Putnam -------- 445
24. In order for evidence of another independent offense to be admissible it must appear that the crime charged has an element of motive, criminal intent, or

guilty knowledge necessary to be established. State v. Putnam ---------- 445

25. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Schmeeckle v. Peterson ---------- 476

26. In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made. State v. Longmore ---------- 509

27. Procedure necessary to be followed to permit introduction of confession in evidence outlined. State v. Longmore ---------- 509

28. Rights of counsel for defendant to cross-examine and to introduce other evidence before admission of confession in evidence outlined. State v. Longmore ---------- 509

29. The admission of a confession in evidence constitutes the court's independent determination that the confession is voluntary. State v. Longmore ---- 509

30. The extent to which defendant's right to consult counsel, during the period prior to and during the interrogation, was delayed or denied is clearly proper to be shown. State v. Longmore ---------- 509

31. The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury. State v. Longmore ---------- 509

32. The use of any confession obtained in violation of the due process clause of the state and federal Constitutions requires reversal of the conviction even though unchallenged evidence adequate to convict remains. State v. Longmore ---------- 509

33. A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights. State v. Longmore ---- 509

34. A confession obtained in violation of the defendant's constitutional rights is involuntary and inadmissible in evidence. State v. Longmore ---------- 509

35. A witness is not competent to give an opinion unless shown to possess the necessary learning, knowledge, skill, or practical experience to enable him to give the opinion testimony. Brown v. Kaar 524
36. Evidence of subsequent conduct of one whose negligence is alleged to have caused or contributed to an accident or injury is inadmissible to show antecedent negligence. Brown v. Kaar ---------- 524
37. A person charged with crime may be convicted on circumstantial evidence. State v. Ohler ---------- 596
38. In order to warrant a conviction on circumstantial evidence the circumstances taken together must be of such a conclusive nature and tendency as to produce a reasonable and moral certainty in the minds of the jury beyond a reasonable doubt that the accused committed the offense charged. State v. Ohler ---------- 596
39. Requirements stated for conviction based solely on circumstantial evidence. State v. Ohler -------- 596
40. In an eminent domain proceeding, the owner of real estate taken can testify as to its value. Swanson v. State ---------- 671
41. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership. Swanson v. State -------- 671
42. A death certificate is not competent evidence of the cause of death in a controversy where the cause of death is a material issue. Skinner v. Jensen -- 733
43. The parol evidence rule is not merely one of evidence, but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. Spellman v. State ---------- 738
44. A court in which a civil action is pending may require one party to produce a copy of a federal income tax return for inspection and use by an adverse party pursuant to discovery statute. Rhodes v. Edwards ---------- 757
45. A person who has made the amount or nature of his income an issue in litigation thereby makes his federal income tax return a legitimate subject of inquiry and he can no longer claim that the relevant information contained in it is confidential or privileged. Rhodes v. Edwards ---------- 757
46. A party who has not retained copies of his income tax returns can be required to obtain copies from

the proper office for use in accordance with the discovery order. Rhodes v. Edwards ---------- 757
47. The fact that a party's income tax return is joint and not his individually is not a defense to an order to produce. His remedy for any anticipated misuse of the income tax return is by application to the court for a limitation of use of the return. Rhodes v. Edwards ---------- 757
48. An order to produce copies of income tax returns pursuant to state discovery statute is not violative of the due process clauses of the state and federal Constitutions. Rhodes v. Edwards ---------- 757
49. Under statute, a party refusing to obey a discovery order may suffer the dismissal of the action or proceeding. Rhodes v. Edwards ---------- 757
50. Where a voluntary written statement is obtained from a defendant in a criminal proceeding, admissions against interest contained therein are ordinarily admissible against him as evidence-in-chief, even though such written statements are not in evidence. State v. Hunt ---------- 783
51. Where an exhibit, alleged to be incompetent and prejudicial, is offered in evidence and refused or withdrawn, the defendant has no cause for complaint where the request of defendant as to the manner of correcting the claimed error is fully complied with by the trial court. State v. Hunt ------ 783
52. When land occupied for business purposes is taken by eminent domain, anticipated profits from the carrying on of the business in its established location cannot be considered in estimating the damages. Bickels v. State ---------- 825
53. Testimony as to the cost of property or as to the cost of remodeling property 8 to 14 years prior to the time of the taking is not competent evidence of market valuation because of its remoteness in point of time. First Baptist Church v. State ----- 831
54. Where there is no market value of property with a specialized use, such as a church, convent, hospital, college premises, or the like, resort may be had to some other method of fixing the value of the property. First Baptist Church v. State ---------- 831
55. Evidence may be destitute of persuasiveness, although it is uncontradicted directly. Meadows v. Skinner Manuf. Co. ---------- 856
56. If the settlement is in writing, oral evidence is competent to show the intention of the parties

thereto in an action against one not a party to the settlement. Tober v. Hampton ---------- 858
57. In a criminal case a confession of guilt alleged to have been made by the defendant is not competent evidence unless first shown to have been voluntarily made. State v. Breaker ---------- 887
58. Where an oral admission or confession has been received in evidence, its voluntary character is still a question of fact for the jury. State v. Breaker ---------- 887

Executors and Administrators.

1. Under statute referred to in opinion, wearing apparel, ornaments, and household furniture allowed to the surviving spouse, and, if there be no spouse surviving, to the surviving children of the deceased spouse, are not assets in the hands of the executors or administrators when a described recipient survives the deceased spouse. Ballard v. Davenport 293
2. Where personal property allowed to a surviving spouse or children by statute referred to in opinion, passes to a survivor named therein, an executor or administrator has no ownership or interest in, or a right of possession in, such property sufficient to sustain an action in replevin. Ballard v. Davenport ---------- 293
3. The county court has exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons. Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves. Eden v. Asa ---------- 651
4. Appeals in probate matters from the county court to the district court, except from the probate or denial of probate of wills and from the allowance or disallowance of claims filed against an estate, are tried in district court as cases in equity are conducted. Eden v. Asa ---------- 651
5. Appeals to the Supreme Court in probate matters are heard and determined de novo. Eden v. Asa ------ 651

Exemptions.

A widow is not entitled to claim all farm machinery as tools of the trade of one engaged in the business of agriculture. She may, however, claim the prop-

erty described in specific subdivision of exemption statute, if there is any such property. Thomas v. Sternhagen ---------- 578

False Imprisonment.

1. A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. Jensen v. Barnett ---------- 429
2. If an informer merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable. Jensen v. Barnett ---------- 429
3. If an informer knowingly gives to an officer false information which is a determining factor in his decision to make an arrest, the informer is liable. Jensen v. Barnett ---------- 429
4. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment. Jensen v. Barnett ---------- 429

Fraud.

Fraud and mistake are never assumed but must be proved by the party that alleges them. Muller Enterprises, Inc. v. Gerber ---------- 463

Garnishment.

1. Garnishment is an attachment by means of which money or property of a debtor in the hands of a third party, which cannot be levied upon, may be subjected to the payment of a creditor's claim. Insurance Co. of North America v. Maxim's of Nebraska ---------- 274
2. A garnishment proceeding requires notice to the garnishee of the attachment authorized by statute. Insurance Co. of North America v. Maxim's of Nebraska ---------- 274
3. Specified sections of statute comprise a comprehensive act governing general attachment and attachment by way of garnishment before judgment. Insurance Co. of North America v. Maxim's of Nebraska ---------- 274
4. In garnishment proceedings, a bond must be given in an amount to be fixed as required by statute. Insurance Co. of North America v. Maxim's of Nebraska ---------- 274

Guardian and Ward.

A proceeding for the appointment of a guardian is in this state a probate matter. Eden v. Asa 651

Habeas Corpus.

1. A writ of habeas corpus is a proper remedy to be used in determining the custody of an infant as between the mother and the paternal grandparents. Green v. Green 207
2. Habeas corpus proceedings seeking custody of minors are governed by consideration of expediency and equity, and should not be bound by technical rules of practice. Green v. Green 207
3. Once a proceeding for habeas corpus has been started for the custody of a minor, it is an action in rem, and the natural father of the infant, whether or not he has actual custody of said child, is a proper party, entitled to file pleadings and to be heard in such case. Green v. Green 207
4. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of the evidence produced at a preliminary hearing, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge. Skinner v. Jensen 733
5. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge the accused. Skinner v. Jensen 733

Highways.

1. An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land. W.E.W. Truck Lines, Inc. v. State 218
2. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. W.E.W. Truck Lines, Inc. v. State 218
3. The right of an owner of property abutting on a

street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. W.E.W. Truck Lines, Inc. v. State ---------- 218

4. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway. W.E.W. Truck Lines, Inc. v. State ---------- 218

5. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. W.E.W. Truck Lines, Inc. v. State ---------- 218

6. A left-hand turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. Hoffman v. Jorgensen Awnings, Inc. ---------- 261

7. As a general rule, a person in charge of animals has a right to lead or drive them along the highway and is not negligent as a matter of law for so doing, but in doing so, he must exercise reasonable care to avoid injury from motor vehicles using the highway. Guynan v. Olson ---------- 335

8. The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto. Vap v. City of McCook ---------- 844

9. Parking on the state highway system is a matter of statewide concern. Vap v. City of McCook ------ 844

10. Statutory authority of Department of Roads with respect to agreements as to streets and highways outlined. Vap v. City of McCook ---------- 844

11. A city may under statute contract with the state through the Department of Roads to prohibit parking on a street which forms a connecting link on the state highway system. In so doing the police power of the city is not bartered away but only limited in its exercise as specifically authorized by law. Vap v. City of McCook ---------- 844

Homesteads.

1. The homestead does not extend to any 160 acres nor any amount of land, as such, unless it is land upon which the dwelling house and appurtenances are situated. Thomas v. Sternhagen ---------- 578
2. If there are two separate and noncontiguous tracts of land, on one of which the dwelling house and appurtenances are situated, only that tract is the homestead, no matter how much less than 160 acres it may contain. Even where the tracts are contiguous, unless the second tract is used in connection with the tract on which the dwelling is located, the second tract is not included. Thomas v. Sternhagen ---------- 578
3. Two tracts separated only by a public highway are contiguous where both tracts were used and operated as one farm. Thomas v. Sternhagen -------- 578
4. A homestead claimant will not be permitted to lay out or select the homestead in an arbitrary, capricious, or unreasonable shape, so as to occasion loss or damage. Thomas v. Sternhagen ---------- 578
5. It does not matter that such tract is in a different section where the tracts were contiguous and used and cultivated indiscriminately and together. Thomas v. Sternhagen ---------- 578
6. Where two tracts of land corner with each other, they are contiguous, and, when used as one farm, may be selected as a homestead. Thomas v. Sternhagen ---------- 578

Homicide.

1. In a homicide case, it is the duty of the trial court to instruct on those degrees of homicide only as find support in the evidence. State v. Worley ---- 232
2. Manslaughter is the unlawful killing of another, either upon a sudden quarrel, or unintentionally, while in the commission of some unlawful act. State v. Worley ---------- 232
   Skinner v. Jensen ---------- 733
3. Malice, intent, or purpose may usually be inferred from the shooting of another person with a deadly weapon. State v. Worley ---------- 232
4. To come within the provisions of the manslaughter statute, there must be evidence that the killing was not intentional or with a design to effect death. State v. Worley ---------- 232
5. The intentional pointing of a loaded pistol at a

person is ordinarily unlawful assault, and when under such circumstances the pistol is unintentionally discharged and a person killed, such acts constitute manslaughter. State v. Archbold ---------- 433

6. The bare belief of one assaulted that he is about to suffer death or great bodily harm will not of itself justify him in taking the life of his adversary. There must exist reasonable grounds for such belief at the time of the killing. The existence of such grounds is a question of fact for the jury. State v. Archbold ---------- 433
7. A defendant formally indicted and charged with a homicide is entitled to the right of effective counsel at every step of the proceedings. State v. Longmore 509
8. Manslaughter may consist of the unintentional killing of a person, without malice, resulting from an unlawful assault and battery that in itself is not of a character or intended to cause death. Skinner v. Jensen ---------- 733

Husband and Wife.

1. Liability of party to husband for alienation of wife's affections stated. Hansen v. Strohschein ---------- 367
2. In an action for alienation of affections, an award of damages by the district court for loss of consortium will seldom be disturbed by the Supreme Court on the ground of excessiveness. Hansen v. Strohschein 367

Indemnity.

1. The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder. Currency Services, Inc. v. Passer ---- 286
2. If a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the contract. Currency Services, Inc. v. Passer -------- 286
3. An indemnity contract should be construed so as to ascertain and give effect to the parties' intention, if that can be done consistently with legal principles. Currency Services, Inc. v. Passer -------- 286
4. Rule for construction of indemnity contract stated. Currency Services, Inc. v. Passer ---------- 286
5. A contract of indemnity continues in force during such time as is expressly or impliedly provided in

the contract. Where no time is fixed for its termination, either party may end it at his pleasure, if he acts in good faith. Western Surety Co. v. Welty ---------- 608

6. The word "indemnity" as used in connection with law relating to tort-feasors means a shifting of the entire loss, while the word "contribution" means a sharing of the loss. Tober v. Hampton ---------- 858

7. Indemnity between tort-feasors is generally restricted to cases where actual fault is attributed to one party and the other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong. Tober v. Hampton ---------- 858

Infants.

1. A writ of habeas corpus is a proper remedy to be used in determining the custody of an infant as between the mother and the paternal grandparents. Green v. Green ---------- 207

2. Once a proceeding for habeas corpus has been started for the custody of a minor child, it is an action in rem, and the natural father of the infant, whether or not he has actual custody of said child, is a proper party, entitled to file pleadings and to be heard in such case. Green v. Green ---------- 207

3. The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. Stewart v. McCauley ---------- 412

4. The jurisdiction of a state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants. Residence within the county suffices even though the domicile of the parents may be in another county. Stewart v. McCauley ---------- 412

5. The juvenile court had its origin in the protection that is due the innocent or helpless. It was never intended that the method provided for its operation should be a trap to prevent such protection. Stewart v. McCauley ---------- 412

6. Rule for construction of juvenile court laws stated. Stewart v. McCauley ---------- 412

7. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should

be in danger of so becoming in the near future. Stewart v. McCauley ---------- 412
8. When the court takes jurisdiction of a child, that child becomes a ward of the court, and the court's primary consideration will always be the best interest and welfare of the child. Stewart v. McCauley 412
9. Where the district court has awarded the care and custody of minor children to their grandparents by a decree that has become final, a change of such custody can be made only on evidence of changed circumstances, or that it shall be to the best interests of the children. Pollard v. Galley ---------- 587
10. Where the proof does not establish the basis for a final judgment awarding custody of minor children to their grandparents, the evidence is ordinarily insufficient to establish changed conditions within the meaning of the statute. Pollard v. Galley -- 587
11. Rule stated as to change of custody of minor children where custody had already been awarded under a judgment that had become final. Pollard v. Galley ---------- 587
12. The indifference of a mother for the welfare of her children without reasonable excuse is a fact to be considered in determining whether or not changed circumstances are sufficient to require a change of custody to her from one having their legal custody. Pollard v. Galley ---------- 587

Injunctions.

1. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. Board of County Commissioners v. Scott ---------- 53
2. Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance. State ex rel. Meyer v. Knutson ---------- 375

Insurance.

1. A loan receipt is not such a payment of insurance as to make the insurer the real party in interest. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ---------- 348

2. Circumstances outlined justifying refusal of life insurance company to honor request for change of beneficiary. Davenport v. Bankers Life Co. ------ 591
3. Where the insured failed to deliver a life insurance policy for endorsement of a requested change of beneficiary, after notice of refusal to make such change without it, and does nothing thereafter for almost 2 years, under circumstances outlined, it will be inferred that he changed or abandoned his intention to change beneficiaries. Davenport v. Bankers Life Co. ---------- 591
4. Where the change of beneficiary has not been effected at death, the rights of the named beneficiary become vested and the insurer cannot thereafter, by interpleader or otherwise, waive a condition of the policy so as to prejudice the named beneficiary's rights. Davenport v. Bankers Life Co. 591
5. In construing an insurance contract, the words used therein should be considered as used in their ordinary and popular sense. Omaha Public Power Dist. v. Travelers Ind. Co. ---------- 709
6. An explosion is a violent bursting or expansion following the production of pressure or a sudden release of pressure. Omaha Public Power Dist. v. Travelers Ind. Co. ---------- 709

Interest.

1. Industrial loan and investment companies are empowered to make unlimited loans at a rate of interest of 9 percent per annum or below. Gruenemeier v. Commonwealth Co. ---------- 66
2. The right of an industrial loan and investment company to make separate loans at a rate of interest of 9 percent per annum or below is not limited by sections of the statute which regulate the power of such companies to make installment loans. Gruenemeier v. Commonwealth Co. ------- 66
3. The prohibition of the statute relating to multiple loans is not that there shall not be more than one loan during any period of time. It is that the excess charges above a rate of interest of 9 percent per annum shall not be charged on more than one loan at the same time. Gruenemeier v. Commonwealth Co. ---------- 66
4. Under the Industrial Loan and Investment Company Act, there may be as many contracts of loan at the same time as the parties desire, but the sev-

eral loans when considered together, must not violate statute prescribing rate of interest on one loan. Gruenemeier v. Commonwealth Co. ---------- 66

5. Industrial Loan and Investment Company Act requires consideration of the loans as a consolidated loan only for the purpose of determining if the splitting of the loans at the same time was for the purpose of exacting a higher rate of charge. Gruenemeier v. Commonwealth Co. ---------- 66

6. The restrictive provisions as to equal payments provided for by the Industrial Loan and Investment Company Act were intended to apply to those portions of the loan which bore interest at a rate in excess of 9 percent per annum. Gruenemeier v. Commonwealth Co. ---------- 66

7. Recovery of interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount. Muller Enterprises, Inc. v. Gerber ---------- 463

8. Interest on damages for breach of a contract, where the amount of the claim is not known or determinable, runs from the date of the rendition of the judgment. School Dist. No. 65R v. Universal Surety Co. ---------- 746

9. By the enactment of L. B. 17, Seventy-fourth (Extraordinary) Session, 1963, the Legislature intended that usurious contracts or indebtedness should be collectible to the extent of the principal but that any usurious interest or other charges should be forfeited to the borrower. Dailey v. A. C. Nelsen Co. ---------- 881

10. The provisions of interest statute extend the borrower's right to recover usurious interest and charges even though the entire contract or loan has been fully paid. Dailey v. A. C. Nelsen Co. -- 881

11. Where an installment contract or loan is usurious and where installment payments are not specifically allocated to principal or interest in the contract or by agreement, installment payments will be credited as payments on principal or so much thereof as remains unpaid and not on any illegal interest or other charges on the loan involved. Dailey v. A. C. Nelsen Co. ---------- 881

12. The right to recover illegal interest or other charges granted to the borrower by L. B. 17 of the

Seventy-fourth (Extraordinary) Session of the Legislature, 1963, may not be exercised as long as any part of the principal debt justly due remains unpaid. Dailey v. A. C. Nelsen Co. ---------- 881

Intoxicating Liquors.

There is nothing in the statutory conditions relative to implied consent which has the effect of changing the foundation requirements for the admission of the results of tests of body fluids to determine intoxication that are performed pursuant to the express consent of the accused. State v. Seager -------- 51

Judgments.

1. All presumptions exist in favor of the regularity and correctness of the judgments of courts of general jurisdiction. The burden is on the plaintiff in a proceeding for a writ of error coram nobis to produce substantial and credible evidence sufficient to overcome the presumption that the judgment of conviction was correct. Parker v. State -- 1
2. When a question in controversy has been once finally decided, it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation. Board of County Commissioners v. Scott ---------- 53
3. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester ---------- 135
4. The determination of whether one is a "party" for purposes of application of the doctrine of res judicata is not a question of mere form, but of substance. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ---------- 348
5. In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded as the same in both actions, the general rule is that they must be parties to both actions in the same capacity or quality. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ---------- 348
6. The rules of res judicata are intended to give a person his day in court upon issues which are important to him in order that he may have an op-

portunity to present everything which is proper to be said from his point of view. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ---------- 348

7. Issues to be tried must be formed by pleadings. A judgment rendered thereon must respond to the issues raised by the pleadings. Muller Enterprises, Inc. v. Gerber ---------- 463

8. Public interest requires that there shall be an end to litigation. When a cause has received the consideration of the Supreme Court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate. Berg v. Midwest Laundry Equipment Corp. -- 770

9. Rule to be applied on second appeal seeking merely to relitigate questions settled by the first appeal stated. Berg v. Midwest Laundry Equipment Corp. 770

10. Function of a nunc pro tunc order outlined. Andrews v. Nebraska State Railway Commission ---- 799

11. In proceedings to secure the correction of the record of a judgment or order nunc pro tunc on the ground of alleged clerical error therein, the party moving to correct the record bears the burden of proof. There is a presumption that a judgment appearing on the record in regular form is the judgment rendered by the court or administrative body and not an error of the clerk. Andrews v. Nebraska State Railway Commission ---------- 799

12. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made. It cannot be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to. Andrews v. Nebraska State Railway Commission ---------- 799

13. A prior judgment may be an operative fact, although rules of res judicata are not applicable. Osgood-Lewis-Perkins, Inc. v. Green ---------- 807

14. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former action is not conclusive of the question in a subsequent suit on a different cause of action. Osgood-Lewis-Perkins, Inc. v. Green ---------- 807

15. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had. Tober v. Hampton ---------- 858

Landlord and Tenant.

Rule as to abandonment of premises by a tenant sufficient to justify reentry by landlord stated. Langemeier, Inc. v. Pendgraft ---------- 250

Larceny.

Since the repeal of statute referred to in opinion, it is not required in a larceny case that the jury fix by its verdict the amount or the value of the money or property stolen. State v. Ohler ---------- 596

Limitations of Actions.

1. Unless a statute provides otherwise, the general rule is that a cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain an action arises, and not before. Houser v. Houser ---------- 401
2. Recovery can be had in quasi contract for claim for services to be paid upon death of promisor. Houser v. Houser ---------- 401
3. Rule as to statute of limitations and its application to a latent injury in workmen's compensation case stated. Ohnmacht v. Peter Kiewit Sons Co. ---------- 741
4. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. Ohnmacht v. Peter Kiewit Sons Co. ---------- 741
5. Where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability. Ohnmacht v. Peter Kiewit Sons Co. ---------- 741

Mandamus.

Before a petition states a cause of action in mandamus to compel the officers of a municipality to submit an ordinance to the voters of the city at a referendum, it must allege facts which show that the city is operating under a statute providing for such a referendum. State ex rel. Warren v. Kleman 564

Master and Servant.

On the issue of his contributory negligence a servant of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation. Runge v. Travis ---------- 562

Mechanics' Liens.

1. A subcontractor who performs labor or furnishes materials for any of the purposes mentioned in mechanics' lien statute may file a mechanic's lien therefor within 3 months from the performance of the labor or the furnishing of the materials. Lofholm v. Stoltenberg ---------- 318
2. The burden of proof is upon one claiming a mechanic's lien to show that the labor performed, or the materials furnished, were performed or furnished within 3 months prior to the filing of the claim of lien; otherwise the purported lien is void. Lofholm v. Stoltenberg ---------- 318
3. Materials furnished a contractor for the purpose of replacing defective material previously furnished, or correcting construction defects, are the subject of a new and separate contract between the contractor and subcontractor, and do not operate to extend the time for filing a mechanic's lien. Lofholm v. Stoltenberg ---------- 318

Mental Health.

1. The statute regarding a criminal sexual psychopathic person is a valid and proper exercise of the police power of the state as a measure of public safety. State v. Madary ---------- 383
2. A proceeding for investigation and for commitment of an alleged sexual psychopath is civil in nature, and the person committed is not confined for commission of a criminal offense. State v. Madary -- 383
3. The statute providing for commitment of sexual psychopaths does not deny equal protection of the laws. State v. Madary ---------- 383
4. The sexual psychopath statute providing for investigation and commitment does not deprive the accused of his liberty without due process of law. State v. Madary ---------- 383
5. A statute providing for detention, investigation, and commitment of alleged sexual psychopaths does not place the accused who has been previously con-

victed of sexual offenses in double jeopardy. State v. Madary ---------- 383
6. The sexual psychopath law requires the person against whom the petition is filed to submit to an examination by physicians appointed by the court upon petition by the county attorney without notice or right to be heard at the examination. Such a provision does not violate the constitutional requirement of due process of law. State v. Madary ---- 383

Monopolies.

1. A combination of individuals may perform acts themselves or cause other persons to do them, by reason of which rights of third persons will be injuriously affected, as long as there is lack of malice or ill will and as long as no definite legal right of such person is violated. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 329
2. It is a question of fact to be determined by a jury whether or not there exists malice or ill will, if the evidence thereon is conflicting or of a doubtful character. If the evidence is of such a character that one conclusion can be reasonably drawn therefrom, the court alone should dispose of the question. Frank H. Gibson, Inc. v. Omaha Coffee Co. 329

Mortgages.

The burden is on the mortgagee in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for recovery of the indebtedness. Bankers Life Co. v. Peterson ---------- 205

Motor Carriers.

1. The burden is on an applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
2. In the determination of whether or not an applicant has sustained the burden imposed, reference must be had to the evidence, and the Supreme Court will not disturb an order of the railway commission granting a certificate of public convenience and necessity based on evidence unless the evidence shows

that such order is unreasonable or arbitrary. The Greyhound Corp. v. American Buslines, Inc. ---- 9

3. An important factor in the determination of whether or not an application for a certificate of public convenience and necessity should be granted is evidence relating to competition with other service and the effect thereon. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
4. A declaration of policy contained in statute relating to the railway commission is to regulate transportation in the public interest and to promote efficient service without undue preferences or advantages and without unfair or destructive competitive practices. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
5. A certificate of public convenience and necessity for regular route transportation of passengers is improperly issued in the absence of proof of both public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
6. A certificate of public convenience and necessity may not properly be granted over an existing route until on notice, hearing, and order of the railway commission the existing carrier has refused or failed to provide adequate service. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
7. Reasonable and necessary interchanges of transportation and transfers do not afford a basis for a claim of inadequacy of service such as to permit the valid issuance of a competitive certificate of public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9

Municipal Corporations.

1. A city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Seidel v. City of Seward -- 345
2. Before a petition states a cause of action in mandamus to compel the officers of a municipality to submit an ordinance to the voters of the city at a referendum, it must allege facts which show that the city is operating under a statute providing for such a referendum. State ex rel. Warren v. Kleman 564
3. In an action for the disconnection of lands from a city or village, the decree of the district court is reviewable as in equity and will be tried de novo in

the Supreme Court. Shelton Grain & Supply Co. v. Village of Shelton ---------- 695
4. Rule stated as to when disconnection of lands from a city or village will be granted. Shelton Grain & Supply Co. v. Village of Shelton ---------- 695
5. The disconnection of lands from a city or village on the basis of justice and equity requires a consideration of all the facts and circumstances tending to show the fairness or unfairness of disconnection as it relates to the particular case. Shelton Grain & Supply Co. v. Village of Shelton ---------- 695
6. Annexation of territory by a metropolitan city is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. Bierschenk v. City of Omaha ---------- 715
7. It is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under statutory authority is a legislative act. Bierschenk v. City of Omaha ---------- 715
8. Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed. Bierschenk v. City of Omaha ---------- 715
9. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the Legislature and when so conferred must be exercised in strict accord with the statute conferring it. Bierschenk v. City of Omaha ---------- 715
10. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. Bierschenk v. City of Omaha ---------- 715
11. A city of the metropolitan class may annex an area by extending its boundaries to form a common one with the portion annexed if the area so attached is urban in nature and is connected to the city by a substantial link of narrower land of the same character. Bierschenk v. City of Omaha ---------- 715
12. Common words as to uses of property permitted in zoning ordinance are to be interpreted according to their general accepted meaning. City of Sidney v. Lieberman ---------- 755
13. Unless authorized by statute or charter, a municipal

corporation cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers. Vap v. City of McCook ---------- 844

14. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Vap v. City of McCook ---------- 844

15. The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto. Vap v. City of McCook -------- 844

16. Parking in a city is a privilage and subject to regulation by proper authorities. Vap v. City of McCook 844

17. One has no legal right to appropriate a part of the street to the purpose of his private business or to be used as a part of or to improve and make more useful a facility used in the conduct of his business. Vap v. City of McCook ---------- 844

18. Statutory authority of Department of Roads with respect to agreements as to streets and highways outlined. Vap v. City of McCook ---------- 844

19. A city may under statute contract with the state through the Department of Roads to prohibit parking on a street which forms a connecting link on the state highway system. In so doing the police power of the city is not bartered away but only limited in its exercise as specifically authorized by law. Vap v. City of McCook ---------- 844

Negligence.

1. Duty of driver of motor vehicle approaching, entering, and crossing an intersection protected by an automatic traffic signal stated. Zavoral v. Pacific Intermountain Express ---------- 161

2. The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, is that meaning which a reasonably prudent operator of an automobile should

and would understand and apply. Zavoral v. Pacific Intermountain Express ---------- 161
3. When the driver of a motor vehicle entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Hellmeier v. Policky ---------- 170
4. In a negligence action, the burden of proof is on the plaintiff to adduce evidence that the neglect charged either alone or in connection with other acts was the proximate cause of the injury. Sears v. Mid-City Motors, Inc. ---------- 175
5. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened. Sears v. Mid-City Motors, Inc. ---------- 175
6. In a case where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented. Sears v. Mid-City Motors, Inc. ---------- 175
7. Actions which were a normal response to the stimulus of a situation created by the defendants' negligent conduct are not a superseding cause of harm to the plaintiff, which the defendants' conduct was a substantial factor in bringing about. Hoffman v. Jorgensen Awnings, Inc. ---------- 261
8. The negligence of the driver is ordinarily not imputed to the guest. Hoffman v. Jorgensen Awnings, Inc. ---------- 261
9. The general rule is that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Guynan v. Olson ---------- 335
10. The exceptions to the general rule embrace conditions under which reasonable minds may differ as to whether or not the driver was able to see in the exercise of ordinary care the situation with which he was confronted. Guynan v. Olson ---------- 335
11. Exceptions to the general rule do not extend to that which is clearly seen in time to avoid a collision or which, in the exercise of ordinary care, would or should have been seen. Guynan v. Olson ---------- 335
12. Ordinarily, conditions such as frost, ice, snow,

mist, or fog are not intervening causes excusing the exercise of ordinary care by a driver but are conditions that require a driver to exercise a degree of care commensurate with the circumstances. Guynan v. Olson ---------- 335

13. There is no duty as a matter of law on the part of a person driving or leading cattle to maintain an advance guard to herald the approach of cattle, but the question of his contributory negligence in not doing so is ordinarily for the jury under all of the circumstances. Guynan v. Olson ---------- 335

14. The failure of a driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law, and defeats recovery. Schmeeckle v. Peterson ---------- 476

15. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence that there is danger of collision if he proceeds. Schmeeckle v. Peterson ---------- 476

16. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection at approximately the same time. Schmeeckle v. Peterson ---------- 476

17. Under the Iowa guest statute, there is a rebuttable presumption that an occupant riding in a car operated by another person is a guest and he has the burden of proving otherwise in an action predicated upon negligence of the operator. Cappellano v. Pane ---------- 493

18. Under the Iowa guest statute, defendant in an automobile negligence action is not required to raise the question of the passenger's status as a guest as an affirmative defense, but plaintiff, if a passenger, must prove as part of his main case that he was riding in the automobile in some relationship other than as a guest. Cappellano v. Pane -- 493

19. Meaning of term "reckless operation" under Iowa guest statute stated. Cappellano v. Pane ---------- 493

20. Under the Iowa guest statute the actions and con-

duct of the driver and not his mental attitude measure the degree of care and determine whether or not he is proceeding with a heedless disregard for consequences. Cappellano v. Pane ---------- 493
21. In order for a guest to establish reckless operation under the Iowa guest statute, it is necessary to show some act of the host that amounts to utter indifference to the safety of the guest. Cappellano v. Pane 493
22. Requirements necessary to establish "reckless operation" under Iowa guest statute stated. Cappellano v. Pane ---------- 493
23. It is prejudicial error for the trial court to submit to the jury allegations of negligence for which there is no proof. Brown v. Kaar ---------- 524
24. Evidence of subsequent conduct of one whose negligence is alleged to have caused or contributed to an accident or injury is inadmissible to show antecedent negligence. Brown v. Kaar ---------- 524
25. Negligence is never presumed and cannot be inferred from the mere fact that an accident happened. Brown v. Kaar ---------- 524
26. Whether errors of judgment will or will not make a defendant an expert liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has handled the matter skillfully or has exercised such reasonable skill and diligence as is ordinarily exercised in his business or profession. Brown v. Kaar ------ 524
27. If the defendant's conduct was negligent and was a substantial factor in bringing about the situation, the normal action of livestock operating in conjunction with it is not a superseding cause of harm. Brown v. Kaar ---------- 524
28. On the issue of his contributory negligence a servant of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation. Runge v. Travis ---------- 562
29. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Runge v. Travis ---------- 562
30. The mere fact that an invitee falls at the entrance of a building where a difference in levels exists does not raise any presumption of negligence on the part of the owner and the doctrine of res ipsa loquitur does not apply. Gorman v. World Publishing Co. 838

31. The owner of a building has a legal duty to exercise ordinary care to keep the premises reasonably safe for the use of a business invitee. The owner is not an insurer of the safety of invitees. Gorman v. World Publishing Co. ---------- 838
32. Negligence and a duty to use due care does not exist in the abstract, but must be considered against a particular set of facts and circumstances. The mere fact that there is a slight difference between levels in different parts of a building or on premises outside the building which the public is invited to enter does not, in itself, constitute negligence. Gorman v. World Publishing Co. ---------- 838
33. A change of level in the entrances or exits of buildings is to be expected. Sidewalk and entrance elevations to most places, public and private, are quite without uniformity. Gorman v. World Publishing Co. ---------- 838
34. Under circumstance shown with reference to condition of entrance to building, motion for directed verdict should have been sustained. Gorman v. World Publishing Co. ---------- 838

New Trial.

1. A new trial is a reexamination in the same court of an issue of fact after a verdict of a jury, report of a referee, or a decision by the court. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. ---------- 226
2. An order overruling a motion for a new trial and placing the defendant on probation is a final appealable order. State v. Longmore ---------- 509

Notaries.

A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause. Storz Brewing Co. v. Kuester ---------- 135

Officers.

1. The word "disability" in statute referred to in opinion includes a situation where the county attorney by reason of prior employment has disqualified himself to act. Stewart v. McCauley -- 412
2. Where a county attorney had disqualified himself to act, the district court may appoint some suitable person as acting county attorney. Stewart v. McCauley ---------- 412

3. A public officer who is duly appointed and qualified and who performs the duties of his office is entitled to draw the salary fixed by law. Grace v. County of Douglas ---------- 690
4. A full-time deputy sheriff is entitled to the minimum statutory compensation as such. Grace v. County of Douglas ---------- 690

Parent and Child.

1. The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. Stewart v. McCauley ---------- 412
2. The jurisdiction of a state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants. Residence within the county suffices even though the domicile of the parents may be in another county. Stewart v. McCauley ---------- 412
3. Rule stated as to change of custody of minor children where custody had already been awarded under a judgment that had become final. Pollard v. Galley ---------- 587
4. The indifference of a mother for the welfare of her children without reasonable excuse is a fact to be considered in determining whether or not changed circumstances are sufficient to require a change of custody to her from one having their legal custody. Pollard v. Galley ---------- 587
5. Where the owner or operator of an automobile transports a minor child, with the consent of the child's parents and pursuant to and in performance of a contract for the care of said child, such carriage confers a tangible and substantial benefit upon such owner and operator beyond those merely incidental to hospitality and social relationship. Snelling v. Pieper ---------- 818

Parties.

1. A loan receipt is not such a payment of insurance as to make the insurer the real party in interest. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ---------- 348
2. Whether plaintiff is the real party in interest ordinarily is a question of law for the court. Tober v. Hampton ---------- 858

Partnership.

1. A party has a right to bring an action on a note for advances made by one party to another for the purpose of carrying on the partnership. Fleischer v. Broders ---------- 723
2. Ordinarily, a partner is not entitled to compensation for winding up the affairs on dissolution. Fleischer v. Broders ---------- 723
3. Ordinarily, advances by a partner beyond the amount of capital that he has agreed to contribute bear interest. Fleischer v. Broders ---------- 723

Penalties.

A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. Berg v. Midwest Laundry Equipment Corp. ---------- 770

Pensions.

Under specified section of the Firemen's Pension Act a fireman receives injuries while in the line of duty if he contracts disease while in the discharge of duty. Campbell v. City of North Platte ---------- 244

Physicians and Surgeons.

In diagnosing a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. State v. Madary ---------- 383

Pleading.

1. While the amendment of pleadings is ordinarily a matter of discretion with the district court, the failure to permit the respondent to make a proper verification when permission is requested is an abuse of discretion. Green v. Green ---------- 207
2. A court may, either before or after judgment in the furtherance of justice, and on such terms as may be proper under the circumstances, permit an amendment to the pleadings when the amendment does not change substantially the claim or defense. Transport Indemnity Co. v. Seib ---------- 253
3. A motion to strike a petition from the files because the facts pleaded are insufficient is in effect a general demurrer and admits the truth of the facts well pleaded. Stewart v. McCauley ---------- 412
4. A general demurrer admits the truth of all material

facts well pleaded, but does not admit the conclusions of law. State ex rel. Warren v. Kleman ---- 564
5. As a general rule, only the pleading demurred to may be considered in passing on the demurrer. State ex rel. Warren v. Kleman ---------- 564
6. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. State ex rel. Warren v. Kleman ---------- 564
7. Neither can the court consider extrinsic facts admitted by the parties or by counsel, nor the conclusions of the pleader, except when they are supported by, and necessarily result from, ultimate facts stated in the pleading. State ex rel. Warren v. Kleman ---- 564
8. The ultimate or issuable facts to be established should be alleged in a pleading. State ex rel. Warren v. Kleman ---------- 564
9. A motion for judgment on the pleadings which is in substance and content a demurrer, will be treated as such, and will be construed to admit the truth of all well-pleaded facts and all reasonable inferences to be drawn therefrom. Western Surety Co. v. Welty -- 608
10. The Supreme Court may, in furtherance of justice, make or permit amendment of any pleading to conform to the facts proved, when such amendment does not change substantially the claim or defense. Lippire v. Eckel ---------- 643
11. The power of the Supreme Court to make or permit amendment of a pleading to conform to the facts proved is ordinarily only exercised to sustain and not to reverse a judgment, unless it appears that a miscarriage of justice would otherwise result. Lippire v. Eckel ---------- 643
12. It is the facts well pleaded and not the conclusions of the pleading that determine the nature of the action and the relief to be granted. Lippire v. Eckel 643
13. A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. Lippire v. Eckel ---------- 643

Principal and Agent.

1. The government is not bound by unauthorized acts of its agents. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211
2. Anyone dealing with the government takes the risk

of having accurately ascertained that he who purports to act for the government stays within the scope of his authority. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211

Principal and Surety.

1. The surety on a builder's bond is bound in the manner and to the extent provided in the obligation it assumes. School Dist. No. 65R v. Universal Surety Co. ---------- 746
2. The contract of a surety company, acting for hire, will be strictly construed most strongly against a compensated surety and in favor of an obligee. School Dist. No. 65R v. Universal Surety Co. ---- 746
3. Where contract of surety contains provision that certain acts shall not operate to relieve from liability, such provision is enforceable against the surety according to its terms. School Dist. No. 65R v. Universal Surety Co. ---------- 746
4. Ordinarily, a surety of a builder's bond occupies the relationship of guarantor for the performance of the contract in the manner and to the extent therein provided and the surety is bound in the same manner and to the same extent as the contractor. School Dist. No. 65R v. Universal Surety Co. ---------- 746
5. In the absence of special provisions in the contract, there is no duty on the part of an owner to notify the surety company of default of the principal contractor and there is no need to proceed against the principal first or give notice to the surety of breach of the contract. School Dist. No. 65R v. Universal Surety Co. ---------- 746

Process.

1. Before any state can subject a foreign corporation to the jurisdiction of that state, such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction. Dale Electronics, Inc. v. Copymation, Inc. -------- 239
2. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts. Dale Electronics, Inc. v. Copymation, Inc. -------- 239

3. The filling of orders solicited by an independent contractor does not bring a foreign corporation within the orbit of doing business in Nebraska sufficient to warrant service of process by publication upon it. Dale Electronics, Inc. v. Copymation, Inc. 239
4. The question whether process may be served on a nonresident party may be determined by the nature of the proceedings in which process was issued and its relation to the suit which the party or witness had been attending. Stewart v. McCauley ---------- 412
5. The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served. Stewart v. McCauley ---------- 412

Public Lands.

1. The public school lands of the State of Nebraska are a trust held by the state. Seidel v. City of Seward 345
2. Claimants of school lands are charged with knowledge of the trust obligation of the state. Seidel v. City of Seward ---------- 345

Public Service Commissions.

1. The burden is on an applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
2. In the determination of whether or not an applicant has sustained the burden imposed, reference must be had to the evidence, and the Supreme Court will not disturb an order of the railway commission granting a certificate of public convenience and necessity based on evidence unless the evidence shows that such order is unreasonable or arbitrary. The Greyhound Corp v. American Buslines, Inc. ---------- 9
3. An important factor in the determination of whether or not an application for a certificate of public convenience and necessity should be granted is evidence relating to competition with other service and the effect thereon. The Greyhound Corp. v. American Buslines, Inc. ---------- 9

4. A declaration of policy contained in statute relating to the railway commission is to regulate transportation in the public interest and to promote efficient service without undue preferences or advantages and without unfair or destructive competitive practices. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
5. A certificate of public convenience and necessity for regular route transportation of passengers is improperly issued in the absence of proof of both public convenience and necessity. The Grayhound Corp. v. American Buslines, Inc. ---------- 9
6. A certificate of public convenience and necessity may not properly be granted over an existing route until on notice, hearing, and order of the railway commission the existing carrier has refused or failed to provide adequate service. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
7. Reasonable and necessary interchanges of transportation and transfers do not afford a basis for a claim of inadequacy of service such as to permit the valid issuance of a competitive certificate of public convenience and necessity. The Greyhound Corp. v. American Buslines, Inc. ---------- 9
8. The issuance of a certificate of public convenience and necessity based on evidence is ordinarily binding on appeal to the Supreme Court, but the failure of an applicant to sustain the burden of showing that the issuance of the certificate was not arbitrary and unreasonable destroys its validity. The Greyhound Corp v. American Buslines, Inc. ---------- 9
9. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the railway commission is subject to and governed by the provisions of such enactment. Sherdon v. American Communication Co. ---------- 454
10. A telephone company must obtain a certificate of convenience and necessity before encroaching upon the territory of another company. Sherdon v. American Communication Co. ---------- 454
11. The grant of a certificate of convenience and necessity to permit one telephone company to invade the certificated area of another may be granted only upon application of the invading company for a certificate of convenience and necessity. Sherdon v. American Communication Co. ---------- 454
12. The railway commission has no power to order a

telephone company to extend its service into the certificated service area of another company unless such telephone company has first applied for and received a certificate of convenience and necessity. Sherdon v. American Communication Co. ---------- 454

13. In the absence of a showing to the contrary, the court or administrative body ordering the nunc pro tunc amendment of its own records is presumed to have acted properly and to have been justified in making the amendment. Andrews v. Nebraska State Railway Commission ---------- 799

14. On appeal to the Supreme Court from an order of the railway commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Andrews v. State Railway Commission ---------- 799

Quieting Title.

In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary. Seidel v. City of Seward ---------- 345

Rape.

1. In a prosecution for forcible rape, competent evidence must show beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed. State v. Hunt 783

2. In a prosecution for forcible rape it is not essential that prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact. State v. Hunt ---------- 783

3. The degree of force required to sustain a conviction for forcible rape is relative, depending upon the particular circumstances, but it must be sufficient to subject the dissenting woman to the power of the man and thus enable him to have carnal knowledge of her notwithstanding good faith resistance on her part. State v. Hunt ---------- 783

4. The degree of resistance required of the prosecutrix is also relative, depending upon the particular circumstances, but she must in good faith resist to

the utmost of her physical ability as long as she has the strength to do so, until the offense is consummated. State v. Hunt ---------- 783

5. In a prosecution for rape the prosecutrix may testify in chief that she complained to another within a reasonable time under the circumstances after the act was committed, and such other party may likewise testify in chief to such fact and the nature of the complaint. Such evidence is for the consideration of the jury as corroboration of the main fact in issue. State v. Hunt ---------- 783

Reformation of Instruments.

1. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Lortscher v. Winchell ---------- 302
2. Equity will decree reformation of a contract only if the mistake is mutual, or for fraud or inequitable conduct. Lortscher v. Winchell ---------- 302
3. Mere negligence in executing a written instrument without reading and understanding its provisions is not a bar to reformation where the ground for relief is a mutual mistake of the parties. Lippire v. Eckel ---------- 643

Schools and School Districts.

1. In a proceeding for a change in the boundaries of a school district, it is presumed that the evidence before the county superintendent was sufficient to support the order which was made if the evidence was not preserved in a proper bill of exceptions. Retzlaff v. Synovec ---------- 147
2. Under statute, a legal voter of a district affected may add his name to the petition at any time before the petition is filed with the county superintendent. Retzlaff v. Synovec ---------- 147
3. Under section of the school law, where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners'

land to be transferred. Rebman v. School Dist. No. 1 ---------- 313
4. The renewal or continuance of a transfer to another school district for school purposes under statute referred to in opinion is not subject to revocation or recall. Such a transfer when renewed is in existance for a period of 1 year and may not be recalled, revoked, or canceled. Harnapp v. Bigelow 440
5. A legal voter within the meaning of section of statute referred to in opinion is one who is eligible to vote at an election for school district officers in the district affected. Harnapp v. Bigelow 440
6. While a transfer for school purposes is in effect, the parent of a pupil so transferred is not a legal voter for school purposes of the district from which the transfer has been made. Harnapp v. Bigelow ---------- 440
7. Under section of statute referred to in opinion, a legal voter of a district affected may add his name to the petition at any time before the petition is filed with the county superintendent. Harnapp v. Bigelow ---------- 440

Searches and Seizures.

1. On a hearing on a motion to suppress evidence, it is within the discretion of the trial court to permit a withdrawal of the rest to permit the taking of further evidence. State v. Putnam ---------- 445
2. A trial court may properly vacate an order entered to suppress evidence and make a new and different order thereon over which it still has jurisdiction. State v. Putnam ---------- 445
3. The search of the premises of a defendant under a void search warrant ordinarily constitutes an unreasonable search and the fruits of such a search are not admissible in evidence against the defendant. State v. Putnam ---------- 445
4. Where a person is lawfully arrested, law enforcement officers may, without a search warrant, make a contemporaneous search of the person of accused for weapons, and fruits of or implements used to commit the crime. State v. Putnam ---------- 445
5. The right to search and seize without a search warrant when the person is lawfully arrested extends to things under such person's immediate control and, depending on the circumstances, to the place and time of arrest. State v. Putnam ------ 445

6. If knowledge of facts warranting the arrest of a person is gained from an independent source from that gained by an unlawful search, such facts may be proven the same as any other fact. State v. Putnam ---------- 445
7. Where a person was arrested, his automobile taken into custody and searched, and stolen goods were found in it, the fact that law enforcement officers transported such person and his automobile to a convenient place and there removed the stolen property in the presence of the defendant is not so remote from the arrest as to make the search and seizure unlawful. State v. Putnam ---------- 445
8. Where a search of a building is authorized by the owner in possession, a search warrant is not required and the search pursuant thereto is in all respects lawful. State v. Hunt ---------- 783

Specific Performance.

1. The granting of the relief of specific performance rests in the sound discretion of the court. Schommer v. Bergfield ---------- 140
2. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance. Schommer v. Bergfield ---------- 140

Statutes.

1. Legislative prohibition or regulation should not be extended beyond the evils intended to be prevented by the Legislature. Gruenemeier v. Commonwealth Co. ---------- 66
2. Rule for construction of statute stated. Rebman v. School Dist. No. 1 ---------- 313
3. Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions. Rebman v. School Dist. No. 1 ---- 313
4. In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity. Rebman v. School Dist. No. 1 313
5. The regulation and registration of persons engaging

in the practice of professional architecture is a proper exercise of the police power. State ex rel. Meyer v. Knutson ---------- 375

6. Classification will be held proper if it reasonably applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation, and there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor. State ex rel. Meyer v. Knutson ---------- 375

7. The constitutional prohibition against special legislation does not prevent the Legislature from dividing a subject into classes, and a classification made pursuant to a public purpose which has a rational basis is not invalid. State ex rel. Meyer v. Knutson ---------- 375

8. A statute bearing alike upon all individuals of each class is not a discrimination forbidden by the state Constitution, nor by the Fourteenth Amendment to the Constitution of the United States. State ex rel. Meyer v. Knutson ---------- 375

9. A statute, to be equal and uniform in its operation, need not extend the same privilege to every individual, but different, appropriate privileges and exceptions may be granted to different classes similarly situated. State ex rel. Meyer v. Knutson ---- 375

10. Where exemptions from the operation of a general law are made applicable to persons of the same class similarly situated, such provisions are not invalid as granting special privileges or immunities. State ex rel. Meyer v. Knutson ---------- 375

11. Purpose and effect of grandfather clause in act regulating practice of engineering and architecture stated. State ex rel. Meyer v. Knutson ---------- 375

12. Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance. State ex rel. Meyer v. Knutson ---------- 375

13. The doctrine of estoppel cannot be applied against the state in enforcing a criminal statute on the ground that the violation is of long duration. State ex rel. Meyer v. Knutson ---------- 375

14. The Iowa guest statute, although in derogation of common law, is to be liberally construed with a

view to promote its objects and assist the parties in securing justice. Cappellano v. Pane ---------- 493
15. Statute on damages recoverable in eminent domain proceedings has not changed rule as to recovery of anticipated profits. Bickels v. State ---------- 825
16. In construing statutes, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies. The particular topic under which the language in question is found, and the intent so deduced from the whole, will prevail over that of a particular part considered separately. Bickels v. State ---------- 825

Streets.

1. Usually a yellow light following the green at an automatic signal controlled intersection warns that the red light is about to appear, and its purpose is to permit the clearance of vehicles from the intersection so that cross traffic may proceed. Zavoral v. Pacific Intermountain Express ---------- 161
2. In the absence of statute, the display of a yellow light following the green on an automatic signal requires vehicular traffic to stop or to proceed carefully if stop cannot be made. Zavoral v. Pacific Intermountain Express ---------- 161
3. A "go" or green signal at an automatic signal controlled intersection is a grant of permission to drivers to proceed lawfully and carefully. Zavoral v. Pacific Intermountain Express ---------- 161
4. The driver of a motor vehicle entering an intersection of two streets is obligated to look for approaching vehicles and to see those within that radius which denotes the limit of danger. Hellmeier v. Policky ---------- 170
5. Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings. W.E.W. Truck Lines, Inc. v. State ---------- 218
6. Reasonable ingress and egress under all of the circumstances is the measure of the right of an owner of property abutting on a street. W.E.W. Truck Lines, Inc. v. State ---------- 218
Swanson v. State ---------- 671

7. One has no legal right to appropriate a part of the street to the purpose of his private business or to be used as a part of or to improve and make more useful a facility used in the conduct of his business. Vap v. City of McCook ---------- 844

Sunday.

The opinion in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475, is controlling in these cases. Skag-Way, Inc. v. Douglas ---------- 290
Plucknett v. Morrison ---------- 292

Taxation.

1. Provisions exempting property from taxation are to be strictly construed and their operation should not be extended by construction. The power and right of the state to tax are presumed and the exemption must be clearly granted. Lincoln Woman's Club v. City of Lincoln ---------- 357
2. A liberal and not a harsh or strained construction is to be given to the terms "education," "religious," and "charitable" in order that the true intent of the constitutional and statutory provisions may be realized. Lincoln Woman's Club v. City of Lincoln 357
3. If property is, in fact, used for no other purpose than those which are educational, religious, and charitable, the conditions of the exemption have been strictly complied with irrespective of the proportion which any one of these distinctive purposes may bear to the others. Lincoln Woman's Club v. City of Lincoln ---------- 357
4. It is the exclusive use of property which determines whether the property is exempt from taxation. Lincoln Woman's Club v. City of Lincoln -- 357
5. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Lincoln Woman's Club v. City of Lincoln ---------- 357
6. It is the use of property as distinguished from the use of the income from the property that determines whether it is exempt from taxation. Lincoln Woman's Club v. City of Lincoln ---------- 357
7. An incidental use of property which produces some funds from members does not make the use any less an incidental use, where such funds are devoted to the primary and dominant purposes of the organization. Lincoln Woman's Club v. City of Lincoln 357

8. If property is actually used exclusively for educational, religious, or charitable purposes, the exemption is not lost because the use is for less than full time. Lincoln Woman's Club v. City of Lincoln ---------- 357
9. It is presumed that a county board of equalization has properly performed its official duties in determining the actual value of property for tax purposes and that in making an assessment it acted upon sufficient competent evidence to support its action. Richards v. Board of Equalization ------ 537
10. For purposes of taxation, the terms actual value, market value, and fair market value are synonymous terms and mean exactly the same thing. Richards v. Board of Equalization ---------- 537
11. The actual value of property for taxation purposes is to be determined by using the applicable elements of actual value, including those specified in section referred to in opinion. Richards v. Board of Equalization ---------- 537
12. In a trial on appeal, the trial court may properly consider all applicable elements of actual value which are supported by evidence of probative force bearing upon the actual value of the property for tax purposes. Richards v. Board of Equalization 537
13. The Constitution of this state provides that the necessary revenue for the maintenance of state government shall be raised by taxation in such a manner as the Legislature may direct. Carpenter v. State Board of Equalization & Assessment ------ 611
14. The Constitution of this state provides that taxes shall be levied uniformly and proportionately upon all tangible property and that the Legislature may prescribe standards and methods for the determination of the value of tangible property uniformly and proportionately. Carpenter v. State Board of Equalization & Assessment ---------- 611
15. It is the function of the county board of equalization to determine the actual value of property for taxation purposes. Carpenter v. State Board of Equalization & Assessment ---------- 611
16. The primary duty of the State Board of Equalization and Assessment is to establish uniformity in taxation between the various counties. Carpenter v. State Board of Equalization & Assessment ----- 611
17. Both the county board of equalization and the State Board of Equalization and Assessment must give

effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. Carpenter v. State Board of Equalization & Assessment ---------- 611

18. The determination of each individual county as to actual value is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the State Board of Equalization and Assessment as conforming to the law. Carpenter v. State Board of Equalization & Assessment ---------- 611

19. The State Board of Equalization and Assessment has no power to readjust individual valuations within any particular county. Carpenter v. State Board of Equalization & Assessment ---------- 611

20. Powers of Supreme Court in reviewing action of State Board of Equalization and Assessment outlined. Carpenter v. State Board of Equalization & Assessment ---------- 611

21. It is only in situations where the record is conclusive that the action of the State Board of Equalization and Assessment was illegal, contrary to law, arbitrary, and capricious that the Supreme Court has any power to interfere with its findings and orders. Carpenter v. State Board of Equalization & Assessment ---------- 611

22. A wide latitude of judgment and discretion is vested in the State Board of Equalization and Assessment. Carpenter v. State Board of Equalization & Assessment ---------- 611

23. The State Board of Equalization and Assessment is not bound by the actual record of the evidence taken before it and no particular method or procedure must be followed. No particular kind or standard of evidence is required and it may act upon the knowledge of its own members as to value and on any other information satisfactory to it. Carpenter v. State Board of Equalization & Assessment ---------- 611

24. The State Board of Equalization and Assessment is entitled to act upon the presumption that the abstracts of assessment returned by the various counties have conformed to law. Carpenter v. State Board of Equalization & Assessment ---------- 611

25. Actual value is an intangible concept, is largely a matter of opinion, and there are no yardsticks by

which it can be determined with accuracy. Carpenter v. State Board of Equalization & Assessment -- 611

26. Substantial compliance with the requirements of equality and uniformity in taxation is all that is required and such provisions are satisfied when designed and manifest departures from the rule are avoided. Carpenter v. State Board of Equalization & Assessment ---------- 611

27. The object of the law of uniformity in taxation is accomplished if all of the property within the taxing district is assessed at a uniform standard of value. Carpenter v. State Board of Equalization & Assessment ---------- 611

28. A sales assessment ratio study, without any investigation or evaluation of the raw information according to some uniform standard of evaluation of the sales, is entitled to little, if any, probative force as evidence on the issue of equalization and valuation. Carpenter v. State Board of Equalization & Assessment ---------- 611

Telecommunications.

1. A telephone company must obtain a certificate of convenience and necessity before encroaching upon the territory of another company. Sherdon v. American Communication Co. ---------- 454

2. The grant of a certificate of convenience and necessity to permit one telephone company to invade the certificated area of another may be granted only upon application of the invading company for a certificate of convenience and necessity. Sherdon v. American Communication Co. ---------- 454

3. The railway commission has no power to order a telephone company to extend its service into the certificated service area of another company unless such telephone company has first applied for and received a certificate of convenience and necessity. Sherdon v. American Communication Co. -------- 454

Time.

Full time is defined as the amount of time considered the normal or standard amount for working during a given period as a day, week, or month. Grace v. County of Douglas ---------- 690

Torts.

1. One who causes loss of business to another merely

by engaging in a business or occupation in good faith is not liable to the other for the loss so caused, even though he knows the loss will result. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 329

2. Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tort-feasor may be held for the entire damage, not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury. Tober v. Hampton 858

3. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers. Tober v. Hampton -- 858

4. The injured party can have only one satisfaction for the injury and if the amount received was not in full satisfaction it is a pro tanto bar to an action against the other wrongdoer. Tober v. Hampton 858

5. Indemnity between tort-feasors is generally restricted to cases where actual fault is attributed to one party and the other party is only technically or constructively at fault, and indemnity is never applicable where both parties are actually in the wrong. Tober v. Hampton ---------- 858

6. Apart from statute, the general rule is that one of several wrongdoers, who has been compelled to pay the damages for the wrong committed, cannot compel contribution from the others who participated in the commission of the wrong. Tober v. Hampton 858

7. The use of a legal device, proper in its setting, should not be extended to a situation foreign to its nature for the purpose of thwarting the decisions of the courts. Tober v. Hampton ---------- 858

8. As used in the present case, loan receipts are being used to thwart the law of Nebraska relating to indemnification and contribution among tort-feasors. Tober v. Hampton ---------- 858

Trial.

1. Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented. Fulmer v. State ---------- 20

2. Where from the evidence, different minds may draw different conclusions, or where there is a conflict

in the evidence, the matter at issue must be submitted to the jury. Caves v. Barnes ---------- 103

3. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester ---------- 135

4. It is the duty of the trial court without request to instruct the jury as to each issue presented by the pleadings and supported by the evidence. Zavoral v. Pacific Intermountain Express ---------- 161

5. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and the failure in this respect is prejudicial error. Zavoral v. Pacific Intermountain Express ---------- 161

6. The question of whether a driver should anticipate a change in lights as he approaches an intersection on a "go" or green signal generally is for the jury under all of the circumstances, evidence, and facts of the case. Zavoral v. Pacific Intermountain Express ---------- 161

7. Ordinarily, in instructions, a court is not required to define words that are of common use and understanding. Zavoral v. Pacific Intermountain Express 161

8. Exactness of statement in instructions is not required if the substance is a correct statement of the applicable law. Hellmeier v. Policky --------- 170

9. In a negligence action, the burden of proof is on the plaintiff to adduce evidence that the neglect charged either alone or in connection with other acts was the proximate cause of the injury. Sears v. Mid-City Motors, Inc. ---------- 175

10. Requirements for establishing a cause of action by circumstantial evidence stated. Sears v. Mid-City Motors, Inc. ---------- 175

11. The burden of proof of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies. Sears v. Mid-City Motors, Inc. ---------- 175

12. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require sub-

mission of the issue to a jury. Sears v. Mid-City Motors, Inc. ---------- 175
13. In a case where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented. Sears v. Mid-City Motors, Inc. ---------- 175
14. It is not the office of an expert witness to give his conclusions of the ultimate fact to be determined, but it is for the court to decide whether there is sufficient evidence thereof to submit to the jury and for the jury to make its decision in case it is submitted to it. Sears v. Mid-City Motors, Inc. -- 175
15. In absence of opposing evidence or in light of surrounding circumstances, an admission against interest may be sufficient to establish fact admitted, but other evidence in the case may render the admission wholly insufficient to establish such fact. Sears v. Mid-City Motors, Inc. ---------- 175
16. To be competent as an admission against interest a statement must be one of fact. A statement which is a mere opinion or a conclusion of law is as a rule inadmissible. Sears v. Mid-City Motors, Inc. ---------- 175
17. In a condemnation action when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. W.E.W. Truck Lines, Inc. v. State ---------- 218
18. Where evidence is adduced in a law action, whether by stipulation or otherwise, issues of fact are tried and determined. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. ---------- 226
19. Unless a motion for a new trial is filed in an action at law, review of the judgment in the Supreme Court will be limited to the sole question as to whether the pleadings support the judgment. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co. ---- 226
20. In a homicide case, it is the duty of the trial court to instruct on those degrees of homicide only as find support in the evidence. State v. Worley ------ 232
21. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. Langemeier, Inc. v. Pendgraft ---------- 250
22. Before a case is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is any evidence, but whether there is any evidence upon which the

jury can properly award recovery to the party upon whom the burden of proof is imposed. Langemeier, Inc. v. Pendgraft ---------- 250
Mathis v. State ---------- 701

23. It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. Langemeier, Inc. v. Pendgraft ---------- 250

24. A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Hoffman v. Jorgensen Awnings, Inc. ---- 261

25. Ordinarily, a party cannot complain of the submission of an issue to the jury where the finding on that issue is favorable to him. Prell v. Murphy -- 278

26. Rule as to when a verdict will be set aside as inadequate stated. Prell v. Murphy ---------- 278

27. Rule for consideration upon appeal of ruling by trial court refusing to sustain motion for directed verdict stated. Middleton v. Nichols ---------- 282

28. In a law action, where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. It is only where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, that the question is one of law for the court. Middleton v. Nichols ---------- 282

29. Before a verdict can be directed against a driver for his failure to see another vehicle approaching a nonprotected intersection, the evidence must show without dispute that the other vehicle was located in a favored position and within the radius of danger. Sanderson v. Westphalen ---------- 298

30. Where a driver looks but fails to see an approaching vehicle which is not shown to be in a favored position his negligence is usually a question for the jury. Sanderson v. Westphalen ---------- 298

31. It is a question of fact to be determined by a jury whether or not there exists malice or ill will, if the evidence thereon is conflicting or of a doubtful character. If the evidence is of such a character that one conclusion can be reasonably drawn

therefrom, the court alone should dispose of the question. Frank H. Gibson, Inc. v. Omaha Coffee Co. 329
32. An ambiguous instruction on the risk of nonpersuasion is not prejudicially erroneous where other instructions definitely and correctly cover the subject. Hansen v. Strohschein ---------- 367
33. A refusal of requested instructions is not erroneous where the instructions given by the court have the same effect. Hansen v. Strohschein ---------- 367
34. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. State v. Archbold ---------- 433
35. Fraud and mistake are never assumed but must be proved by the party that alleges them. Muller Enterprises, Inc. v. Gerber ---------- 463
36. Issues to be tried must be formed by pleadings. A judgment rendered thereon must respond to the issues raised by the pleadings. Muller Enterprises, Inc. v. Gerber ---------- 463
37. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Schmeeckle v. Peterson ---------- 476
38. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Schmeeckle v. Peterson ---------- 476
39. A defendant formally indicted and charged with a homicide is entitled to the right of effective counsel at every step of the proceedings. State v. Longmore ---------- 509
40. It is prejudicial error for the trial court to submit to the jury allegation of negligence for which there is no proof. Brown v. Kaar ---------- 524
41. Whether requested to do so or not, the trial court has the duty of instructing on issues presented by the pleadings and the evidence, and failure to do so constitutes prejudicial error. Brown v. Kaar 524
42. It is within the sound discretion of the court to permit a party to withdraw his rest and introduce

additional testimony. Mead v. Missouri Valley Grain, Inc. ---------- 553

43. It is the province of the jury to determine the circumstances surrounding the alleged crime. If, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. State v. Ohler ---- 596

44. After a jury has considered the evidence in the light of applicable rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Ohler ---------- 596

45. Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. Swanson v. State ---------- 671

46. Rule as to admissibility of evidence of other sales in eminent domain proceeding stated. Swanson v. State ---------- 671

47. Rule as to consideration given to view of the premises by trial court stated. Linch v. Nichelson ---- 682

48. In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom. Sall v. Schnackenberg ---------- 699

49. Where the evidence is contradictory, the verdict of the jury will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination and not for the court. Sall v. Schnackenberg ---------- 699

50. Rule for consideration of motion for directed verdict stated. Mathis v. State ---------- 701

51. The instructions in a criminal case may describe the offense in the language of the statute. State v. Sukovaty ---------- 779

52. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. State v. Sukovaty ---------- 779

53. It is not error for a prosecutor to argue to the jury that it is its sworn duty to find a defendant guilty under the evidence adduced at the trial. State v. Hunt ---------- 783
54. The ruling of the trial court on a question involving misconduct of the jury will not be disturbed in the absence of a showing of an abuse of discretion. State v. Hunt ---------- 783
55. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. Tober v. Hampton ---------- 858
56. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented. Tober v. Hampton ---------- 858
57. Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. Tober v. Hampton ---------- 858
58. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal. Tober v. Hampton ---------- 858
59. If at a pretrial conference it appears there are issues which might be determinative of the cause although not then within the pleadings, they should be stated in the pretrial order which should thereafter govern the proceeding in that respect. Tober v. Hampton ---------- 858
60. It is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not. An instruction, which, by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case, is prejudicially erroneous. State v. Breaker ---------- 887
61. Where the trial court admits a confession which is challenged as involuntary by the defendant's evidence, it is prejudicial error for the court to not submit to the jury for its determination under appropriate instructions, the question of whether the defendant's alleged oral admission or confession is voluntary. State v. Breaker ---------- 887
62. It is the duty of the trial court to instruct a jury to disregard an alleged confession or oral admis-

sion of guilt if found to be involuntary. State v. Breaker ---------- 887

United States.

1. The government is not bound by unauthorized acts of its agents. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211
2. Anyone dealing with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the scope of his authority. Todd Brothers v. Federal Crop Ins. Corp. ---------- 211

Usury.

1. The prohibition of the statute relating to multiple loans is not that there shall not be more than one loan during any period of time. It is that the excess charges above a rate of interest of 9 percent per annum shall not be charged on more than one loan at the same time. Gruenemeier v. Commonwealth Co. ---------- 66
2. Under the Industrial Loan and Investment Company Act, there may be as many contracts of loan at the same time as the parties desire, but the several loans when considered together, must not violate statute prescribing rate of interest on one loan. Gruenemeier v. Commonwealth Co. ---------- 66
3. Industrial Loan and Investment Company Act requires consideration of the loans as a consolidated loan only for the purpose of determining if the splitting of the loans at the same time was for the purpose of exacting a higher rate of charge. Gruenemeier v. Commonwealth Co. ---------- 66
4. The restrictive provisions as to equal payments provided for by the Industrial Loan and Investment Company Act were intended to apply to those portions of the loan which bore interest at a rate in excess of 9 percent per annum. Gruenemeier v. Commonwealth Co. ---------- 66
5. The plain wording of Installment Loan Act rendered void only the payments of principal, interest, and charges included in the loan and did not affect a downpayment which was no part thereof. Berg v. Midwest Laundry Equipment Corp. ---------- 770
6. By the enactment of L. B. 17, Seventy-fourth (Extraordinary) Session, 1963, the Legislature intended that usurious contracts or indebtedness should

be collectible to the extent of the principal but that any usurious interest or other charges should be forfeited to the borrower. Dailey v. A. C. Nelsen Co. ---------- 881

7. The provisions of interest statute extend the borrower's right to recover usurious interest and charges even though the entire contract or loan has been fully paid. Dailey v. A. C. Nelsen Co. ---------- 881
8. Where an installment contract or loan is usurious and where installment payments are not specifically allocated to principal or interest in the contract or by agreement, installment payments will be credited as payments on principal or so much thereof as remains unpaid and not on any illegal interest or other charges on the loan involved. Dailey v. A. C. Nelsen Co. ---------- 881
9. The right to recover illegal interest or other charges granted to the borrower by L. B. 17 of the Seventy-fourth (Extraordinary) Session of the Legislature, 1963, may not be exercised as long as any part of the principal debt justly due remains unpaid. Dailey v. A. C. Nelsen Co. ---------- 881

Vendor and Purchaser.

Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance. Schommer v. Bergfield ---------- 140

Venue.

1. The Uniform Declaratory Judgments Act is procedural and the venue of a declaratory judgment action is governed by the rules relating to venue of civil actions generally. Father Flanagan's Boys' Home v. Graybill ---------- 79
2. The venue of a declaratory judgment action brought in the district court for the sole purpose of construing a will is in the county in which the defendant, or some one of the defendants, resides or may be summoned. Father Flanagan's Boys' Home v. Graybill ---------- 79

Waters.

1. In the case of a change in the general course of a river, the better rule is that the frontage of each

riparian owner on the new river bank should be divided in proportion to his frontage on the original bank. Swanson v. Dalton ---------- 55
2. Two adjoining property owners may agree upon their respective interests in accretion adjoining their lands and fix the boundary lines by agreement, regardless of their exact legal rights. Swanson v. Dalton 55
3. When surface waters concentrate and gather in volume so as to lose their character as diffused surface waters and flow into a natural drainageway, the flow may not be arrested or interfered with to the injury of an adjoining proprietor. Linch v. Nichelson ---------- 682
4. Where a landowner by dike, dam, or ditch diverts water from a natural drainageway and causes it to be discharged in volume on a lower or servient estate to its damage, injunction is an appropriate remedy for the protection of the rights of the owner of the lesser or servient estate. Linch v. Nichelson 682
5. A general rule cannot be followed in dividing accretion among riparian landowners under all circumstances. Osgood-Lewis-Perkins, Inc. v. Green ---- 807
6. Under exceptional circumstances and in order to do equity, an incomplete meander line may be used as the old bank to be measured pursuant to the frontage-to-frontage method of apportioning accretion among landowners. Osgood-Lewis-Perkins, Inc. v. Green ---------- 807

Wills.

1. The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. David v. Wirth ---------- 74
2. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law. Davis v. Wirth ---------- 74
3. In the absence of other provisions in the will to the contrary, a remainder devised to the children of a life tenant, with a limitation over in the event of the death of the life tenant leaving no child, is a vested remainder subject to defeasance. Davis v. Wirth ---------- 74
4. A county court has jurisdiction to construe wills when necessary for the benefit of the executor in

carrying out the terms of the will. Father Flanagan's Boys' Home v. Graybill ---------- 79
5. The district court has exclusive jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Father Flanagan's Boys' Home v. Graybill 79
6. Rule for construction of a will stated. Father Flanagan's Boys' Home v. Graybill ---------- 79
7. A will, which gives to a devisee specific real estate, as to which testator had entered into a binding contract of sale, will pass the interest of the testator in the contract with all the rights incidental thereto, unless the intent of the testator as demonstrated by the will and the attendant circumstances is shown to be otherwise. Father Flanagan's Boys' Home v. Graybill ---------- 79

Witnesses.

1. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Caves v. Barnes ---------- 103
2. Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. Caves v. Barnes ------ 103
3. While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. Caves v. Barnes ---------- 103
4. It is not the office of an expert witness to give his conclusions of the ultimate fact to be determined, but it is for the court to decide whether there is sufficient evidence thereof to submit to the jury and for the jury to make its decision in case it is submitted to it. Sears v. Mid-City Motors, Inc. 175
5. In questioning an expert witness on an appropriate subject, a party may choose a hypothesis based upon his theory of evidence which raises an issue of fact. Campbell v. City of North Platte ---------- 244
6. An opinion responsive to a proper hypothetical question will ordinarily sustain a jury verdict on that issue of fact unless probative value is de-

stroyed by impeachment. Campbell v. City of North Platte ---------- 244
7. A trial court exercises a discretion in overruling a general objection to a hypothetical question, and abuse may not be predicated solely upon minor inaccuracies in the hypothesis. Campbell v. City of North Platte ---------- 244
8. A witness is not competent to give an opinion unless shown to possess the necessary learning, knowledge, skill, or practical experience to enable him to give the opinion testimony. Brown v. Kaar 524
9. The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case. State v. Sukovaty ---------- 779
10. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. State v. Sukovaty ---------- 779
11. Rule as to use of names and qualifications of witnesses before the board of appraisers stated. Bickels v. State ---------- 825
12. Ordinarily, a resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation. First Baptist Church v. State ---------- 831
13. Mere membership in a church or an organization does not bring a lay witness into such relationship with property that he may testify as to its value without further foundation. First Baptist Church v. State 831
14. As a general rule, a witness need not be an expert to testify as to the value of land. The admission of such testimony rests in the sound discretion of the court. First Baptist Church v. State 831
15. Testimony of a witness as to value is ordinarily received if he shows an acquaintance with the property and is informed as to the state of the market. First Baptist Church v. State ---------- 831
16. Mere familiarity with the physical structure and location of the property is not sufficient foundation to render a lay witness competent to testify as to valuation. First Baptist Church v. State ---------- 831

Work and Labor.

1. If payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such

services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof. Houser v. Houser ---------- 401
2. The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely rebuttable by circumstantial as well as direct evidence. Houser v. Houser ---------- 401
3. The presumption of gratuity is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay. Houser v. Houser ------- 401

Workmen's Compensation.

1. In order to entitle an employee to recover under the Nebraska Workmen's Compensation Act, he has the burden of establishing that the injury arose out of and in the course of his employment by the employer from whom he seeks recovery. Gibb v. Highway G.M.C. Sales & Service Corp. ---------- 127
2. Rule stated as to when an injury arises out of and in the course of the employment in a workmen's compensation case. Gibb v. Highway G.M.C. Sales & Service Corp. ---------- 127
3. Ordinarily a commercial traveler is regarded as acting in the course of his employment during the entire period of travel on the employer's business, and his acts in procuring food and shelter are considered, ordinarily, to be incidents of his employment. Gibb v. Highway G.M.C. Sales & Service Corp. ---------- 127
Murphy v. Hi-Way G.M.C. Sales & Service Corp. -- 397
4. Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty, or to a point where in the performance of duty he is required to be. Gibb v. Highway G.M.C. Sales & Service Corp. -------- 127
Murphy v. Hi-Way G.M.C. Sales & Service Corp. ---- 397
5. Rule as to deviation from employment and return thereto stated. Gibb v. Highway G.M.C. Sales & Service Corp. ---------- 127
6. An employer who is made a party defendant for purposes of subrogation in a workmen's compensa-

tion case appears in a different capacity than as plaintiff in employer's separate cause of action for property damage against the same defendant arising out of the same occurrence. American Province Real Estate Corp. v. Metropolitan Utilities Dist. -- 348

7. Where an employee sues a third person for personal injuries, and the employer is joined as a defendant, the third person may be deemed to have knowledge that the employer's appearance is for the sole benefit of the workmen's compensation insurance carrier of the employer. American Province Real Estate Corp. v. Metropolitan Utilities Dist. ------ 348

8. A workmen's compensation case is considered de novo upon the record in the Supreme Court. Murphy v. Hi-Way G.M.C. Sales & Service Corp. -------- 397

9. Where an employee has returned to the point of deviation and engages in the duties of his employment, or engages in acts reasonably incidental to his employment, which, but for the deviation, would have been performed, although at an earlier time, he is within his employment and the coverage of the Workmen's Compensation Act. Murphy v. Hi-Way G.M.C. Sales & Service Corp. ---------- 397

10. In a workmen's compensation case disability is determinable by a consideration of employability and earning capacity. Hula v. Soennichsen ---------- 484

11. The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery. Hula v. Soennichsen ---------- 484

12. The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim. Hula v. Soennichsen --------- 484

13. In a rehearing in the Nebraska Workmen's Compensation Court a de novo consideration is required. Hula v. Soennichsen ---------- 484

14. A plaintiff employee in a workmen's compensation case who seeks to toll the statute of limitations must affirmatively show in his petition that the payment was made within the space of 1 year from commencing action in order to state a cause of action against a general demurrer. Schwieger v. Island Supply Co. ---------- 547

15. Where an employer furnishes medical, surgical, and hospital services to an employee, the payments therefor constitute payment of compensation within the meaning of the Nebraska Workmen's Compensation Act. Schwieger v. Island Supply Co. ------ 547

16. Where an employee who suffered an accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of the Nebraska Workmen's Compensation Act. Schwieger v. Island Supply Co. ---------- 547
17. To be effective to toll the statute of limitations, the employer must have furnished medical services or made payment therefor within a period of 1 year before the filing of the petition. Schwieger v. Island Supply Co. ---------- 547
18. The general rule is that injury by freezing is compensable where the employee's exposure is greater than that of the general public in the same locality. Mead v. Missouri Valley Grain, Inc. ---- 553
19. It is not necessary that an employee be exposed to risk greater than other employees in the same or similar employment in order that an injury may be compensable but the question is whether in the performance of his duties he was exposed to the dangers to a greater extent than the ordinary person in such locality. Mead v. Missouri Valley Grain, Inc. ---------- 553
20. It was clearly the intent of the Legislature in establishing a schedule of benefits for the specific injuries listed in the Workmen's Compensation Act, to fix the amount of such benefits without regard to the extent of the subsequent disability with respect to the particular work or industry in which the employee was engaged at the time of his injury. Mead v. Missouri Valley Grain, Inc. ---------- 553
21. Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disabiilty. Mead v. Missouri Valley Grain, Inc. ---------- 553
22. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Mead v. Missouri Valley Grain, Inc. ---------- 553

23. Rule as to statute of limitations and its application to a latent injury in workmen's compensation case stated. Ohnmacht v. Peter Kiewit Sons Co. ------ 741
24. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. Ohnmacht v. Peter Kiewit Sons Co. ---------- 741
25. Where an injury is latent and progressive, the tolled statute of limitations begins to run against an employee from the time it becomes reasonably apparent, or should have become reasonably apparent, that he has a compensable disability. Ohnmacht v. Peter Kiewit Sons Co. ---------- 741
26. An occupational disease under the Workmen's Compensation Act is a disease which is due to causes and conditions which are characteristic of and peculiar to the employment and which is not an ordinary disease of life to which the general public is exposed. Ritter v. Hawkeye-Security Ins. Co. ---- 792
27. An occupational disease need not originate exclusively from the employment, but the employment must result in a hazard which distinguishes it in character from employment generally. Ritter v. Hawkeye-Security Ins. Co. ---------- 792
28. A dishwasher who develops a contact dermatitis on his hands as a result of the use of cleansing chemicals in his employment sustains an injury as a result of an occupational disease and is entitled to recover workmen's compensation for the injury. Ritter v. Hawkeye-Security Ins. Co. ---- 792
29. If conflicting evidence on rehearing in the Nebraska Workmen's Compensation Court was specially resolved according to the demeanor of witnesses, the resultant findings will be considered correct on de novo review in the Supreme Court. Meadows v. Skinner Manuf. Co. ---------- 856

Zoning.

Common words as to uses of property permitted in zoning ordinance are to be interpreted according to their generally accepted meaning. City of Sidney v. Lieberman ---------- 755