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JEAN L. PRELL, APPELLANT, V. BILLIE EDWARD PRELL, APPELLEE.

149 N. W. 2d 104

Filed March 10, 1967. No. 36472.

1. **Divorce.** Where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state.
2. ———. The determination of the trial court with respect to child support will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Farley Young, for appellee.

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

MCCOWN, J.

This is an appeal from an order of the separate juvenile court reducing the amount of child support payments in a divorce decree.

The original divorce decree entered July 13, 1964, granted the defendant right of visitation at reasonable times and places and provided for child support in the sum of $87.50 per month for each of two children, a total of $175 per month. The defendant filed a petition to amend the decree on March 26, 1965. The evidence shows that the plaintiff had substantially interfered with the defendant's right of visitation following the entry of the original decree. In February 1965, she removed the children to California without the knowl-

edge or consent of the defendant or the court. The separate juvenile court modified the decree by reducing the child support to $62.50 per month for each child as long as the minor children of the parties remained outside the jurisdiction of the court. Plaintiff has appealed.

The evidence shows no substantial change in the defendant's financial condition. There is no evidence as to financial requirements of the children. The plaintiff contends that there is, therefore, no evidence of a change of circumstances sufficient to justify modification. We cannot agree.

We hold that where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state. See Annotation, 95 A. L. R. 2d 118.

The determination of the trial court with respect to child support will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

The judgment is affirmed.

AFFIRMED.

BERNICE M. GRASS, APPELLANT, V. VALLEY FEED & GRAIN, A PARTNERSHIP, ET AL., APPELLEES.

149 N. W. 2d 355

Filed March 17, 1967. No. 36370.

1. **Damages: Pleading.** Damages for disabling effect of an injury, past and prospective, are recoverable under the general ad damnum clause.
2. **Trial.** It is the duty of the court to instruct the jury upon the

issues presented by the pleadings and evidence whether requested to do so or not.

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

Burbridge & Burbridge and Martin & Stirtz, for appellant.

James M. Knapp and Tye, Worlock, Tye & Jacobsen, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

WEAVER, District Judge.

The plaintiff Bernice M. Grass commenced this action for damages against Valley Feed & Grain, a partnership consisting of Fred Reese, Jr., and the estate of Victor E. Touslee, deceased, as owners of the 1962 Kenworth truck involved in the collision herein. The truck driver, Francis L. McCallen, was named defendant because of his employment by the partnership. The only evidence in support of allegations of negligence or contributory negligence comes solely from plaintiff's witnesses for the reason that defendants called no witness bearing on this facet of the case. The jury returned a verdict in favor of plaintiff and against defendants. Plaintiff filed a motion for new trial. The motion was overruled and plaintiff has appealed.

The accident happened in Kearney, Buffalo County, Nebraska, at approximately 5:30 p.m. on April 17, 1963, at the junction of Twenty-fifth Street and Avenue L. The sun was shining and Twenty-fifth Street, which runs east and west, was paved and dry. In the area where the accident occurred, and for a number of blocks to the west, Twenty-fifth Street has two eastbound lanes each approximately 12 feet wide. Immediately to the north of these lanes is an 8-foot wide median or "island" which separates the two eastbound lanes from two similar westbound lanes.

Plaintiff was driving her 1958 Oldsmobile at 30 to 35 miles an hour in an easterly direction in the eastbound lane next to the island and intended to turn left at the intersection of Twenty-fifth Street and Avenue L. Avenue L runs north and south, it is 36 feet wide, and the portion located north of Twenty-fifth Street is graveled. Avenue L does not extend south of Twenty-fifth Street at this point.

The truck operated by defendant McCallen was following plaintiff at an undetermined distance. James Fowler observed the blinker on plaintiff's car signaling for a left turn. Plaintiff stopped before completing her left turn and the truck struck the rear of plaintiff's car. The truck traveled 5 feet after impact and plaintiff's car was propelled 29 feet to the northeast.

The island on the west side of the intersection is 15 feet west of the west curbline of Avenue L as extended. The debris from the accident was located 4 feet 9 inches south of the south curbline of the island and 4 feet east of the east end of the island. The Oldsmobile was approximately 18 feet long. Plaintiff's eyewitness James Fowler described the location of plaintiff's car immediately before the accident as follows: "A The car was in the opening between the islands with the left front bumper approximately at the edge of the south lane on the north side of the island, and with the rear bumper protruding into the north lane on the south side of the island."

Plaintiff assigns as error the fact that the trial court submitted the issue of contributory negligence based on failure to keep a proper lookout; failure to give a signal to turn left as required by law; and in suddenly slowing or stopping her vehicle without giving a signal of intent to do so. Plaintiff testified that she looked in her rearview mirror twice before turning and that she came to a gradual stop. She offered evidence that her turn signal was operating for more than 60 feet prior to her stopping. Defendant offered no evidence in rebuttal.

The record does not support the allegations of contributory negligence and it was error to submit such issue to the jury. Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652.

Plaintiff was a housewife not employed outside of the home and there is no evidence of loss of earnings or earning capacity. However, there was evidence that plaintiff was unable to perform certain household tasks.

Plaintiff alleges error of the trial court in failing to properly instruct on the question of damages, and more specifically that the instructions did not permit the jury to make any award for the disabling effect of the injury, past and prospective, or for the destruction or impairment of any physical function of the plaintiff. In this connection the following motion and ruling are pertinent:

By defendant's counsel: "Now comes the Defendants and move the Court to withdraw from this jury any question of future pain and suffering, of future disability, of loss of future earning power or claimed loss for future medical expenses on the part of the Plaintiff for the reason that the Plaintiff's evidence will not support any verdict for any of those items.

"The Court: The Court will remove from the consideration of the jury any questions of future medical expenses. The *rest will be submitted;* * * *." (Emphasis supplied.)

The court failed to submit the elements of past and prospective disability. These elements are recoverable under the general ad damnum clause. City of Harvard v. Stiles, 54 Neb. 26, 74 N. W. 399; Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. The trial court erred in this respect.

Plaintiff makes other miscellaneous assignments of error but we do not deem it necessary to pass upon them for the reason that plaintiff is entitled to a new trial in

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

REVERSED AND REMANDED.

JACK SCHAFFER, APPELLANT AND CROSS-APPELLEE, V. GILBERT BOLZ ET AL., APPELLEES AND CROSS-APPELLANTS.
149 N. W. 2d 334

Filed March 17, 1967. No. 36378.

1. **Trial: Damages.** Where the issue of liability has been determined fairly but there has been error in the determination of damages which requires that the verdict be set aside, the new trial may be limited to the issue of damages alone. But where it appears that the verdict was the result of a compromise, the new trial should be upon all issues.
2. **Automobiles: Negligence.** A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. But knowledge that the driver has been drinking does not necessarily bar the recovery by a guest.
3. ———: ———. The rule contemplates a situation where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such an extent that the guest is charged with knowledge of it.
4. **Automobiles.** A family purpose automobile is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family.

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

Malcolm D. Young, Moyer & Moyer, and William E. Naviaux, for appellant.

Groth & Biehn and Deutsch & Hagen, for appellees.

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

BOSLAUGH, J.

This is an action for damages arising out of an auto-

mobile accident. The jury returned a verdict for the plaintiff, Jack Schaffer, in the amount of $10,500. The plaintiff moved for a new trial on the issue of damages on the ground that the verdict was inadequate and that the trial court had erred in permitting the defendants to prove the limits of an applicable liability insurance policy. The defendants, Farrell Bolz, Gilbert Bolz, and Frances Bolz, each moved for judgment notwithstanding the verdict.

The trial court found that the verdict was grossly inadequate and had been rendered in disregard of the instructions and evidence, and granted a new trial upon all issues. The plaintiff has appealed and the defendants have cross-appealed.

The accident happened at about 12:15 a.m., on February 17, 1963. The plaintiff and Farrell Bolz had been to Yankton, South Dakota, and were returning to Norfolk, Nebraska. The automobile in which they were riding struck the guard railing on the approach to a bridge on U. S. Highway No. 81 approximately 4 miles north of Norfolk, Nebraska, and then left the highway, coming to rest in a field east of the highway. The plaintiff sustained a fracture of the 12th thoracic vertebra with complete loss of motor and sensory functions below that level. His condition is described as paraplegia.

The amended petition alleged that Farrell Bolz was driving the automobile at the time of the accident; that the automobile was a family purpose automobile owned and maintained by Gilbert Bolz and Frances Bolz for the pleasure and convenience of their son, Farrell Bolz; and that the accident was caused by the gross negligence of Farrell Bolz.

The amended answer alleged that the automobile was being operated by the plaintiff; and that if it were found that Farrell Bolz was driving at the time of the accident, the plaintiff's recovery was barred by his contributory negligence and his assumption of the risk.

The plaintiff was 20 years of age at the time of the

accident. He was in good health and had no disability. As a result of the injuries sustained in the accident, he was hospitalized for long periods of time and required to submit to surgical procedures. He is now a paraplegic residing in a nursing home. We think the trial court was correct in determining that the verdict was grossly inadequate and rendered in disregard of the instructions and evidence.

The plaintiff contends that the new trial should be limited to the issue of damages only. Where the issue of liability has been determined fairly but there has been error in the determination of damages which requires that the verdict be set aside, the new trial may be limited to the issue of damages alone. Caster v. Moeller, 176 Neb. 446, 126 N. W. 2d 485. But where it appears that the verdict was the result of a compromise, the new trial should be upon all issues.

The automobile involved in the accident was a 1958 Ford convertible. The liability insurance on this automobile had been purchased by Gilbert Bolz and he was the named insured. The defendants were allowed to introduce, over objection, exhibits and testimony relating to the insurance policy which disclosed that the policy limits were $10,000 for each person, $20,000 for each accident, and $500 medical payments for each person. The admission of this evidence relating to the policy limits was erroneous and prejudicial and may have influenced the jury to return a compromise verdict for the exact amount of the coverage provided.

The plaintiff contends that the new trial should be limited to the issue of damages because misconduct on the part of defendants' counsel has made it impossible for the plaintiff to obtain a fair trial upon the issue of liability. The misconduct complained of consists of a letter which was sent to each juror that was a member of the panel or of the jury that heard the case. The letter was dated March 26, 1966, and was sent while the plaintiff's motion for new trial was pending. It advised

each juror that a polygraph or "lie detector" test had indicated that Farrell Bolz was not driving the automobile at the time of the accident, but that the results of the test had not been offered in evidence "because the Nebraska court does not recognize such tests as having been scientifically established."

At this time we are concerned only with the plaintiff's contention that he has been prevented from obtaining a fair trial upon the issue of damages. Whatever may be the fact, the record does not establish that this contention is true. We are unable to say, as a matter of law, that the conduct of defendants' counsel has prevented a fair new trial upon the issue of liability. Upon the present state of the record, the plaintiff's contention cannot be sustained.

By cross-appeal the defendants contend that their motions for judgment notwithstanding the verdict should have been sustained. The defendants contend that the evidence established that the plaintiff was guilty of contributory negligence and assumption of risk as a matter of law.

The evidence shows that the plaintiff and the defendant, Farrell Bolz, left Norfolk, Nebraska, at about 9 p.m. On the trip to Yankton, South Dakota, Farrell drove the car. They had an eight-pack of beer in the automobile and each of them drank four cans on the way to Yankton. At a pizza house in Yankton, they each had one glass of 3.2 beer. At another bar they each ordered one beer and had "about two drinks out of it."

On the trip back to Norfolk, the plaintiff drove the automobile during the first part of the trip. There is no evidence that Farrell drank any beer after they left Yankton.

The evidence is in conflict as to what happened just before the accident. Farrell testified that he went to sleep on the return trip and did not remember anything after crossing U. S. Highway No. 20 until he awakened in the hospital a day and a half after the accident.

The plaintiff testified that he drove the automobile to a point near the Madison County line where he stopped the automobile at the request of Farrell. Farrell then insisted that he be allowed to drive the automobile. The highway was slippery and, according to the plaintiff, Farrell commenced driving at a very high speed with the car weaving back and forth across the road. The plaintiff asked Farrell to slow down or stop, but Farrell kept driving faster. The automobile eventually struck a guardrail on a bridge approach on the west side of the road and then left the highway, coming to rest in a field some 903 feet from the bridge. The automobile was equipped with a high-powered engine, and it is clear that it was traveling at a very high rate of speed when it left the highway.

The defendants' theory is that Farrell was intoxicated to such an extent that, as a matter of law, the plaintiff was guilty of contributory negligence and assumed the risk of injury by riding in the automobile with Farrell.

A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. See, also, McGrath v. Nugent, 133 Neb. 237, 274 N. W. 549. But knowledge that the driver has been drinking does not necessarily bar the recovery by a guest. The rule contemplates a situation where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such an extent that the guest is charged with knowledge of it. See, Annotation, 15 A. L. R. 2d 1165; 5 Blashfield, Automobile Law and Practice (3d Ed.), § 215.30, p. 389.

The evidence as to intoxication in this case consists of the evidence as to the quantity of beer consumed by the parties. Most of the beer was consumed on the trip to

Yankton while Farrell was driving the automobile. There was testimony that Farrell drove during a part of the time they were in Yankton, but there is no evidence that his driving was erratic or unusual until just before the accident.

The defendants did not allege that Farrell was intoxicated; no witness testified that he was intoxicated; and the plaintiff testified that Farrell was not intoxicated. Whether Farrell was intoxicated and the extent to which his condition was apparent were inferences to be drawn from all of the evidence in the case. We think the trial court was correct in holding that these were questions for the jury.

The defendants, Gilbert Bolz and Frances Bolz, further contend that the trial court should have determined, as a matter of law, that the automobile involved in the accident was not a family purpose automobile. A family purpose automobile is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family. McBroom v. Wolsleger, 180 Neb. 622, 144 N. W. 2d 199.

The certificate of title to the automobile involved in this case was issued to "Gilbert Bolz &/or Francis Bolz WROS." The purchase price of $1,200 was paid by Gilbert Bolz. Gilbert Bolz paid the taxes and registration fees and paid for the insurance on the automobile. After the accident Gilbert Bolz paid a bill for transmission repair and disposed of the automobile for salvage.

In addition to the 1958 Ford convertible, Gilbert Bolz owned two other automobiles and a farm truck. Farrell was the only child old enough to drive. The convertible was used by Farrell for pleasure and to drive back and forth to school. His sister, who was in high school, rode with him. When the convertible was being repaired, Farrell drove one of the other automobiles.

The convertible was classified as 2C for insurance purposes which indicated that it was owned or used by a male unmarried person under 25 years of age. The evi-

dence relating to the classification for insurance purposes was of such slight relevance or materiality that we believe it should not have been received.

The defendants produced evidence that Farrell Bolz had wanted to buy an automobile with $902.57 which he had received from the sale of some calves that he had raised. Farrell had turned this money over to his father, Gilbert Bolz, before the convertible was purchased, and Farrell was to reimburse his father for the balance.

There is evidence in this case that the head of the family purchased, owned, and maintained the automobile for the use of a member of his family. Although there is evidence that Farrell assisted in the purchase and maintenance of the automobile, the evidence does not show the actual amount of his contribution. The evidence presented a question for the jury as to whether the convertible was a family purpose automobile. The trial court was correct in determining that the issue was one of fact for the jury.

The order of the district court granting a new trial upon all issues is affirmed.

AFFIRMED.

LAWRENCE V. BOWLEY ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
149 N. W. 2d 417

Filed March 17, 1967. No. 36411.

1. **Municipal Corporations.** A city has no right or power to enter into contracts which curtail or prohibit the exercise of its legislative or administrative authority.
2. **Counties.** A county board may not delegate its powers involving the exercise of judgment and discretion, but duties which are purely ministerial and executive may be delegated.
3. **Municipal Corporations: Gifts.** A gift for a public purpose may be tendered to a city upon conditions or reservations so long as those conditions or reservations do not unreasonably interfere with the municipal use and enjoyment of the property.

4. ———: ———. Section 14-374, R. R. S. 1943, empowers cities of the metropolitan class to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks in such purposes.
5. **Counties: Gifts.** Section 23-819, R. S. Supp., 1965, grants similar powers to counties.
6. **Municipal Corporations: Gifts.** There is no question in this state a municipal corporation may accept funds conditionally or with reservations for purposes germane to the objects of the corporation so long as the conditions do not unreasonably interfere with public use and enjoyment, and when accepted a trust is imposed upon the municipality to perform in accordance with the conditions.
7. **Eminent Domain.** The power of eminent domain is an attribute of sovereignty inherent in the state, and only those agencies to whom the Legislature has delegated the power can exercise the right, and it must be exercised only on the occasion and in the mode or manner and by the agency prescribed by the Legislature.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Charles S. Reed and James F. Green, for appellants.

Herbert M. Fitle, Edward M. Stein, Donald L. Knowles, James M. Murphy, Frederick A. Brown, and White, Lipp, Simon & Powers, for appellees.

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

SPENCER, J.

This is an action in equity for a declaratory judgment and an injunction to declare ultra vires and void a contract between the City of Omaha, hereinafter referred to as City; the County of Douglas, hereinafter referred to as County; the Airport Authority of the City of Omaha, hereinafter referred to as Authority; and Eugene C. Eppley Foundation, Inc., hereinafter referred to as Eppley; and to enjoin the City from condemning plaintiffs' land pursuant to the contract for a park. The trial court found against plaintiffs and dismissed the

petition. Plaintiffs have perfected an appeal to this court.

There is no dispute of fact in this case. The evidence was for the most part received by stipulation of the parties. The questions to be resolved relate solely to the validity of the agreement between the defendants.

Plaintiffs are the owners as joint tenants of certain real estate. the description of which is immaterial herein, bordering the Missouri River and adjoining land owned by Authority.

For purposes of discussion herein, it is only necessary to summarize and set out portions of the agreement. Authority grants to City and County the use for park purposes and approaches approximately 400 acres belonging to Authority, lying between the existing levee and the Missouri River, with the stipulation that the land shall not be improved, operated, or maintained in such a manner as to impair the visibility or constitute an obstruction to the flight of aircraft approaching or departing from Authority. Authority further reserves the right to withdraw portions of its land from park purposes when and as needed for purposes of Authority.

City and County agree to establish and create a public park to be known as Eppley Park, which shall embrace the 400 acres belonging to Authority and the real estate involved herein, which is to be acquired by condemnation if negotiation fails. City and County agree to apply for federal participation to the extent of 30 percent of the acquisition cost under the Open Space Act. It is also agreed that Leo Daly Company shall be engaged to prepare a comprehensive development plan for Eppley Park, and Eppley agrees to pay the fees and charges for said Leo Daly Company up to a maximum of $10,000.

Articles VII, VIII, IX, and X of the agreement are as follows: "VII. Foundation agrees to contribute to City seventy (70%) percent of the reasonable cost of acquir-

ing the privately owned land described in Article III above, provided:

"(a) If said land is acquired through negotiation and purchase, Foundation shall approve the purchase price thereof, and if Foundation shall refuse to approve such purchase price, this Agreement shall terminate and the parties shall stand mutually and reciprocally released from any liability on account hereof;

"(b) If said land is acquired through proceedings in condemnation under the exercise of City's power of eminent domain, then Foundation obligates itself in all events to pay seventy (70%) percent of the condemnation award or judgment therefor as finally adjudicated (exclusive of costs or other expense of said proceedings), unless on or before the forty-fifth day after the date of the award of the appraisers in the proceedings in County Court, Foundation shall serve upon City or its counsel a written notice that Foundation has withdrawn its financial support, whereupon this Agreement shall terminate and the parties shall stand mutually and reciprocally released from any liability on account hereof.

"VIII. City and County shall jointly undertake, diligently pursue and expeditiously perform and complete on a high standard of quality the improvement of the Eppley Park in conformity with said approved development plan and in accordance with the drawings and specifications thereof and under the general verification of the Leo Daly Company. As their respective shares thereof, County shall primarily have responsibility for the work and bear the cost of installing roads and parking areas and City shall primarily have responsibility for the work and bear the cost of installing the other improvements specified in said approved development plan, it being contemplated that the aforesaid expenditures for each share will be approximately equal and each will cost not less than One Hundred Fifty Thousand Dollars ($150,000). It is agreed that said Eppley Park

shall be ready for public use in a completed state not later than June 15, 1970.

"IX. County undertakes, assumes and agrees to maintain the said Eppley Park and all improvements, roads and facilities thereon located, upon a high standard of quality and will provide proper and adequate security personnel. City agrees through its Park and Recreation Department or other department to which such activities may be assigned by City to promote and supervise recreational programs.

"X. It is expressly agreed that Foundation has offered the financial assistance aforesaid and agreed to make the required contribution to the acquisition of the Eppley Park in reliance upon the promises and agreements of City, County, and Authority as herein set forth. City, County, and Authority hereby expressly grant and agree to accord to Foundation, acting by or through its officers, attorneys or other authorized representatives, the right at all reasonable times to inspect the work in progress upon and the quality of maintenance of the said Eppley Park, to examine all records, accounts, contracts and papers pertaining thereto, with right to make copies thereof, or abstracts therefrom and to enforce compliance with the terms of this Agreement."

Exhibit B indicates that the officers of Eppley were approached in the summer of 1964 by the parks and recreation committee of the Omaha Chamber of Commerce for financial assistance in the acquisition of certain river-front land, including the property of the plaintiffs, for the purpose of developing and dedicating the same as a "River Front Park." In support of their appeal, the Chamber of Commerce committee prepared and circulated to the directors of Eppley a brochure which is a part of exhibit B, explaining in detail the nature of the project and the public funds which were available for its acquisition, development, maintenance, and operation. Eppley's board of directors approved

the project and, subsequent thereto, on September 29, 1964, the contract in question was executed.

It is evident from exhibit B and the contract itself that this project was instigated by various groups, organizations, and civic-minded citizens. Its purpose was to establish a river-front park, adjoining and east and north of the land of Authority and encompassing in excess of 900 acres of river-front property. Included in the area are native trees, shrubs, and flora; interesting terrain; and random outcroppings of rock and shale. A river-front park in this location will be within easy access of the center of Omaha.

Stripping plaintiffs' assignments of error of all surplusage, we conclude that the basic issue involved herein is one of delegation of powers.

A city has no right or power to enter into contracts which curtail or prohibit the exercise of its legislative or administrative authority. See Seidel v. City of Seward, 178 Neb. 345, 133 N. W. 2d 390. A county board may not delegate its powers involving the exercise of judgment and discretion, but duties which are purely ministerial and executive may be delegated. See Dunn v. Dixon County, 102 Neb. 1, 165 N. W. 959.

There is quite a difference between a delegation of authority to private individuals and the initiation of governmental action by private individuals where the ultimate decision to act must be made by government officers. The case of Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535, 83 A. L. R. 2d 831, cited by plaintiffs, involves the former. The contract herein is an instance of the latter.

Plaintiffs contend that City by this contract has delegated its power of condemnation to Eppley. It is evident that plaintiffs are using suspicion, conjecture, and inferences for substance. Plaintiffs insist that Eppley's "absolute" control of price gives it control of the condemnation and in essence City by contract has waived its power to make any determination concerning the ex-

cessiveness of the condemnation award, or, more accurately, the acceptance or rejection of the award. The contract does not bind City to pay any part of the award regardless of amount. On the other hand, City may proceed whether Eppley desires to do so or not. Eppley, on its original solicitation by the Chamber of Commerce committee, agrees to provide money to secure the land for park purposes, but only if the land can be secured for a price agreeable to it, which we assume to be within the $350,000 figure suggested to it as the necessary contribution for land acquisition for the project. If our calculations are correct, based upon a gift of $350,000 and 600 acres of land (exhibit B puts it at 520 acres), the award could total in excess of $700 per acre, and at 70 percent would still be within $350,000. This does not mean that Eppley has fixed a price for plaintiffs' land. As explained in the next paragraph, it merely keeps Eppley within the ambit of the proposal accepted by its board of directors.

Plaintiffs complain that the contract permits Eppley to terminate the agreement but has no similar provision for City and County. It is City which is to acquire the land by negotiation or by condemnation. The contract provides Eppley will pay 70 percent of the condemnation award. The other 30 percent is to be financed from federal funds. In the contract, Eppley reserves the right to withdraw its financial support within 45 days of the condemnation award. This is understandable. Without an escape clause, Eppley would be giving a blank check for 70 percent of the award regardless of amount. Plaintiffs are wrong in assuming that there is no escape clause for City. If Eppley does not pay the award, City may abandon the condemnation if it does not want to go ahead, or it may proceed without Eppley's participation. Under the provisions of section 76-711, R. R. S. 1943, City has still 15 days to abandon the condemnation even if Eppley should exercise its option on the 45th day. The right of Eppley to withdraw its offer for a limited

period in no way infringes on the exercise of judgment and discretion by City.

It may be pertinent to observe that plaintiffs have on six different occasions offered the area in question to City as a landfill site for the disposal of refuse, at a rate ranging from $183,600 to $277,750 per year. One of these offers was accepted by the city council, but vetoed by the mayor who gave as his reason its proximity to the Airport and his belief that the rental fee to be charged was out of line when contrasted with the value of the land. This veto was sustained. Plaintiffs infer ulterior motives in the present contract because the chairman of Authority is a director of Eppley. All of this is of no moment except as it may indicate the dispute on valuation which may arise in a condemnation, and the need for Eppley, who is providing the major part of the acquisition funds, to have an escape clause.

It appears to us that the conditions attached on the part of Eppley, if they may be so construed, are only those which insure that it will not be called upon for a blank check and that any donation made will be used for park purposes. At most it was an offer made to public bodies for a purely public purpose. Those bodies have accepted the conditions. Those conditions were merely the basis of the gift. The acceptance by the public bodies was their own affirmative action. The contract does not deprive any of the public bodies of any discretion which public policy demands should be left unimpaired. On this point, their position is not too different from that of the city in Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440, where we specifically provided that if funds were accepted for hospital purposes, the condition of the gift should be observed.

A gift for a public purpose may be tendered to a city upon conditions or reservations so long as those conditions or reservations do not unreasonably interfere with the municipal use and enjoyment of the property. Without such a rule, donations for public improvements would

be seriously curtailed if not entirely eliminated. As we construe the contract, the control of the park will be in the public bodies, and it will be used exclusively for public purposes.

Section 14-374, R. R. S. 1943, empowers cities of the metropolitan class to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks in such purposes. Section 23-819, R. S. Supp., 1965, grants similar powers to counties. There is no question in this state a municipal corporation may accept funds conditionally or with reservations for purposes germane to the objects of the corporation so long as the conditions do not unreasonably interfere with public use and enjoyment, and when accepted a trust is imposed upon the municipality to perform in accordance with the conditions. See Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386.

Despite plaintiffs' protestations, the acceptance of donations as an inducement for a public improvement is not uncommon in this country. The general rule is enunciated in 38 Am. Jur., Municipal Corporations, § 561, p. 249, as follows: "* * * it is held by the weight of authority that an offer by a landowner to pay a certain sum or a certain proportion of the cost if a particular public improvement is constructed near his land is not necessarily illegal, and that if the board of public officers intrusted with the duty of deciding whether the improvement shall be constructed and where it shall be located determines that public necessity and convenience require it to be laid out as asked for, it is not unlawful for it to take the offer into consideration."

Plaintiffs seek to distinguish City of Omaha v. Megeath, 46 Neb. 502, 64 N. W. 1091, and Browne v. Palmer, 66 Neb. 287, 92 N. W. 315, in which this court enforced the conditions of an agreement, on the premise that no question was raised as to the power of the city to make the agreement. It is true this point was not discussed in those opinions, but it was certainly raised and briefed

and was supported by substantial authority in City of Omaha v. Megeath, *supra,* as set out at pages 504 and 505 of 46 Nebraska. The substance of the opinion would indicate that the court in its discussion assumed the legality of the transaction on the facts stated.

Plaintiffs argue that the contract allows Eppley to select plaintiffs' land as its target, and that the substance of the contract is that the City is lending its name to Eppley for the purpose of condemning the plaintiffs' land. This contention finds no basis in the contract or the stipulated facts. The reasonable inference is that certain groups, organizations, and civic-minded individuals, desirous of having a river-front park, did urge location of a park in the area embracing plaintiffs' land. The contract itself suggests that this particular site is the most practical and desirable for the location of a river-front park to best serve the interests of the City.

Further answering plaintiffs' contention, the power to decide whether or not there should be a condemnation does not rest with Eppley. The condemnation ordinance was the exclusive decision and action of the city council. The power of eminent domain is an attribute of sovereignty inherent in the state, and only those agencies to whom the Legislature has delegated the power can exercise the right, and it must be exercised only on the occasion and in the mode or manner and by the agency prescribed by the Legislature. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683. There is no violation of this principle in the contract.

Plaintiffs argue the contract permits Eppley to name the architect. We do not so construe it. There is nothing in the agreement to indicate Eppley suggested the architect, but even if this were a fact, what is said above is applicable and the action is that of the political subdivisions involved when they accepted the offer. Certainly, for a public project of this nature, the services of an architect are required by good business practice. Here the most that can be said is that Eppley has assumed the

obligation to pay for the services of the architect up to a maximum of $10,000. The political subdivisions in any agreement made with the architect can certainly limit their obligation.

Plaintiffs argue that even if we hold a delegation of power to be valid herein, in any event there are no standards spelled out in the ordinance in which City accepted "all the obligations" contained in the agreement with Eppley. First, there is no delegation of powers. Second, we reiterate, the contract is only the basis of a gift. Eppley is providing money under certain stipulated conditions which the public bodies involved have accepted. None of these conditions impinge in any way on the discretion of the public bodies so as to be offensive to public policy. The conditions attached are only those which insure the donation will be used for park purposes.

Plaintiffs further argue that because the acquisition and maintenance of a park are governmental functions, the municipality cannot make a contract which endures beyond the terms of the officials making the agreement. Their brief suggests that the term of the councilmen who made this agreement in 1964 ended in 1965. Plaintiffs cite Leidigh v. City of Nebraska City, 138 Neb. 136, 292 N. W. 115, to demonstrate the invalidity of the contract. That case involved a purchase of land for park purposes, with payments extending over a period of 7 years with a reversion of title to grantors if the city defaulted on any installment. It has no application herein. While the contract may in a measure circumscribe the legislative powers of successive councils, it does not do so unlawfully. The 1963 Legislature enacted L.B. 756, which became effective July 5, 1963. (Laws 1963, c. 481, p. 1549.) Sections 1 and 2 of that act are now sections 23-820 and 23-821, R. S. Supp., 1965. They are as follows: "Any city, village, school district, or county shall have the power to join with any other political or governmental subdivision, or with any agency, or public cor-

poration, whether federal, state, or local or with any number of combinations thereof, by contract or otherwise in the joint ownership, operation, or performance of any property, facility, power, or function, or in agreements containing the provisions that one or more thereof operate or perform for the other or others, this power as above set forth, to be only for the express purpose of acquiring, holding, improving and operating any park, playground, swimming pool, recreation center, or any other recreational use or facility. Each such political or governmental subdivision shall also have power to acquire, hold, improve and operate any park, playground, swimming pool, recreation center, or any other recreational use or facility. For the exercise of the powers above set forth, each such political or governmental subdivision shall have the power to levy a tax, to be known as a park and recreation tax, upon all the taxable property in its jurisdiction, except intangible property. This levy may be accumulated as a sinking fund from fiscal year to fiscal year to provide funds for the purpose of acquisition, holding, improvement and operation of any park, playground, swimming pool, recreation center, or any other recreational use or facility." § 23-820, R. S. Supp., 1965.

"For the specific purposes set forth in section 23-820, any city, village, school district or county shall have the power to receive (1) any grant or devise of real estate, (2) any grant or gift or bequest of money or other personal property, and (3) any other donation in trust or otherwise." § 23-821, R. S. Supp., 1965.

It is apparent that if Eppley were not a party to the contract, the public bodies were expressly authorized to contract among themselves as they did, and such contract would be binding upon successive councils. We have previously discussed the relation of Eppley to the contract.

To sustain their contention of the delegation of powers, plaintiffs refer to Eppley as the enforcer of the contract.

True, article X does provide that Eppley has the right "to enforce compliance with the terms of this agreement." Does this give Eppley any rights it would not have if these words were omitted from the contract? As suggested heretofore, our law is clear, if a municipal corporation accepts public funds on certain conditions, those conditions may be enforced. Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440; Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386.

Finally, plaintiffs urge that Authority has exceeded its power in lending its land for park purposes. They contend that unless the park is directly related to the airport function, its action is ultra vires and void. Here again plaintiffs confuse shadow with substance. Authority is a body corporate and politic, constituting a public corporation organized and existing under and by virtue of sections 3-501 to 3-514, R. R. S. 1943. Airport authorities are agencies of the cities establishing them. Without extending this opinion by analyzing the provisions of the statute, suffice it to say that under subsection (5) of section 3-503, R. R. S. 1943, airport authorities have the power to sell, lease, or otherwise dispose of property not needed for airport purposes. Further, subsection (10) of section 3-504, R. R. S. 1943, provides as follows: "To include in such project, subject to zoning restrictions, space and facilities for any or all of the following: Public recreation, business, trade or other exhibitions, sporting or athletic events, public meetings, conventions, and all other kinds of assemblages, and in order to obtain additional revenues, space, and facilities for business and commercial purposes. Whenever the authority deems it to be in the public interest, the authority may lease any such project or any part or parts thereof, or contract for the management and operation thereof or any part or parts thereof. Any such lease or contract may be for such period of years as the authority shall determine; * * *."

Without considering the apparent practicalities of the

present situation, we construe the statute to be broad enough to permit Authority to loan any portion of its property not needed for airport purposes to City, which created it, for park purposes. In doing so, Authority has protected the use of its facilities and has enhanced the utilization of the land within the public-use objective of its powers.

For the reasons given, we find there is no merit to any of the numerous objections raised by plaintiffs, and affirm the judgment of the trial court.

AFFIRMED.

EDWARD FORMAN, APPELLEE, V. EARL ANDERSEN, APPELLEE, BARBARA FORMAN, APPELLANT.

149 N. W. 2d 525

Filed March 24, 1967. No. 36437.

1. **Depositions.** A deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved.
2. **Husband and Wife: Witnesses.** Either a husband or wife may be a witness against the other in any action brought by either husband or wife against a third person, relating to the marriage relationship between such husband and wife, or the interruption of or interference with such relationship.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Robert M. Snell, for appellant.

Lyle Winkle, for appellee Forman.

Ray C. Simmons, for appellee Andersen.

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

WHITE, C. J.

Appellant Barbara Forman, wife of plaintiff in this action, refused to answer any questions when her deposi-

tion was attempted to be taken by the defendant. She was fined for contempt and appeals. We affirm the judgment.

Plaintiff husband's action is for damages for loss of services of his wife, property damage, and expenses growing out of an automobile accident in which it is alleged that appellant wife Barbara Forman was the operator of an automobile owned by plaintiff and involved in a collision with defendant's vehicle.

Section 25-1267.02, R. R. S. 1943, provides that a deponent may be examined regarding any matter, *not privileged*, which is relevant to the subject matter involved. Both plaintiff and appellant objected to the taking of her deposition and to all questions propounded, and appellant refused to answer. Was she entitled to refuse to appear as a witness or answer any questions because of privilege?

At the outset we should distinguish between her marital disqualification or competency as a witness and the right to not be examined as to any privileged communication between husband and wife. Section 25-1204, R. R. S. 1943, governs the latter and prohibits the examination of a spouse as to any communication between husband and wife while married. No question arises in this case as to the application of this statute. No issue is raised as to any examination as to confidential communication between appellant as a spouse witness and her husband as a party plaintiff. Her assertion is that she may not be examined at all and is incompetent to testify. This is based primarily on the statute, section 25-1203, R. R. S. 1943, and our holdings thereunder. See, Stalcup v Jepsen, 118 Neb. 240, 224 N. W. 16; Niland v. Kalish, 37 Neb. 47, 55 N. W. 295; Olmsted v. Edson, 71 Neb. 17, 98 N. W. 415. Prior to 1925 the statute, section 8837, Comp. St. 1922, provided: "The husband can in no case be a witness against the wife, nor the wife against the husband, except * * *." None of the exceptions were applicable

in this case. However in Laws 1925, c. 75, § 1, p. 236, and Laws 1943, c. 43, § 1, p. 188, the exceptions were expanded and the law now provides: "Either (husband or wife) may be a witness against the other in any action brought by either husband or wife *against a third person,* relating to the marriage relationship between such husband and wife, *or the interruption of or interference with* such relationship, * * *." § 25-1203, R. R. S. 1943. (Emphasis supplied.) Plaintiff's allegations as to loss of consortium and loss of services in this case place directly in issue an alleged tortious destruction and interference with an essential part of his marital relationship, the services of his wife. The statute, by creating this further exception, has opened up this area of the husband-wife relationship for full exploration on trial and on discovery proceedings in the interests of justice. To permit parties to allege and prove damages to such a relationship and prohibit a third party defendant from proving or exploring the nature or extent of it from an essential witness, the wife, would obviously be inequitable and unfair. A contrary holding in this case would permit the plaintiff and appellant to claim the "privilege" of marital disqualification or incompetency up to the time of trial, and then waive it on trial when it served their best interests. We hold that appellant wife was a competent witness and neither she nor the plaintiff husband could claim the privilege of marital disqualification and refuse to testify on the taking of her deposition.

We point out that nothing that we have said herein permits the interrogation of the appellant as to any privileged communication between husband and wife which is specifically protected by the provisions of section 25-1204, R. R. S. 1943. The present posture of this case presents no issue of this nature.

The holding of the district court that appellant wife of plaintiff was a competent witness and could be examined under the provisions of the discovery statute, sec-

tion 25-1267.02, R. R. S. 1943, in this case, was correct and the judgment of contempt is affirmed.

AFFIRMED.

MARY KULA, APPELLANT AND CROSS-APPELLEE, V. TOM KULA, APPELLEE AND CROSS-APPELLANT, JOE KULA ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLANTS.
149 N. W. 2d 430

Filed March 24, 1967. No. 36469.

1. **Divorce: Parties.** Intervention, as a general rule, is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected.
2. **Divorce.** The rule for determining alimony or the division of property in a divorce action provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property involved, depending on the facts and circumstances of the particular case.
3. **Trusts.** The burden of establishing a resulting trust is upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.
4. ———. Ordinarily a trust will not be impressed where the transaction is as consistent with another relationship as with that of a trust.
5. **Gifts.** Where one advances property or money to another, when the parties are closely related and there is no evidence of intent to create any special relationship, the presumption of gift arises and the donor obtains no right to a lien upon the property of the donee.
6. **Divorce.** In making a division of property in a divorce action, it is the duty of the court to make a fair and just award, taking into consideration the nature of the property and the abilities of the parties in putting it to its best use.

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

Kelley, Grant & Costello, for appellant.

Lathrop & Albracht for appellee and interveners-appellees.

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

CARTER, J.

This is an action by Mary Kula wherein she seeks a decree of divorce from her husband, Tom Kula, on the ground of cruelty. The answer of the defendant is a general denial. A petition in intervention was filed in the case by Joe Kula and E. James Kula, in which they allege they are the owners or part owners of the real estate to which Tom Kula holds the legal title and pray that the rights of each be established in this action, particularly as against the claims of Mary Kula to a property settlement with her husband, Tom Kula, in the divorce action. The trial court granted plaintiff a divorce, denied the claims of the interveners, and fixed the terms of the property settlement. Plaintiff appealed and the defendant and interveners have cross-appealed.

Plaintiff's assignments of error are: The trial court erred in awarding plaintiff an insufficient amount from the property owned by plaintiff and defendant, in failing to award the home place to the plaintiff, and in directing plaintiff to pay one-half of all income tax liability incurred by plaintiff and defendant for 1964 and prior years. Cross-appellants assign as error the awarding of an excessive amount of alimony to the plaintiff. The right of Joe and E. James to intervene under the circumstances is supported in Harris v. Harris, 151 Neb. 191, 36 N. W. 2d 849, and 27A C. J. S., Divorce, § 91, p. 318.

As a matter of expediency, we shall refer to the plaintiff as Mary, the defendant as Tom, and the interveners as Joe and James. Joe is a brother of Tom and James is the adult son of Tom and Mary. Tom and Mary were married at Alliance, Nebraska, on February 23, 1930. Mary was 17 years of age at the time and Tom

was 28, although there is some dispute in the evidence as to the ages of these parties.

The granting of the divorce is not assigned as error. The assignments of error relate to the correctness of the division of property awarded by the trial court. The value of the property involved was stipulated in the pretrial order as follows: The farm in Nance County containing 240 acres, referred to in the record as the Prairie Creek farm, $30,000; the farm in Nance County containing 80 acres, referred to in the record as the home place, $40,000; the farm in Merrick County containing 160 acres, referred to in the record as the Merrick County farm, $28,000; the apartment house in Columbus, Nebraska, $16,000; cattle, $12,000; farm machinery, $4,000; 1965 Ford automobile, $2,500; and household goods, $2,000. The total stipulated value of the property is $134,500. The plaintiff was awarded the apartment house of the agreed value of $16,000, household goods of the value of $2,000, a 1963 Ford automobile valued at $1,300, plaintiff's personal jewelry of the value of $400, and the sum of $35,000 in cash, exclusive of 5 shares of IBM stock, value not shown, and stock of K. N. Paul Company purchased for $1,000, $500 of which was paid for from $2,350 inherited from an aunt. The award of property was of the approximate value of $54,700.

The evidence shows that after the marriage, Tom continued to farm a ranch in Box Butte County with his brothers, Joe and Charley. All had some interest in the ranch. They lost this ranch about 1934. Charley was paid his interest in the remaining property of the partnership and he no longer appears as a participant in subsequent transactions. Tom and Joe rented some ranch land which was operated by Tom, Mary, and Joe as a partnership of some kind. In 1939, the home place in Nance County was acquired and the title taken in the name of Tom. In 1941, Tom and Mary moved to the home place in Nance County. Joe remained on the Box Butte County ranch. In 1945, Tom contracted for

the purchase of the Prairie Creek farm to which Tom eventually took the title, and, later still, conveyed it to Mary and himself in joint tenancy. In 1946, Tom bought the Merrick County farm at public auction and title was eventually taken in his name although other members of the family had interests in it, or, at least, contributed to the purchase price. In 1946, Tom and Joe purchased an apartment house in Columbus, Nebraska, at an estate sale, in which the other brothers and sisters of Tom and Joe had equal interests. The title was taken in the name of Tom and Joe. It was later conveyed to Tom by Joe. As to the personal property, Joe admits that Tom was in partnership with him in the cattle and machinery on the Box Butte County ranch at the time Tom and Mary left in 1941, but asserts that extensive wheat growing was his personal operation. It cannot be questioned that Joe sent Tom large sums of money which may have been contributions to operational partnerships, partnership in lands purchased, loans, gifts, or trust funds used by Tom for Joe's benefit. The evidence is rather conclusive that Tom and Joe were partners for many years under the name of Kula Brothers. Their relationship was close and their records ill-kept. After changes were made in the original Kula Brothers partnership, particularly after James allegedly became a member, its financial operations, to the extent shown by this record, were so fragmentary that the nature of the interest of each in the partnership is not determinable. The interests of the parties to the lands was in a like condition other than the interests shown by recorded instruments. Although jurisdiction existed in this action to determine the respective interests of the parties, the evidence was insufficient to change the effect of the recorded deeds, particularly to establish liens or resulting trusts.

James was the only child of Tom and Mary and was 35 years of age at the time of trial. He was a graduate of a law college and had engaged in the practice

of law for a year and a half before he returned to farming. His testimony is that he had been assured by Tom, Mary, and Joe that if he would return and assist them with their farming operations, he would inherit all of their property. According to his testimony, he became a partner in 1957, drew checks on partnership funds, made deposits to the same funds, purchased a farm of his own, and made advancements to the partnership, or to the individual members, in very large amounts. His testimony is that he has advanced more than $24,800 to the partnership which he refers to as advancements and for which he seeks a lien. The source of these advancements is very questionable. He testifies that he purchased his own farm in Nance County in 1957. He says all the production from his farm, including crops, cash rent, and government payments were used on the home place from 1957 to 1964. He says he kept track of these contributions and that they were in excess of $24,800. During this period of time, the partnership filed partnership income tax returns. These returns show James' income for the whole period to have been $6,883.10. He claims his gross income for the period to have been $82,747. James explains this by saying, in effect, that the partnership income tax returns were not made to show the actual earnings or profits of the individual partners, but were made to distribute them arbitrarily to reduce the income tax to a minimum. As an example, he says that after Joe applied for and received social security, he was no longer shown as a partner or that he received a share of the earnings and profits although he still had his interest and received his share. This was done, he says, to protect his qualifications to receive social security. This evidence is so incredible by one admitted to the practice of law that we can give it little weight. The fact is that these advancements, if made, were thought to be for his own benefit for the reason that he anticipated their return to him by inheritance upon the deaths of Tom, Mary,

and Joe. We necessarily conclude that these advancements, even if made, were not made to acquire an interest in the fee title to the property and that no basis exists for declaring them to be a lien on the property of Tom and Mary, or of Joe if Joe had been able to establish an interest therein. We are necessarily led to the conclusion that the real intent of the evidence of James was to reduce the property interests of Tom for the purpose of reducing the division of property to Mary in this divorce action.

On November 16, 1964, Tom, Joe, and James entered into an unsworn instrument designated as "Affidavit and Agreement for Accounting." This purported agreement was entered into in November 1964 preceding the divorce action on March 3, 1965. It purports to review the previous transactions between the members of the partnership, including changes in its members, usually for the purpose of minimizing the amount of income tax to be paid without regard for the facts and of protecting social security benefits for Joe and Mary. The facts therein recited are generally not supported by anything other than the mere recitation in the agreement, other than checks and bank records in evidence which tend to confuse the true effect of their transactions. The agreement apparently was intended for use in future legal actions, the only one in the offing being this divorce action, as is evidenced by the last paragraph authorizing the attorney who drafted the instrument to testify in their behalf as to any materials, records, conversations, or in any other matter relevant to the same in any court or legal proceeding. The purported agreement, not participated in by Mary, is nothing more than a self-serving statement insofar as Mary is concerned, and has little weight except as to the admissions against interest therein contained.

It is fundamental that the burden of proving a resulting trust is upon the person asserting it and he must do so upon evidence that is clear, convincing, and satis-

factory. Where the alleged trust relationship is just as consistent with that of a gift or loan, courts will not ordinarily impress a resulting trust. These principles are sustained by our holdings in Meisinger v. Johnson, 162 Neb. 360, 76 N. W. 2d 267, and Olsen v. Best, 167 Neb. 198, 92 N. W. 2d 531.

We think the evidence sustains a finding that the value of the property of Tom and Mary is $134,500 as stipulated by the parties. From this amount, the indebtedness of Tom, consisting of notes and unpaid taxes in the amount of $9,140 should be deducted. The indebtedness of Tom is $6,000 and unpaid taxes are approximately $3,140, making the amount of indebtedness to be deducted. The net value of the estate is therefore $125,-360. The award to Mary by the decree is $54,700, less taxes on the apartment house in Columbus and one-half of any income tax liability that may be assessed against Tom. We think this is a fair division of the property accumulated by the parties over the years under the rules declared by the following cases: Loukota v. Loukota, 177 Neb. 355, 128 N. W. 2d 809; Read v. Read, 179 Neb. 637, 139 N. W. 2d 829.

Ordinarily, under the circumstances shown by this record, the wife is entitled to approximately one-half of the accumulated property of the parties. Both are charged with one-half of any income tax liability, which has been tentatively assessed at $7,976.21. Considering the possible interest of Joe to some of the property in the name of Tom, the trial court could properly give consideration to this contingency. We find the division of property to be fair and reasonable, and the award of the trial court on this phase of the case is approved.

Complaint is made of the trial court's order requiring Mary to pay one-half of any income tax liability that may be assessed against Tom. In a sense, such a potential liability is against the property being divided. The amount affects the net value of Tom's estate and, the amount not being determinable at the time of trial,

we can see no reason why Mary should not be charged with her share of this tax liability. We think the trial court was in error in charging her with one-half of this tax liability rather than her proportionate share. To this extent the decree of the trial court is modified.

It is contended by Mary that the trial court erred in not assigning the home place to her as a part of her award. The evidence shows that the home place, the Prairie Creek farm, and the Merrick County farm are operated successfully as a single unit. The home place is particularly adapted to the feeding of cattle, the Prairie Creek farm to the production of grain and hay, and the Merrick County farm is adapted mostly for pasture. Where it can be avoided, it is the duty of the court to divide the property in such a manner as to permit the husband to retain the means to pay off any judgment awarded to the wife. The wife's contention here seems to be an emotional one while that of Tom appears to be one of necessity. The trial court properly refused to award the home place to Mary under the circumstances here shown.

We affirm the decree of the district court except as to the modification herein stated. The costs of the appeal are taxed to the plaintiff.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE WARNER, APPELLANT.

149 N. W. 2d 438

Filed March 24, 1967. No. 36491.

Constitutional Law: Criminal Law. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Miles W. Johnston, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

SPENCER, J.

This is an appeal from an order denying a motion to vacate a sentence and judgment under the provisions of the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965.

On May 21, 1964, the defendant entered a plea of guilty to an information for burglary, and on June 22, 1964, he was sentenced to confinement in the Nebraska Penal and Correctional Complex for a period of 2 years, said sentence to be served consecutively to any sentence for which the defendant was then under commitment or was serving.

On August 3, 1966, defendant filed a motion to vacate the sentence and judgment for the reason that he was without counsel at the time of his arraignment, plea, and sentence. The trial court, after an order to show cause, denied the relief requested. An appeal was perfected to this court by court-appointed counsel.

The following portion of the record on defendant's arraignment is pertinent on the question raised herein:

"MR. LAHNERS: I have also explained to you that, in this court, you are entitled to the services of a lawyer and that in the event you do not have sufficient funds with which to hire a lawyer that the Court will appoint one and the county would pay for his services. Do you understand you are entitled to the services of a lawyer?

"MR. WARNER: Yes, sir.

"MR. LAHNERS: Do you wish to have a lawyer appointed for you, or do you wish to waive that right?

"MR. WARNER: I wish to waive that right, sir.

"MR. LAHNERS: Do you do that freely and voluntarily?

"MR. WARNER: Yes, sir. I would like to try to contact a lawyer of my own.

"MR. LAHNERS: Do you wish to do that before you enter a plea in this case, or do you—

"MR. WARNER: No, sir.

"MR. LAHNERS: Or prior to sentencing?

"MR. WARNER: Prior to sentencing, sir.

"MR. LAHNERS: All right.

"MR. WARNER: I wish to make my plea now and contact a lawyer to represent me at the time of sentencing, sir.

"THE COURT: I want this clearly understood, because this is one of the points at which a great many people think you ought to have advice of counsel.

"MR. LAHNERS: Your Honor, in this regard, I visited with Mr. Warner, and Mr. Warner informed me that he did not want an attorney at this time, but he did want an attorney to explain some mitigating factors to the Court prior to sentence; and I knew that Mr. Warner wanted to do this, and he says he has an attorney whom he intends to get in touch with.

"THE COURT: This would be your private attorney;—

"MR. WARNER: Yes, sir.

"THE COURT: —you are not asking the Court to appoint somebody?

"MR. WARNER: Yes, sir.

"THE COURT: You understand what Mr. Lahners means when he asks you if you waive this right? This means you don't have it, go without it.

"MR. WARNER: Yes, sir."

There can be little question the defendant was fully advised of his rights. However, he alleges that he has only a tenth-grade education and could not and did not intelligently waive his right to counsel. This conclusory statement standing alone is not sufficient to re-

quire a hearing in this case, and its denial on the record is not an abuse of discretion. See, Olive v. United States, 327 F. 2d 646; Machibroda v. United States, 368 U. S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473.

A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. He is required to allege facts which if proved would constitute an infringement of his constitutional rights. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

An examination of the record made on defendant's arraignment satisfies us that defendant freely, knowingly, and voluntarily waived his right to counsel and entered a plea of guilty to the charge in the information. It is to be noted that defendant was not sentenced for more than a month after his plea. Defendant's plea was entered May 21, 1964, at which time proceedings were suspended pending an investigation. He was not sentenced until June 22, 1964, at which time he was given an opportunity to state any reason he might have as to why sentence should not be passed. While the record does not indicate what mitigating circumstances were considered by the court at the time of the sentencing, it is evident that the sentence imposed was lenient. The penalty for the offense charged is 1 to 10 years. The defendant, who was not a first offender, received 2 years.

For the reasons given, the ruling of the trial ocurt was correct and the judgment is affirmed.

AFFIRMED.

LORRAINE S. MOUNTS, APPELLANT, V. DAYTON ROBERT MOUNTS, APPELLEE, WILLIAM W. GRIFFIN, GARNISHEE-APPELLEE.

149 N. W. 2d 435

Filed March 24, 1967. No. 36499.

1. **Domicile.** A state has judicial jurisdiction over an individual who is domiciled in the state.
2. ———. A domicile once established continues until it is superseded by a new domicile.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded.

Roscoe L. Rice, Frank J. Roubicek, and Rice & Efron, for appellant.

William W. Griffin, for garnishee-appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

SMITH, J.

In question is the validity of a personal judgment that a Minnesota court ordered on default by defendant. Jurisdiction was based on domicile.

In the present proceeding plaintiff petitioned for registration of the judgment. The district court concluded that the judgment was unenforceable, quashing a summons in garnishment and dismissing the petition. Plaintiff has appealed. The garnishee argues that the judgment may not be enforced for two reasons: Defendant was not domiciled in Minnesota, and the affidavit for constructive service did not satisfy a condition precedent to the exercise of jurisdiction.

The Minnesota court assumed jurisdiction under the following rule: "The summons may be served by * * * published notice in * * * the cases enumerated * * * when there shall have been filed * * * an affidavit of the plaintiff * * * stating the existence of one of such cases, and that he believes the defendant is not a resi-

dent of the state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his place of residence or that such residence is not known to him. * * *

"Such service shall be sufficient to confer jurisdiction: (1) When the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; * * *." Rules Civ. Proc., rule 4.04, 27A M.S.A.

Plaintiff and defendant as wife and husband had made their permanent home in Polk County, Minnesota, for some time up to May 1950. In that month defendant deserted plaintiff and their three minor children. In September 1951, the district court for Polk County granted her an absolute divorce. Almost 14 years later she filed a complaint against defendant in the district court for Hennepin County, Minnesota. She alleged a right to recover the reasonable value of support that she had furnished to the minor children from 1950 through 1964. She filed with her complaint her affidavit as follows:

"* * * in 1950 defendant was a resident of this State and either concealed himself within the State or departed from the State to avoid support of his minor children; * * * since that time the plaintiff has made repeated attempts to locate the defendant * * * in order to force defendant to support his minor children; * * * the attorneys for plaintiff have made similar attempts to enforce defendant's support obligation; * * * defendant departed the State with the intent to defraud his creditors, namely plaintiff * * *; * * * plaintiff's attorneys have mailed copies of the summons and complaint herein to * * * (defendant in care of a resident of Tonkawa, Oklahoma) and to * * * (defendant in care of the garnishee at O'Neill, Nebraska) addresses at which it is believed defendant may receive such copies; * * * defendant has no place of residence known to plaintiff or her attorneys."

The court found that notification mailed to the address of the garnishee had been returned with the seal broken. Exercising personal jurisdiction after publication of summons, it ordered judgment for $19,068.75.

Other evidence was introduced at the hearing on the petition for registration. Warrants for the arrest of defendant had been issued, and public officials had been contacted in Minnesota, Illinois, and Oklahoma. There has been no suggestion of death, but defendant's whereabouts and home at any time subsequent to the desertion were unknown.

The objection to domiciliary jurisdiction is built on the long period of evasion, but proclivity for hiding hardly immunizes a fugitive from suit. "A state has judicial jurisdiction over an individual who is domiciled in the state. * * * An individual should not be able to escape liability by concealing himself from process or by departing to parts unknown. Everyone should therefore be subject to suit in at least one state even though personal service of process cannot there be made upon him at the time. * * * The rule is accordingly to the effect that a state has judicial jurisdiction over its domiciliaries even when they are absent from its territory. Milliken v. Meyer, 311 U. S. 457 (1940)." Restatement, Conflict of Laws 2d, Tent. Draft No. 3, § 79, p. 67.

"A domicil once established continues until it is superseded by a new domicil." Restatement, Conflict of Laws 2d, Tent. Draft No. 2, § 23, p. 87.

The alleged defect in the affidavit is an omission as to the residence of defendant at the time of the statement. The language should be given a reasonable interpretation. See, Skala v. Brockman, 109 Neb. 259, 190 N. W. 860; Frost v. Davis, 182 Okl. 593, 79 P. 2d 600. For present purposes it is tantamount to a direct assertion of domicile in Minnesota. The affidavit and the court rule are insufficient evidence of a local restriction upon authority, and the Minnesota court properly exercised jurisdiction.

In the registration proceeding the district court erred in quashing the garnishment summons and setting aside the registration. The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

KOKJER, District Judge, dissenting.

It is true, as held in the majority opinion, that a state has judicial jurisdiction over an individual who is domiciled in the state. It does not follow that a domicile existing in 1950 is a sound basis for holding, without more, that such domicile continued to exist in 1964.

Plaintiff seeks to have a Minnesota judgment registered in Nebraska. The Minnesota judgment was based on service by publication. The initial essential ground for jurisdiction had to be that defendant was a resident of Minnesota at the time the action there was filed. Plaintiff filed her suit in Minnesota in the year 1964. Her affidavit for service by publication stated that in 1950 defendant was a resident of Minnesota; that he either concealed himself within the state or departed therefrom to avoid support of his minor children; that plaintiff attempted, without success, to locate him; and that defendant has no place of residence known to plaintiff or her attorneys. Judgment was entered by default. The Minnesota court did not find that defendant was a resident of Minnesota in 1964. It found that defendant was a resident of Minnesota in 1950.

Authorization for service by publication must be based upon facts existing at the time such service is made. Leigh v. Green, 62 Neb. 344, 86 N. W. 1093. In that case the affidavit for service by publication was sworn to two days before the suit was filed, and was attacked for that reason. The court said: "The plaintiff insists that the affidavits were insufficient, and for that reason the court acquired no jurisdiction. * * * One objection urged against the affidavits is that they were sworn to some two days before the petitions were filed in the respective

cases. The argument on this point, as we understand it, is that between the making of the affidavit and the filing of the petition conditions might have changed so that service might have been had on the defendant in this state, or in some other way, so that the affidavit could not have been truthfully made at the time of filing. It is clear that the law must permit some interval to elapse between the making and the filing of the affidavit, because, strictly speaking, the two acts could not be simultaneous. This being true, the only question that can arise is what length of time it will permit to elapse between the two acts. The statute is silent on the subject; hence the inference is warranted that it will permit a reasonable time. Just what will be regarded as a reasonable time this court has not decided. However, in Armstrong v. Middlestadt, 22 Nebr., 711, it was held that an affidavit made one day before the petition was filed was sufficient. But in that case the court expressly disclaims any intention to go beyond the facts, and, of holding that an affidavit made several days before the commencement of the action would be sufficient. In our opinion, when the petition is filed within such time after making the affidavit that no presumption could fairly arise that the state of facts had changed in the interval, it is sufficient. Crombie v. Little, 47 Minn., 581; Snell v. Meservy, 91 Ia. 322. Applying this rule to the affidavits in question, we do not believe that any presumption of a change in the state of facts, during an interval of two days, could fairly arise."

As a foundation for jurisdiction in the Minnesota case the affidavit for service by publication must have disclosed, and the court must have been satisfied, that the defendant at that time had legal residence or domicile in Minnesota; or that such fact existed within such a reasonable time immediately prior to the commencement of the action that it could be presumed no change might have taken place.

I do not believe 14 years is a reasonable time. I can

agree, as stated in the majority opinion, that a domicile, once established, continues until it is superseded by a new domicile. I cannot agree that we can reasonably assume that a domicile has not been superseded by a new domicile in a period of 14 years just because we do not know what the facts are.

The Minnesota Supreme Court, in the case of Sheridan v. Sheridan, 213 Minn. 24, 4 N. W. 2d 785, held that a default divorce decree of an Iowa court, based upon service by publication, in favor of a husband domiciled in Iowa, from his wife who resided in Minnesota, was, upon principles of comity, recognized as terminating the marriage status as a judgment in rem but was ineffective as a judgment in personam.

It is my view that the Minnesota court did not obtain jurisdiction of defendant within the requirements of its own law and was without authority to enter a personal judgment against him. The district court in Nebraska came to this conclusion, and its judgment refusing to register the Minnesota judgment should be affirmed.

For the foregoing reasons I respectfully dissent.

WELDON E. LOEWENSTEIN, APPELLEE, V. MIDWESTERN INVESTMENT COMPANY, A CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH ERMA L. BUTLER ET AL., APPELLEES.

149 N. W. 2d 512

Filed March 31, 1967. No. 36313.

1. **Corporations: Rescission.** A contract for sale or a sale of securities in violation of the provisions of the Blue-Sky Law is not void, but voidable by the purchaser, and the purchaser's remedies embrace enforcement or rescission, whichever is appropriate.
2. **Corporations: Estoppel.** Ordinarily, in the absence of intervening rights of third persons or the purchaser's duty to insist

on compliance with the securities regulations, the doctrine of equitable estoppel cannot be invoked by the seller of stock or other securities to defeat the purchaser's claim that the contract is invalid because it violates the state's securities regulations.

3. **Fraud: Duress.** A plaintiff is not regarded as in pari delicto with the defendant, if, even though he knew or had reason to know that the bargaining was illegal or immoral, he was induced to participate in it by fraud or duress or by the use of influence derived from superior knowledge, mental power, or economic position.
4. **Corporations.** An officer or director of a seller who knew, or, in the exercise of reasonable care could have known, the existence of the facts by reason of which civil liability existed, may be individually liable with the seller to a purchaser of securities under the provisions of sections 81-347, R. R. S. 1943, and 81-348, R. S. Supp., 1963.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Wagener, Marx & Youngs, Mattson, Ricketts & Gourlay, and Donald L. Biehn, for appellants.

Joseph Ginsburg and Edwin F. Dosek, for appellee Loewenstein.

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

MCCOWN, J.

This is an action by the purchaser of securities against the seller to recover the purchase price under statutory provisions authorizing civil recovery for violation of the Blue-Sky Law.

The action was brought against the defendant Midwestern Investment Company and the individual defendants who were officers and directors of the company. On May 15, 1961, the plaintiff, who was a farmer, was solicited by the individual defendants, Lester E. Jones and M. L. Simmons, for the purchase of shares of the capital stock of Midwestern Investment Company. He paid $5,250 to the company for 1,500 shares of its stock at

$3.50 per share. The plaintiff testified that it was represented to him that the stock had been approved by the state; and that the sale price was $3.50 per share. Concealed from the plaintiff was the fact that the book value of the stock at the time of the sale was approximately 50 cents per share; that the majority of stock had been sold for $1 per share; and that the company had accumulated substantial losses and deficits since the date of its organization in June 1960. The plaintiff testified that he would not have purchased the stock had he known the truth concerning the facts misrepresented or concealed.

The stock of Midwestern Investment Company was not exempt under any provisions of the Blue-Sky Law, nor did the company or any salesman have a permit as broker or salesman at the time of the sale. Prior to the sale of stock to the plaintiff, the defendant had issued written offers to repurchase a substantial number of shares of its original stock issue because it had not been authorized or registered as required by the Blue-Sky Law. The stock of several stockholders had been repurchased and was held as treasury stock by the corporation. It was some of this stock that was sold to the plaintiff. It is clear that the officers and directors knew these facts. Counsel for the company specifically advised the directors on April 21, 1961, that the sale of this treasury stock was, in his opinion, a violation of the Blue-Sky Law. On that date, the board of directors adopted a resolution to make available 22,500 shares of treasury stock, in blocks of not more than 1,500 shares per person at $3.50 per share, with the sale to be limited to members of the advisory board of the United Reserve Life Insurance Company or the substantial stockholders of that company who had asked for the opportunity to make such purchase. United Reserve Life Insurance Company was an insurance company which had been organized and its stock sold by the defendant company under authorization by the state Department of Insur-

ance. The plaintiff had previously purchased some of the United Reserve Insurance Company stock from one of the same persons who sold the stock involved here. The only directors voting against the April 21 resolution were the company's counsel and the individual defendant B. B. Wright. Mr. Wright testified that he voted against the resolution not only because of counsel's opinion that it was in violation of the Blue-Sky Law, but also because he did not think $3.50 was a large enough price.

The district court found that fraud had been perpetrated upon the plaintiff and entered judgment against the defendants and each of them, and this appeal followed.

The Blue-Sky Law which was effective at the time of the sale here, but has been since replaced, was originally adopted in 1937, although the particular portions of the statute dealing with civil liability to a purchaser were not incorporated until 1955. A portion of the original act of 1937 which was still in effect provided that in any civil action, the sale of securities in violation of the act should be deemed prima facie evidence of fraud upon the part of the seller. § 81-335, R. R. S. 1943.

In 1955, the Legislature adopted civil liability sections. Section 81-347, R. R. S. 1943, provides: "Any person, except a person who shall have obtained from the Department of Banking a permit to do business as a broker or salesman, who shall within the State of Nebraska sell, issue, exchange, or transfer any security or interest therein in violation of sections 81-302 to 81-346, shall be liable to the purchaser of the security for the value of the consideration paid by the purchaser less the amount of any income or recovery received thereon."

Section 81-348, R. S. Supp., 1963, adopted at the same time and amended in 1959, provides in part: "An action to enforce liability as provided in section 81-347 must be commenced within five years after the date of the

sale * * *. Such an action shall be heard and determined by the court as an action in equity."

We are here dealing with an illegal contract or what is referred to as an illegal bargain in the Restatement of Contracts. The Legislature has clearly made such a bargain illegal and criminal insofar as the seller is concerned. However, the statute was intended for the protection of the public from fraud and imposition and for the benefit of purchasers as opposed to sellers. Under such circumstances, we believe the rule stated in Restatement, Contracts, section 601, page 1116, applies: "If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed." The reasons for such a rule being applied in favor of a party for whose benefit the law was intended and against a party toward whom the prohibition or penalty is directed are well stated in 6A Corbin on Contracts, section 1540, page 833.

We hold that a contract for sale or a sale of securities in violation of the provisions of the Blue-Sky Law is not void, but voidable by the purchaser, and the purchaser's remedies embrace enforcement or rescission, whichever is appropriate.

Here the plaintiff has elected to avoid the bargain and seek rescission and restitution under the civil liability section of the statute. The defense rests on equitable estoppel, incorporating laches, waiver, and ratification, or on the doctrine of pari delicto. The plaintiff attended a stockholders meeting of the defendant company on October 15, 1962, and at that meeting was elected a director of the defendant company, and, on the same day, at the directors meeting following the stockholders meeting, was elected secretary-treasurer and also attended a directors meeting on November 12, 1962, and then resigned prior to the board of directors meeting for December. At the stockholders meeting in October at

which the plaintiff was elected director, the minutes reflect that the individual defendant Brown, who had dominated management of the defendant company from the time of its organization, had resigned the preceding year. There was extensive discussion of matters of disagreement with former management and a discussion about stock sales during the early part of 1960 and 1961. The defendant Wright, who had succeeded Brown as president, pointed out that operations had not been profitable and explained how management was doing its best to overcome the situation it inherited from Mr. Brown. Stockholders were given a copy of an accountant's report which was reviewed. One stockholder finally stated that it seemed to him that management was really headed in the right direction now and that the big money drain had been stopped. He then moved that the activities of the officers and board of directors since its organization in the sale of the stock of the company and particularly all actions since the last meeting of stockholders be approved, authorized, and ratified as and for the acts of the company. This motion was seconded by the plaintiff and unanimously adopted.

The plaintiff never signed any checks, nor did he participate in management in any way except for his attendance at the two board meetings in October and November 1962. His testimony that he had never had occasion to examine and read and analyze a financial report was uncontradicted and he also testified that he did not realize at the time of the annual stockholders meeting in 1962 that his stock had been issued illegally, nor that other stockholders had acquired their stock for $1 a share, nor that some had been issued for services, nor that the company had lost money since its very beginning. He had no association with the company at all for over a year after he became stockholder and specifically testified that during the brief period he was an officer and director, he did not get the full story of the activities of the company.

It is on this record that the defendants ground their contention that the plaintiff's conduct constituted an equitable estoppel or placed him in pari delicto with the defendants, as to the illegal sale of the stock to him.

Ordinarily, in the absence of intervening rights of third persons or the purchaser's duty to insist on compliance with the securities regulations, the doctrine of equitable estoppel cannot be invoked by the seller of stock or other securities to defeat the purchaser's claim that the contract is invalid because it violates the state's securities regulations.

Conduct which constitutes participation sufficient to estop a purchaser or place him in pari delicto is difficult to generalize or define. Generally speaking, cases holding that the purchaser's conduct placed him in pari delicto are those in which the purchaser's participation was in the original organization and management, or was prior to or in connection with the sale of the securities to him, or where his participation involved illegal securities transactions. See Annotation, 84 A. L. R. 2d 479. We find no support for the position that participation in the affairs of the company under circumstances such as are involved here is sufficient to estop the purchaser or place him in the position of being in pari delicto. If it were, about all that would be necessary to wipe out the statutory liability or permit the wrongdoer to enforce an illegal bargain after its completion would be to elect an unsuspecting purchaser to the board of directors and have him attend a meeting or two.

"A plaintiff is not regarded as in pari delicto with the defendant, if, even though he knew or had reason to know that the bargaining was illegal or immoral, he was induced to participate in it by fraud or duress or by the use of influence derived from superior knowledge, mental power, or economic position." 6A Corbin on Contracts, § 1537, p. 826.

The facts here are insufficient to place the plaintiff in pari delicto, nor do they serve to forfeit the plaintiff's

right of avoidance under the statutory provisions with respect to civil recovery under the Blue-Sky Law.

The defendants also argue that the statute providing civil liability for a violation of the Blue-Sky Law refers only to any person and does not specifically extend to officers or directors or persons participating in the sale, and that, therefore, the individual defendants who did not directly participate in the sale to the plaintiff cannot be held liable. This question with respect to sections 81-347, R. R. S. 1943, and 81-348, R. S. Supp., 1963, was specifically answered adversely to the defendants' contention in the case of Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479. Here there is no question that the individual defendants knew, or in the exercise of reasonable care could have known, the existence of the facts by reason of which the liability here existed. The evidence was sufficient to support the trial court's finding that the individual defendants engaged, participated, permitted, or ratified the sale to the plaintiff and that fraud was perpetrated upon the plaintiff in the sale of the stock to him.

For the reasons stated, the judgment of the trial court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE LEROY KONVALIN, APPELLANT.

149 N. W. 2d 755

Filed March 31, 1967. No. 36413.

1. **Constitutional Law: Criminal Law.** Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel.
2. **Criminal Law.** The want of effective counsel is not measured alone by the result obtained. Where an examination of the

evidence and trial proceedings shows that the claim is not based on fact, the claim will not be sustained.

3. **Criminal Law: Attorney and Client.** In the absence of statutory authorization, the fees and expenses allowed counsel appointed to represent an indigent prisoner under the Post Conviction Act cannot be taxed as costs against the prisoner.

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

Owen A. Giles, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Post Conviction Act. The defendant, Dale LeRoy Konvalin, was convicted of robbery and assault with intent to commit rape. The conviction was affirmed in State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227.

The defendant filed a lengthy motion to vacate and set aside the conviction and sentence. The allegations contained in the motion may be summarized as a complaint that the defendant was denied the effective assistance of counsel. After an evidentiary hearing, at which the defendant was represented by counsel, the trial court found generally against the defendant and overruled the motion. The defendant has appealed.

The preliminary hearing in the criminal case was held on April 30, 1964. The defendant was not then represented by counsel although the hearing had been continued previously for the purpose of allowing the defendant to obtain counsel. The defendant stated that he was ready to proceed if a court reporter was obtained. A court reporter was obtained, the hearing was held, and the defendant was bound over to the district court. The defendant made no admissions and did not testify.

Under these circumstances, the failure to provide counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

The information was filed in the district court on May 1, 1964. On May 18, 1964, the defendant was taken before the district court for the appointment of counsel. The defendant stated that his brother was going to arrange for private counsel. The trial court appointed the public defender to represent the defendant with the understanding that the defendant could obtain private counsel if he was able to do so.

On May 26, 1964, the defendant was taken before the district court for the purpose of setting a trial date. The public defender was present. The defendant had not obtained private counsel and was complaining that his brother and niece had not been allowed to visit him. At the defendant's request the trial was continued until the fall term.

On September 9, 1964, the defendant was taken before the district court for arraignment. The defendant had not obtained private counsel and was represented by the public defender. The defendant pleaded not guilty and the case was set for trial on September 14, 1964. The trial court instructed the sheriff to allow the defendant to make whatever telephone calls he might want to make and directed the public defender to assist the plaintiff.

With the assistance of the public defender, arrangements were made for Thomas D. Carey to represent the defendant. Before Mr. Carey had an opportunity to confer with the defendant, L. S. Cornett, a bondsman, commenced an action against the defendant and caused a summons in garnishment to be served upon the sheriff. As a result of the garnishment proceeding, the sum of $370 that was in the hands of the sheriff, and available

to the defendant for the purpose of hiring counsel, became unavailable for that purpose. Mr. Carey then withdrew from the case.

The case proceeded to trial on September 15, 1964. Defendant was represented throughout the trial by the public defender. The public defender also prosecuted the appeal to this court.

The defendant asserts that the garnishment proceeding, which deprived him of funds to hire private counsel, was instigated by the county attorney's office. The record effectively disproves this assertion and further establishes that the defendant had ample time in which to arrange for private counsel. The defendant's money had been in the hands of the sheriff for about 4 months prior to the garnishment proceeding.

The important fact in this case is that the defendant was furnished the effective assistance of counsel. Able, competent counsel was available to defendant at all times after the information was filed in the district court.

The defendant makes some criticism of the way his defense was conducted, but his complaints in this regard have no substance. The record discloses that none of the contentions advanced by the defendant have any merit. The want of effective counsel is not measured alone by the result obtained. The claim of ineffective counsel in this case finds no support in the record.

The trial court allowed fees and expenses in the amount of $356.12 to the defendant's counsel appointed in this proceeding. The defendant contends that this amount should not have been included in the costs taxed against him.

The Post Conviction Act provides that: "Costs shall be taxed as in habeas corpus cases." § 29-3001, R. S. Supp., 1965. The habeas corpus statute mentions fees of the county judge, clerk, sheriff, and witnesses as costs but contains no provision regarding the appointment of counsel or allowance of fees. § 29-2824, R. R. S. 1943.

As a general rule, only those costs which are au-

thorized by statute may be taxed. State v. Jungclaus, 176 Neb. 641, 126 N. W. 2d 858. The judgment of the district court should be modified by deleting $356.12 from the amount of the costs taxed against the defendant.

The judgment of the district court as modified is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. CAROL D. SPEAL, APPELLEE, v. GAYLE M. EGGERS, APPELLANT.

149 N.W. 2d 522

Filed March 31, 1967. No. 36477.

1. **Divorce.** Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action.
2. ———. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Kerrigan, Line & Martin, for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

NEWTON, J.

This is a habeas corpus action. Relator, Carol D. Speal, obtained a divorce from the respondent, Gayle M. Eggers, in the district court for Linn County, Iowa, on May 27, 1964, and was awarded custody of the two minor children of the parties. On August 6, 1965, the

district court for Dodge County, Nebraska, on stipulation entered into an action under the Uniform Reciprocal Enforcement of Support Act, gave respondent the right to have the children for a period of 2 months each summer. Respondent received the children June 8, 1966, and subsequently refused to return them to relator who then brought this action to regain custody of the children. The trial court awarded custody of the children to relator, with the provision that respondent should have visitation privileges not exceeding one continuous period of 2 weeks each year, together with such shorter periods as might be agreed upon between the parties.

The evidence reflects that soon after the Linn County, Iowa, divorce, relator moved to Grand Junction, Colorado, where she obtained employment as a secretary for the Atomic Energy Commission. The children went with her to Colorado with the consent of the Iowa court. On June 19, 1966, relator married Alexander Speal, a mining engineer in the employ of the Atomic Energy Commission who had been so employed for a period of 12 years. Mr. Speal had also been once married and divorced. Relator had established and maintained, prior to this marriage, an adequate modern home, recently remodeled, in a middle-class neighborhood in Grand Junction and was still residing there at the time of trial. The record does not reflect that relator at any time failed to properly provide for or adequately care for the minor children, to wit: A daughter Christine, 13 years of age at the time of trial, and a son Stewart, 11 years of age at the time of trial, but it does appear that relator was guilty of an indiscretion with a married man for a short period following the Iowa divorce. Respondent resides in Fremont, Nebraska, and although he had held several different positions during the past 5 years, is now employed as a vice president and general manager of Claridge Farms. He, too, remarried on November 25, 1965, his wife having been twice married and divorced and having two minor children, one by each

former marriage, who reside in their home. There is nothing to indicate that respondent could not give the children a proper home or that he was unfit to have their custody.

The children testified while their parents were absent from the courtroom. They indicated affection for their mother and father and, also, for the present spouses of their parents. They stated, in substance, that having lived with their mother for a considerable period, they would now like to live with their father, but would want to see their mother occasionally and might eventually wish to return to her. They enjoyed being in Fremont during the summer vacation while free from any duties entailed by attending school and they also enjoyed visiting with the relatives of relator and respondent who resided within the Fremont area.

Respondent contends that evidence of indiscretions alleged to have been committed by relator prior to the entry of the divorce decree in Linn County, Iowa, was wrongfully rejected by the trial court. In this regard, attention is called to the case of Young v. Young, 166 Neb. 532, 89 N. W. 2d 763, wherein this court held: "* * * an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata." It is therefore evident that the evidence offered was not pertinent to the issues before the court.

Respondent also contends that the preference expressed by the children to remain with their father should be decisive in this case or at least be considered to carry great weight. It is a matter of common knowledge that children of the age of Christine and Stewart are very impressionable and it is only to be expected that when on vacation from school and other duties, in a

place where they are able to fully enjoy themselves, they would be inclined to wish to continue such a happy interlude; however, this court has stated in the case of Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509, that: "The child's statement may be considered, but is not controlling in determining his custody."

Respondent also contends that relator is unfit, due to alleged former indiscretions, to have custody of the children. Yet, notwithstanding his contention that she had been guilty of such indiscretions prior to the Iowa divorce, he, at that time, made no attempt to establish such fact or to obtain custody of the children. Regarding relator's indiscretion shortly following the divorce, it is possible that had respondent, under the then existing circumstances, sought custody of the children, a different view would have been taken of the situation than that warranted by present circumstances. At the time of trial and for some time past, relator had ceased such indiscreet conduct, was steadily employed, and was then, as she had been at all times before, adequately caring for her children. She has now remarried and her present husband, insofar as the record in this case shows, is a responsible citizen of good reputation, with an excellent and steady position as a mining engineer, and he has expressed considerable fondness and affection for relator's children. Most certainly the home now offered the children by Mr. and Mrs. Speal is a good home, capable of supplying all the needs of these children, and both of them appear definitely interested in the children's continued welfare. Ordinarily where one of the parents has had the custody of the minor children of the parties for a considerable period, during which time they have been properly cared for and strong mutual attachments have developed, the interest of the children will generally be best served by leaving them with such parent. See Koch v. Koch, 175 Neb. 737, 123 N. W. 2d 642.

Ordinarily, custody of minor children awarded to their

mother in a divorce action will not be disturbed, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. See Hossack v. Hossack, 176 Neb. 368, 126 N. W. 2d 166. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. See Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262. In the present case, the record does not disclose that the mother is at this time an unfit person to have the custody of her minor children, or that a change of custody would be advantageous to the children, nor does it disclose any abuse of discretion on the part of the trial court. We do feel, however, that it is in the interest of the children to maintain a responsible relationship with both parents and that respondent should be entitled to have the children for a continuous period of 4 weeks during the summer school vacation and for short periods at such other times as the parties may agree upon, provided that respondent makes adequate provision for their transportation to and from their mother's home. Subject to the modification mentioned, the judgment should be and is affirmed.

AFFIRMED AS MODIFIED.

GENERAL MOTORS ACCEPTANCE CORPORATION, A CORPORATION, APPELLEE, V. JOE BLANCO ET AL., APPELLANTS.
149 N. W. 2d 516

Filed March 31, 1967. No. 36478.

1. **Replevin.** The gist of a replevin action is the right to possession of the property.
2. **Contracts.** Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and

carry out rather than defeat the purpose for which they were executed.

3. ———. Generally in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Bertrand V. Tibbels, for appellants.

Wright, Simmons & Hancock, for appellee.

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

SPENCER, J.

This is a replevin action brought by General Motors Acceptance Corporation, hereinafter referred to as plaintiff, against Joe and Bobby Blanco, defendants. Bobby Blanco did not sign the contract involved herein, but is a defendant because the certificate of title to the automobile, which is the subject of the contract, shows title in Joe Blanco or Bobby Blanco. Any interest Bobby may have depends upon the title of her husband and no reference will be made to her hereafter. Joe Blanco will be referred to as defendant.

This action was filed subsequent to, and is referred to in Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257, which was an action by Blanco for a declaratory judgment to determine the validity of the contract herein. The issues raised herein are identical to those involved therein.

The trial court on a motion for summary judgment herein determined: "That there is no issue of fact and that this case may be disposed of as a matter of law; that the contract is not void and that Plaintiff has a security interest in the vehicle replevined and is entitled to judgment for the possession thereof and its costs." Defendant perfected an appeal to this court. There is no

issue of fact present. The questions raised are solely ones of law.

Without reference to any question of res judicata, which was specifically and consistently urged by the plaintiff, we affirm the judgment of the trial court herein.

We have heretofore, in Blanco v. General Motors Acceptance Corp., *supra,* fully and adequately described the transaction and set out sufficient of the defendant's allegations and assumptions that no purpose will be served by repetition herein. Suffice it to say that defendant's argument is bottomed upon the premise that the language of the contract is so unintelligible, vague, ambiguous, so contrary to public policy, and so consciously loaded in favor of the plaintiff, that its execution constituted a fraud on the defendant, and that fraud vitiated or rendered the contract void.

A short description of the contract is necessary to an understanding of the defendant's contention. On the front side of the contract, immediately following the title in solid capitals, "CONDITIONAL SALE CONTRACT," is the following sentence: "The undersigned seller hereby sells, and undersigned buyer or buyers, jointly and severally hereby purchase(s), subject to the terms and conditions set forth below *and upon the reverse side hereof,* the following property, delivery and acceptance of which in good order are hereby acknowledged by buyer, viz.: * * *." (Italics supplied.) Here follows a description of the vehicle involved herein. Immediately following the description are eight numbered paragraphs which set forth the price, insurance premium, and terms of the transaction. The remainder of the face of the instrument above the signature line is devoted to an explanation of insurance provisions.

The following then appears: "Executed in quadruplicate, copy of which was delivered to, and receipt is ac-

knowledged by, buyer, this 21 day of July, 1964
(Do not date on Sunday)

"A Buyer
Signs in Ink Joe Blanco (Sgd.)
2038 12th, Mitchell, Nebraska
(Street) (Town) (Postal Zone) (State)

"B Co-Buyer
Signs in Ink _____
(Street) (Town) (Postal Zone) (State)

"Seller
Signs in Ink Kramer Motors, Inc.
By John A. Plaster (Sgd.)
(Title) (Address) "

Following the signatures is the assignment and transfer of the instrument to the plaintiff.

It is to be noted that we italicized "and upon the reverse side hereof," appearing in the first paragraph of the contract. We did this to indicate that these words are in boldface type to contrast them from the rest of the sentence, although the size of the type is the same.

On the reverse side of the instrument, under the title "Provisions," are 12 numbered sections, some of which have several paragraphs. The type is small but readable. Provision No. 1 is as follows: "For the purpose of securing payment of the obligation hereunder, seller reserves title, and shall have a security interest, in said property until said obligation is fully paid in cash."

We further set out herein provision No. 12 because of the questionable applicability of some of the provisions. If they were involved herein, provision No. 12 could be pertinent. It is as follows: "Any provision of this contract prohibited by law of any state shall as to such state be ineffective to the extent of such prohibition

without invalidating the remaining provisions of the contract."

The defendant does not deny that he received a copy of the contract after its execution.

As we analyze defendant's argument, it would appear to present a two-pronged approach: The contract is void; or, if not, the transaction was an unconditional or executed sale. Defendant's position would be the same in either instance. Plaintiff would have no right to possession of the property as against defendant. The gist of a replevin action is the right to possession of the property. Crancer Co. v. Combs, 94 Neb. 655, 144 N. W. 251.

Defendant, ignoring the import of the words "and upon the reverse side hereof" develops the premise that the face of the instrument purports to pass an unconditional title to him. Obviously, the provisions on the reverse side of the contract, except as they may be unenforceable in this state, are a part of the contract and must be so considered.

Provision No. 1, set out above, described the nature of this transaction. Without attempting to answer the many ramifications of the defendant's argument, it does not make the slightest difference on the issue of possession whether the purport of the contract is to create a conditional sale or is to reserve a security interest. In either event, plaintiff would be entitled to possession of the property. Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out rather than defeat the purpose for which they were executed. Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245.

Defendant tries to make much of the fact that he did not read the reverse side of the contract. Generally in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. We realize there may be situations in modern commercial life where the relative position of the parties is such that one of them has unconscionably

taken advantage of the necessities of the other, and certain provisions of the contract should not be enforced as a matter of public policy. Defendant attempts to rely on such a case herein. It is Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69, 75 A. L. R. 2d 1, which involves the waiver of an implied warranty. The principle enunciated in that case has no applicability herein. Here the defendant is not attempting to void some specific provision of the contract which for reasons of public policy should not be enforced, but by expanding the thrust of that case, he is attempting to void the contract itself. To adopt defendant's illusory premise would void all sale contracts where the relative bargaining opportunities of the parties are unequal. To so apply it would be to pervert the principle involved and serve to destroy the very freedom of opportunity it is designed to protect. While there may be provisions of the contract to which the argument would be applicable, a question we do not need to decide, it would strain credulity to believe that the defendant did not fully understand that the intent of the agreement signed by him herein was to retain a security interest in the seller until the obligation was paid.

Defendant has devoted a major portion of his brief to provision No. 6 on the reverse side of the contract, which provides the conditions upon which default will occur and provides for repossession by the seller and a subsequent private sale. It is not necessary to list or discuss those provisions. We merely observe that some of them are more consistent with a security interest than a conditional sales contract. Nor is there any need to comment on any question of the enforceability of any of the items in provision No. 6 because none of those items are pertinent to a decision herein. This is not an attempt to enforce the contract out of court. Replevin is the proper legal action to enforce a security interest. There is no dispute defendant was in default on his payments. This replevin action was not filed until after

defendant had filed his action for a declaratory judgment. The only question to be determined herein is the right to possession. The trial court properly found the right of possession in plaintiff.

AFFIRMED.

KENNETH EMRY, APPELLANT, V. MARVIN F. LAKE ET AL., APPELLEES.

149 N. W. 2d 520

Filed March 31, 1967. No. 36489.

1. **Pleading.** Tested by general demurrer, a petition for an extraordinary remedy is strictly construed.
2. **Constitutional Law.** The Nebraska Bill of Rights guarantees due process of law and a right to be heard in the court of last resort. Neither guarantee is violated by a statute that authorizes administrative action to be reviewed by the district court in error proceedings alone.

Appeal from the district court for Brown County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland, for appellant.

Samuel C. Ely, J. Marvin Weems, John C. Coupland, and C. Russell Mattson, for appellees.

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

SMITH, J.

Plaintiff sued to enjoin the county commissioners of Brown County, Nebraska, from taking his land for relocation of a road. The district court sustained a general demurrer to the petition. Plaintiff having elected to stand on his petition, the suit was dismissed. Contentions on appeal are: (1) The county board was attempting to exercise the power of eminent domain for private use. (2) Section 39-1725, R. R. S. 1943, authorizing the

board to relocate roads, is unconstitutional in that plaintiff had no right of appeal.

County Road No. 100 was located mostly on east-west section lines. The county board in December 1965, received from plaintiff and many others a petition concerning the road. Petitioners requested that the road at its then location be maintained in a reasonably passable condition for the public. They also requested that the board construct approaches for public access to State Highway No. 7.

The board acted in January 1966, without reference to the petition. Finding that the public interest might require relocation of the part lying east of the state highway, the board suggested a route approximately one-half mile north. Henry S. Miles was directed to study the use being made of the road and to submit a report and a recommendation concerning relocation.

Miles, who had been a commissioner of the county, submitted a report stating in part: "I drove to the Conrade-Emry area and made a visual inspection of * * * the South or hill road and the (suggested) north or bottom road. * * * the * * * hill road will require three-tenths of a mile more road bed or distance * * *, and since this distance is up a very steep hill which will be subject to drifting snow and washing rain, probably will cost considerably more to maintain. * * * the * * * hill road will require a prepared surfaced road bed to be built almost its entire distance with west one-third of a mile approaching highway #7 being a rather expensive operation so that it can be traveled at all. Also there will probably have to be constructed some * * * access to the Emry farmstead. The * * * bottom road could be built and maintained at a minimum cost because it is in a protected area with better soil * * *. either road would only serve two families for the present at least, and since there is a good surfaced county road about one-half mile south which runs east from Highway #7 * * * it would be hard to justify the hill road

that close * * *. where the * * * hill road would intersect on the highway will require a hazardous approach because of traffic * * * and lack of visibility * * *. either site will probably require the purchase of some land. * * * I have no interest * * * in this controversy * * *. I would recommend that the road follow the north or bottom route."

After publication of notice and a public hearing the board relocated the road along the north route. A proceeding in eminent domain was subsequently commenced to acquire 1.573 acres owned by plaintiff.

To allege private use plaintiff pleaded only that the relocation would be a private road for the sole benefit of Lawrence Conrad. The hypothesis is too conclusional for a cause of action. Tested by general demurrer a petition for an extraordinary remedy is strictly construed. School Dist. No. 25 v. De Long, 80 Neb. 667, 114 N. W. 934.

The Legislature allowed appeals in eminent domain actions but not in relocation proceedings. Without an appeal provision the relocation statute is said to be unconstitutional. The petition alleged a violation of sections 3 and 24 of the Nebraska Bill of Rights: No person shall be deprived of property without due process of law. The right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, shall not be denied.

A hearing on road relocation has no significant characteristic of individual controversy, and the board decides no dispute of adjudicative fact. Its decision is not quasi-judicial unless the Legislature has attached judicial incidents to the administrative function—a subject which we pretermit. See School Dist. No. 23 v. School Dist. No. 11, *ante* p. 305, 148 N. W. 2d 301. Orders made in the exercise of judicial functions by a board inferior to the district court are reviewable by proceedings in error. §§ 25-1901 and 25-1903, R. R. S. 1943. Neither section of the Bill of Rights is violated by a statute that

authorizes administrative action to be reviewed by the district court in error proceedings alone. See, Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292, opinion adhered to on rehearing, 72 Neb. 71, 100 N. W. 136; cf. Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N. W. 489; Moise v. Powell, 40 Neb. 671, 59 N. W. 79.

The judgment is affirmed.

AFFIRMED.

D. E. MUINCH, APPELLEE, V. W. GORDON HULL ET AL., APPELLEES, LESTER L. JENSEN, SHERIFF OF SHERIDAN COUNTY, NEBRASKA, APPELLANT.

149 N. W. 2d 527

Filed March 31, 1967. No. 36497.

Sheriffs and Constables. Under the statutory provision for a commission on money received and disbursed by the sheriff on order of sale, redemption precludes the commission. § 33-117 (1), R. S. Supp., 1965.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

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

Edmund Hollstein, for appellee Muinch.

L. E. Mitchell, for appellees Hull et al.

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

SMITH, J.

A statute providing for poundage on judicial sales by sheriffs is ambiguous concerning redemption. In this foreclosure suit the sheriff held a sale of land, but the mortgagors subsequently redeemed the property. On motion to retax costs the district court disallowed

the claim to the commission, and the sheriff has appealed.

The statute reads in part: "The * * * (sheriff) shall charge and collect * * * commission on all money received and disbursed by him on * * * order of sale, * * *; Provided, in all cases where no money is received or disbursed by him no percentage shall be allowed; * * *." § 33-117 (1), R. S. Supp., 1965.

At the sale the sheriff struck off the property to joint bidders who had not been parties to the suit. A commission of $3,215.80, which represented the statutory percentage, was entered in the itemization of costs attached to the return of order of sale. To redeem the land the mortgagors subsequently paid the commission under protest, and the sheriff then refunded the purchase money to the bidders.

The effect of redemption upon a claim to the statutory commission was mentioned in O'Shea v. Kavanaugh, 65 Neb. 639, 91 N. W. 578. A decree of foreclosure had been rendered, but the parties had subsequently agreed to a private sale. The sheriff held no sale, and no money passed through his hands. He charged and collected, however, a commission on the judgment. It was said: "It is claimed * * * that the sheriff is entitled to a commission on * * * the money represented by the decree in all respects as though a sale of the premises had been made by the sheriff, and the money received and disbursed by him. We are unable to accept this view. There can be no doubt that it was the purpose of the legislature * * * to pay the sheriff for the services performed, and also to compensate him for whatever risk there might be in collecting, keeping and disbursing the money. * * * the sheriff would not be entitled to commission upon money which never came into his hands. * * * had the money been lost, and an action brought against the sheriff and his bondsmen for the money, there could have been no recovery, for the reason that the money never was paid to the sheriff or disbursed by

him * * *. If he had never received it * * *, and he and his bondsmen were not liable for it, then it seems clear that he would not be entitled to a commission for its collection and disbursement. * * * in Fiedeldey v. Diserens, 26 Ohio St., 312, the supreme court of Ohio said: 'Where land is sold on execution or order of sale, and before confirmation * * *, the judgment * * * is satisfied * * *, and the sale is thereupon set aside, the officer making the sale is not entitled to "poundage" on the purchase money * * *, the same not being "money actually made and paid," within the meaning of the statute.' "

Analysis in terms of risk to the sheriff would be profitless, because a different policy of compensation has been in effect for years. Salary is not payable out of fees; the sheriff must pay all commissions to the county treasurer for credit to the general fund of the county. See, §§ 23-1114 and 33-117 (2), R. S. Supp., 1965. The sheriff still runs a risk, but he does not receive additional compensation for it. See, §§ 25-1531 and 25-2144, R. R. S. 1943. The statutory rate on the purchase money is 6 percent of the first $400, 4 percent of the next $600, and 2 percent of the balance. The legislative purpose itself is ambiguous.

Present policy concerning compensation of sheriffs and the quoted reference to Ohio law adequately indicate that redemption precludes the commission. The judgment is affirmed.

AFFIRMED.

CITY OF ORD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. WAYNE L. ZLOMKE ET AL., APPELLEES.
149 N. W. 2d 747

Filed April 7, 1967. No. 36418.

1. **Municipal Corporations: Streets.** A plat of dedication is a mere

offer to dedicate which must be accepted before the dedication is complete.

2. ———: ———. When the recorded plat of an addition to a village or city of the second class, or some definite part thereof, has been duly vacated pursuant to sections 17-419 and 17-420, R. R. S. 1943, by a written instrument declaring the same to be vacated, duly executed and recorded as the statute provides, and none of the streets laid out or described in such plat is a public highway accepted or used for public purposes, and no rights nor privileges of other proprietors in said plat are abridged or destroyed, such vacation of the plat divests all public rights in the streets shown therein; and such vacated streets are the property of the proprietors of the adjoining lots, as set out in section 17-421, R. R. S. 1943.

3. ———: ———. Only those property owners whose property abuts upon the vacated part of the street need join in the deed of vacation.

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

Leonard W. Cronk, for appellant.

Wagoner & Grimminger, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

The persons named as defendants herein, claiming to be all of the owners of abutting lots, filed deeds vacating the plat of parts of the streets and alleys in Hillside Addition to the City of Ord. The city thereafter filed a petition in the district court for Valley County, in which it prayed for the cancellation of those deeds of vacation and that title to the streets and alleys described be quieted in the city. After trial, the district court found that plaintiff had failed to prove the allegations of its petition and that the vacation deeds are valid. We affirm the judgment.

A careful review of the record reveals little, if any, conflict as to the facts. The plat of Hillside Addition to Ord was filed for record on October 8, 1884. Defend-

ants Zlomke own all of Block 12, the west half of Lot 4, all of Lots 5 and 6, and the south half of Lots 7 and 8, less the north 25 feet thereof, in Block 11. Defendants Cicmanec own Lot 3 and the east one-half of Lot 4, in Block 11. Defendants Parkos own the land outside the city limits immediately south of P Street, which is platted, running east and west just south of Blocks 11 and 12. In the east one-half of Block 11, Lots 1 and 2 are owned by the Donald Stewarts; and the north half of Lots 7 and 8, just south thereof, is owned by the Herbert Rickards. Neither the Stewarts nor the Rickards appeared in the case. Lots 1, 2, 3, and 4 make up the north half of Block 11, and Lots 5, 6, 7, and 8 make up the south half. Blocks 11 and 12 are in the extreme southwest corner of the city. Twenty-third Street, which is open, runs north and south just west of Block 12, its southern terminus being the city boundary line near the southwest corner of Block 12. O Street, which is open, runs from the west city limit eastward along the north side of Blocks 11 and 12. Twenty-second Street is platted north and south between Blocks 11 and 12 but between these blocks has never been opened. Twenty-first Street runs from the north past the east side of Block 11 and ends at the city boundary near the southeast corner of Block 11. The east and west alleys in Blocks 11 and 12 have never been opened. P Street, as platted, runs east and west along the city boundary south of Blocks 11 and 12, but has never been opened west of Twenty-first Street. The defendants vacated the plat as to: (1) The east-west alley of Block 12; (2) the portion of Twenty-second Street between Blocks 11 and 12; (3) the portion of the east-west alley lying between Lots 3 and 4 on the north and Lots 5 and 6 on the south in Block 11; and (4) the portion of P Street lying south of Blocks 11 and 12.

The City of Ord never passed an ordinance accepting the plat of Hillside Addition as required by section 17-567, subsection (6), R. R. S. 1943, which reads as follows:

"No street or alley which shall hereafter be dedicated to public use, by the proprietor of ground in any city or village, shall be deemed a public street or alley, or be under the use or control of the city council or board of trustees, unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purpose."

The city could have accepted the plat by using the areas platted for streets and alleys for public purposes. Village of Maxwell v. Booth, 161 Neb. 300, 73 N. W. 2d 177. It did not do so.

The defendants proceeded under the provisions of the following statutes:

"Any such plat may be vacated by the proprietors thereof, at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged or proved and recorded in the same office with the plat to be vacated. The execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat. In cases where any lots have been sold, the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid." § 17-419, R. R. S. 1943.

"Any part of a plat may be vacated under the provisions and subject to the conditions of section 17-419; Provided, such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat. Nothing contained in this section shall authorize the closing or obstructing of any public highways laid out according to law." § 17-420, R. R. S. 1943.

All of the owners of lots abutting on the areas vacated have joined in the vacation deeds. This court held in the case of Village of Hay Springs v. Hay Springs Commercial Co., 131 Neb. 170, 267 N. W. 398, that only those

property owners whose property abuts on the vacated part of the street need join in the deed of vacation.

Section 17-420, R. R. S. 1943, provides that nothing contained in this section shall authorize the closing or obstructing of any public highways laid out according to law. This court held in Village of Hay Springs v. Hay Springs Commercial Co., *supra,* that this provision does not apply to nominal streets designated on plats which were never used as public highways. The evidence shows clearly that the parts of streets and alleys vacated by defendants were never opened nor used for the public as streets, nor for any other public purpose. The entire area had been enclosed by fences and used for pasture or the growing of crops.

Plaintiff contended that because the Stewarts and the Rickards did not join in the vacation deeds, they were not effective. The evidence shows that only the portion of the alley in the west half of Block 11 was vacated and that these persons owned lots abutting on the alley in the east half of the block. The only use ever made of this alley for public purposes was the placing of a pole, about one-fourth of the way through the alley from the east, in connection with electric service to the Stewarts and Rickards. The alley was never used for travel through the block. If this alley were to be opened for travel clear to the west end of the block, one using it could go nowhere except to the end of the alley. The east end can still be used for access to their properties by the Stewarts and Rickards if they desire to have it opened and improved. They also both have access from Twenty-first Street and access along the north side of the lots owned by the Rickards may be had from O Street.

The case of Johnson v. Buhman, 98 Neb. 236, 152 N. W. 403, involved the vacation of an area platted in 1886 as an alley, extending east and west through the middle of a block in Leigh, Nebraska, which joined an alley which was open extending north and south through the

block. The owners of the lots abutting on both sides of this half-block alley had used it as part of their properties until 1909. In June 1909, the village authorities, by the performance of certain acts not described in the opinion, attempted to take possession of and assume control over the strip, which attempt was resisted by the owners. In April 1910, the owners duly executed and filed a deed vacating the plat so far as it affected this half-block alley. Thereafter, until December 1910, the village desisted from further activities on this strip and the owners restored their fences around it and repaired the injury which the village had done. On the last-named date the village forcibly removed the fences. The owners then filed suit to enjoin the village; and in its answer the village admitted that if not restrained it would continue its attempt to open the strip of ground as an alley. After trial the court found that the strip, although platted as an alley, had never been used by the public, nor had any act been done by the village authorities indicating an intention to open the same as an alley; and that even though the owners had not enclosed and used the strip, the vacation deeds would have been effectual to vest ownership and control in those seeking the injunction. The court pointed out also that every proprietor in the block had access to his property from streets around the block and the north and south alley. Injunction was granted. The situation is much the same here. No proprietor is being deprived of access; the owners on both sides of the half-block alley signed the vacation deeds; and no public use has ever been made of the part of the alley closed. Even if the Stewarts and Rickards were here complaining, which they are not, the defendants were duly authorized by law to do just what they did.

The plaintiff also claimed to own a 12-foot strip from its reservoir out in the country south of the city to and connecting with the east 12 feet of P Street just south of Block 11, and that as proprietor it was a necessary

signer of any deed vacating P Street. The only proof of ownership offered is the record of the minutes of a meeting of the board of trustees of the Village of Ord on September 12, 1887, purporting to accept the appraisement of a board of assessment of damages and injuries in condemning the described strip, and authorizing the chairman to tender to John G. C. Haddle the sum of $250 for said damages and injuries. There was a complete absence of proof of acceptance of any such tender or of any condemnation proceedings, or of a deed, or of any other proof of ownership. There is testimony that a pipeline for water extends from the reservoir, which pipeline is thought to be in this 12-foot strip, and which apparently crosses P Street close to its junction with Twenty-first Street. This strip is outside the city. It has never been used for travel to or from the reservoir. Had there been a showing of proprietorship, the defendants could have vacated the part of P Street west of this 12-foot strip. The district court, in its judgment, granted the city an easement of 12 feet over the east end of P Street vacated for purposes of maintenance and service of that portion of pipeline, if any, situated across the vacated street. This easement is construed by this court to grant the use of the east 12 feet of the vacated portion of P Street for access to its reservoir if the city is able to, and elects to, open this route south from P Street. The defendants did not appeal from this provision and it gives the city all it could have anticipated receiving.

The district court correctly determined the issues in favor of the defendants and its judgment should be affirmed.

AFFIRMED.

DAVID L. DIKE, BY VELMA M. DIKE, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. EDWARD BETZ ET AL., APPELLEES.
149 N. W. 2d 750

Filed April 7, 1967. No. 36468.

1. **Workmen's Compensation.** To entitle a claimant under the Workmen's Compensation Act to recover, he must establish by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.
2. **Trial: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony.
3. **Trial: Witnesses.** This court will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of the others.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

James L. Macken, for appellant.

Robert M. Harris and Atkins, Ferguson & Nichols, for appellees.

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

NEWTON, J.

This is an appeal in a workmen's compensation case. Appellant, David L. Dike, was an employee of appellee, Edward Betz, and alleges that during construction of a concrete liner in an irrigation ditch on the farm owned and operated by appellees, Lester Klein and Vernetta Klein, his wife, he sustained injuries. Appellee Betz did not carry workmen's compensation insurance. On hearing before a single judge of the Workmen's Compensation Court, an award was made to appellant. On rehearing before the full court and on appeal to the district court, his claim was denied, such action being based specifically on lack of credibility of appellant and his witnesses.

Appellant originally claimed and alleged that his accident occurred on May 5, 1964, but subsequently amended his petition and now claims that the accident occurred on May 1, 1964. He testified that he was employed by appellee Betz and on May 1, 1964, they were engaged in constructing a concrete liner in an irrigation ditch on the farm of appellees Klein. Immediately following the pouring of the cement and while other employees, to wit, Donald Dike, Donald Betz, Gerald Kling, and Leonard Reizenstein, were forming and finishing the cement, appellant was pulling laths off the 2 by 4's used in making forms, which 2 by 4's had already been removed from the ditch, and while carrying a bundle of the laths so removed from the 2 by 4's, he stumbled over a chunk of hardpan and, in falling, his knees struck some 2 by 4's, inflicting injuries to both knees. He sustained momentary pain but continued to work. He had had no trouble with his knees before, but that night they swelled badly. Appellee Betz was absent at the time the accident was said to have occurred, but returned soon thereafter and appellant informed him he had hurt his knee. He does not recall if he went to work the next day, but does recall that he worked for Betz later. A few days later, appellant does not recall how many, while working on a job east of town, his knees bothered him, he went and sat in a truck, and Betz came along, asked what was the matter, and was told he hurt his knees. A few days later, while Betz, appellant, and the entire crew were having lunch in a building where Betz stored his equipment, he again had a conversation with Betz, who told him to work a couple of days until he, Betz, got his insurance in effect, and "he would say that it happened while he had the insurance," also, to wait a few days before going to a doctor. He did wait a few days, then called on Mrs. Betz, wife of appellee, who sent him to Cecil Hall's office, after which he went to Dr. Wiley's office and was examined either by Dr. Wiley or Dr. Barnwell. He does not recall

which one nor does he recall how much pay he received, but thought his take-home pay was around $50 a week. Appellant worked a few days later on for Betz, but had trouble with his knees and does not recall whether he quit or was laid off. He did some work for other parties afterwards, but his knees bothered him and would swell when he did heavy work. Commencing in January 1965, surgery was performed on his knees.

On cross-examination, appellant stated that the ditch being constructed was a step-off ditch. The form sections constructed of 20 foot 2 by 4's were also 20 feet long. The ditch was 150 to 200 feet long and they were still pouring cement at one end when the accident occurred. He was asked, "And you were taking the forms off—as I understood you, they were already off?" to which he replied, "We were stripping them up at the end where I was and I was taking off the lath from them." He further testified: "Q You weren't taking the forms off of the ditch, itself? A Yes, sir, you have to take the forms off and then take the laths off, too. Q I think you missed my question. Were you doing that, personally? A I helped do it, yes, sir. Q Who else was working up there? A I don't recall now. Q Was there anybody else working up there? A I don't recall. Q Was it normal that more than one person worked to remove the forms? A Yes, sir. Q If there had been anybody else working they would have been right in your immediate area, wouldn't they? A I guess so." He further stated that he couldn't remember but believed the forms he fell on had already been removed from the ditch. The forms were lying on both sides of the ditch, all the way down beside him. There would be four or five laths nailed to a single form. He was picking up the lath and had both hands full as he walked along picking them up, dropped some, and started to reach down when he stumbled and fell. He does not recall what time of day the accident happened, or whether it was morning or afternoon, nor the day of

the week. It was on May 7, 1964, when he went to the doctor. He had originally thought the accident happened on May 5 because he figured he had waited a couple of days before going to the doctor, but concluded the accident occurred on May 1 when he learned the only cement poured at Lester Klein's was on April 30 and May 1. He also testified that his conversation with Mr. Betz in the truck was several days after the accident and that the second conversation with Mr. Betz, when at lunch east of town, was several days after the first conversation. It was at the time of this last conversation that Mr. Betz told him to work a couple of days until his insurance went into effect and then to go to a doctor. He reiterated that he went to the doctor on May 7; the accident happened on May 1; the two conversations were several days apart; and he waited some more days before going to the doctor. All the other employees were at the other end of the ditch when the accident happened.

He met with his attorney, his brother, Gerald Kling, and another person one night at a filling station in which his brother had an interest and at that time, Gerald Kling was informed that the accident happened May 1. Subsequent to the accident, he worked for a Mr. Bernhardt who was in the same business as Mr. Betz, for the L. W. Cox Lumber Company shoveling coal, and for Merced Blanco driving a truck. He quit school in the ninth grade, denies having a conversation with Donald Betz at the end of May or the first part of June 1964, wherein he stated he had hurt one knee, but was going to try to get both fixed, denies telling Gerald Kling that "one kneecap snapped," but admits having said something about "my kneecap popping." He further denies telling Gerald Kling that he was going "to try to collect for both knees" and does not recall telling Cecil Hall how the accident happened.

Appellant's brother, Donald Dike, testified he did not see the accident, was 100 or 150 feet away, but heard

appellant say something, looked around, and saw him holding his knees. He inquired what happened and was told by appellant he had fallen and hurt his knees while pulling laths off 2 by 4's. This witness talked to appellee Betz at least 2 weeks later in a pick-up truck, told him of the accident, and was informed that appellant would have to wait until Betz got his insurance in effect at which time appellant could work a couple of days, say he got hurt then, and go to a doctor. This witness also stated that he and Gerald Kling talked to appellant about the accident the same day it occurred, but later, on cross-examination, stated that this conversation occurred 6 months later and says that he had a second conversation with Mr. Betz when Gerald Kling was present, which occurred before the witness' conversation with Betz in the pick-up, but does not recall when or where, but both conversations occurred after appellant had gone to a doctor.

Velma M. Dike, mother of appellant, stated that one night during the first part of May 1964, while appellant was working with Betz, his knees swelled and became very painful.

Dr. Calvin M. Oba stated that he examined appellant on August 27, 1964, took X-rays and also examined X-ray films taken by Drs. Wiley and Barnwell. Appellant informed the doctor he had slipped on gravel and in falling, his knees had struck a 2 by 4 across a trenching ditch. He found loose bodies within the knee joint in both knees, with a softening and damage to the cartilage underneath the kneecap. In his opinion, appellant had had loose bodies in the knee prior to the accident which condition was aggravated by the injury. He recommended surgery which was performed on both knees. In his opinion, appellant would have had difficulty sooner or later with his knees, with or without trauma.

Dr. Gerhard W. Schmitz testified that he examined appellant January 21, 1966, and found that he suffered

a partial disability of 12 percent in the right leg and 12½ percent in the other.

Cecil Hall testified that he handled insurance for appellee Betz and on the occasion when appellant called at his office, appellant told him he had fallen on a "stake" and injured his "knee." On cross-examination, this witness admitted that Betz had threatened to sue him because he had not had insurance coverage.

Appellee Betz testified that appellant reported for work on May 2, the day following the alleged injury, but no work was done because of weather conditions. Thereafter appellant worked for him 10½ hours on May 6, 6½ hours on the 16th, 11 hours on the 18th, 10½ hours on the 19th, and 11 hours on the 20th. He further stated that on a ditching job such as the one on the farm of appellees Klein, the job was always completed before the forms were removed and that everyone helped on the removal of the forms. Appellant did not talk with him on May 1, 1964, about any injury nor was there any conversation about such an injury at any later date when his entire crew was present. He did not at any time tell appellant or his brother to wait on seeing a doctor until he obtained insurance, but on May 6 he first learned from Donald Dike that appellant had leg trouble, and said for appellant to go to the house, pick up a slip from his wife, and go to Dr. Campbell.

Donald Betz, son of appellee Betz, testified that a few days after the accident is alleged to have occurred, appellant told him, "I hurt this one knee out on the job and, I would like to see if I can't get the other one fixed" and appellant said he was going to try and get it fixed. The witness denied that there was ever any conversation at a point east of Scottsbluff in the presence of the entire crew at which appellee Betz told appellant to work a couple of days until his insurance went into effect before going to a doctor.

Gerald Kling testified to a conversation with appellant in which appellant said he "jerked a form and

thought he hurt his kneecap on one leg." He does not recall a conversation during the lunch hour, east of Scottsbluff, wherein appellee Betz told appellant to work a couple of days until his insurance went into effect before going to a doctor, but on cross-examination, admitted that he had testified at a previous hearing that Betz said appellant was to hold off going to a doctor until Betz could get his insurance into effect. Witness insisted he could not recall such a conversation.

The foregoing is the substance of evidence introduced at the trial of this cause and the basis for the finding by the full Workmen's Compensation Court that it could not give credence to appellant's claim, notwithstanding that one member of the court had previously found in favor of appellant. The appellant's recollection was very hazy regarding all elements surrounding the injury, including the date and time of day, except as to the occurrence of the accident, and even in this respect his statements are contradictory. He testified that he tripped over a chunk of "hardpan" and struck both knees, informed Dr. Oba that he "slipped on gravel," and informed Cecil Hall not that he fell on a 2 by 4, but that one knee struck a "stake." No one saw the alleged accident occur, appellant continued to work, and reported for work the following day. The only verification that an accident occurred is that of his brother who said he saw him holding his knees and that appellant stated he had hurt them. Appellant denies that he had ever had any difficulty with his knees, yet the undisputed evidence of his own doctor is to the effect that he had "loose bodies" in both knees which sooner or later would cause trouble with or without an injury. Appellant further claims that he fell and injured both knees, yet two witnesses say that sometime after the accident he claimed to have injured only one knee. Due to the uncertainties and indefiniteness in appellant's testimony and to his contradictory statements made to others, it does not appear with any reasonable degree of certainty

that appellant sustained an injury at the time and place alleged or, in fact, any injury at all. The Workmen's Compensation Court found in dismissing appellant's petition that appellant had failed to establish his claim by a preponderance of the evidence.

A workmen's compensation cause on an appeal to this court is considered de novo upon the record, but where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of the others. See Wengler v. Grosshans Lumber Co., 173 Neb. 839, 115 N. W. 2d 415. To entitle the plaintiff to recover, he must sustain the burden of proof by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. The rule of liberal construction is not applicable to the evidence offered to support a workmen's compensation claim. Where the matter was tried on rehearing and appeal was taken to the district court, and where the evidence is irreconcilable and in direct conflict, the court will consider 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. See Runyons v. Mavis & Sons, Inc., 177 Neb. 179, 128 N. W. 2d 596. Where testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be sustained. Such an award cannot be based on possibility or speculation, and, if an inference favorable to the claimant can only be reached on such basis, he cannot recover. See Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808.

Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testi-

mony. See Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

In this case, the evidence of appellant was so indefinite, uncertain, and subject to so many contradictions that the trial court found its credibility to be destroyed and denied an award to appellant. The record in this case does not establish appellant's claim with sufficient clarity and certainty to enable this court to disregard the finding of the trial court that appellant failed to establish his cause by a preponderance of the evidence and the finding of the trial court should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES K. NEWMAN, APPELLANT.

150 N. W. 2d 113

Filed April 7, 1967. No. 36486.

1. **Criminal Law.** A defendant who has taken an appeal from his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure.
2. **Constitutional Law: Criminal Law.** Acts occurring outside the courtroom and without the knowledge of the court or jury cannot be considered to have prejudiced the defendant's constitutional right to a fair trial.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Francis D. Lee and Richard L. Goos, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

NEWTON, J.

This is a proceeding under what is generally referred

to as the Post Conviction Act. James K. Newman was convicted of second degree murder and sentenced to life imprisonment. Subsequent to his conviction, he filed a motion to vacate and set aside such conviction in the district court for Holt County. He criticizes the instructions given at his trial; alleges error in that the court failed to give certain instructions and in the rejection of certain testimony; but appears to rely in this proceeding primarily on an allegation that the county attorney, having originally investigated the case and conducted the preliminary hearing, then found that he would have to be a witness at the trial in the district court, withdrew from the case, and had a special prosecutor appointed. During the course of the trial, the county attorney sat at the prosecutor's table with the special prosecutor. Defendant Newman indicates his belief that the county attorney assisted the special prosecutor by conferring with witnesses and performing other acts outside the courtroom. He does not set forth any facts to verify such statements, but proceeds on the theory that such conduct should be investigated and that if it occurred, such conduct resulted in prejudice to the defendant of such nature as to deprive him of his constitutional right to a fair trial.

Subsequent to his conviction, defendant appealed the case to this court and at that time urged similar objections relating to instructions given and not given, to the rejection of evidence, and to the limited participation of the county attorney in the trial. These matters were all fully considered at the former hearing had in this case. See State v. Newman, 179 Neb. 746, 140 N. W. 2d 406. A motion to set aside a judgment of conviction cannot serve the purpose of an appeal to secure a review of the conviction. See State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765. A defendant who has taken an appeal from his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure.

Regarding the insistence of defendant on an investigation into acts of the county attorney outside the courtroom, outside the presence of the jury, and without its knowledge, it is clear that such acts, if any such occurred, could not, in any manner, have prejudiced the court or the jury and consequently could not have deprived defendant of a fair trial.

The trial court was correct in ruling that the files and records in this case disclosed that there was no basis for or substance to the allegations made in defendant's motion and that he was not entitled to an evidentiary hearing thereon. No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF WILLIAM R. GRAY, FOR A WRIT OF HABEAS CORPUS.

WILLIAM R. GRAY, APPELLANT, V. NADINE MAE HARTMAN ET AL., APPELLEES.

150 N. W. 2d 120

Filed April 14, 1967. No. 36331.

1. **Trial: Appeal and Error.** In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a judgment in a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.
2. **Habeas Corpus: Infants.** After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court.
3. ———: ———. The desires of a child of 15 years of age should be given important, though not controlling, consideration in the determination as to whom her custody should be awarded.
4. **Parent and Child.** The natural rights of a parent to the custody of his child are not absolute. They must yield to the best

interests of the child where the preferential right has been forfeited.

5. ———. The indifference of a parent for a child's welfare over a long period of time, and the willingness that others should assume the obligations of parents in his stead, with the development of the ties and affections that naturally flow therefrom, is a material element in determining whether a parent has forfeited or abandoned his natural right to the custody of the child.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Frost, Meyers & Farnham and Frederick J. Stoker, for appellant.

White, Lipp, Simon & Powers, for appellees.

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

HASTINGS, District Judge.

This is a suit in habeas corpus brought by William R. Gray, the father of Susan Marie Gray, against Nadine Mae Hartman, the half sister of the child, to obtain custody of the child. The trial court entered an order dismissing and denying the writ, and remanding custody and possession of the minor child to the half sister, and the father has appealed.

The evidence shows that plaintiff and Mae Hartman were married on August 24, 1948. On August 21, 1950, the child, Susan Marie Gray, was born to this union. In November of 1950, William R. Gray filed a petition for divorce on which a decree of divorce from William R. Gray was granted on March 12, 1951, to Mae Hartman Gray on her cross-petition. The decree awarded custody of the minor child to Mae Hartman, with visitation rights granted to the father, who was ordered to pay child support of $50 per month.

At the time of the marriage, Mae Hartman Gray continued to live at the home of her parents at 3021 Read Street, Omaha, Nebraska, where she remained with

Susan and two daughters by a previous marriage, Judy and Nadine, the defendant herein, until Mae's death on March 19, 1965. On March 30, 1965, Nadine made application to modify the original divorce decree to place the minor child's custody in her. On April 5, 1965, plaintiff filed his petition for a writ of habeas corpus, the denial of which by the trial court, on the 25th day of February 1966, is the subject of this appeal.

It is obvious from an examination of the record, that plaintiff's only standing to make his claim is the fact that he is the child's natural father and sole surviving parent. Although Mae Hartman admittedly always resided at 3021 Read Street, plaintiff never claimed that as his residence, stated that he would stay there but 1 or 2 days a month, and that at sometime 9 months or more prior to the filing of the divorce petition, he separated from his wife and moved in with his parents. This would place the date of separation 6 months or more before the minor child was born.

Plaintiff testified that for about the first 5 years of Susan's life, he attempted to exercise his visitation rights, but after being rebuffed on several occasions, "I got tired of the whole thing * * * I just got sick of the whole thing," and for the next 10 years or so, never saw the child, or sent her birthday or Christmas cards or gifts, or inquired as to her well-being. This seems incredible in view of the fact that plaintiff, on August 16, 1952, married the present Mrs. Gray, and lived in her father's house at 7161 North Thirtieth Street, approximately one block east and a block and a half north of Mae Hartman's house, until July of 1964. It is of interest to note that plaintiff had been previously married to a Betty Finch in 1937, to whom a son, Clifford, was born in "about 1940," and whose care and custody was with plaintiff's parents from then on through his marriage to Mae Hartman, and his present marriage. In response to a question as to whether plaintiff ever discussed with his parents that he should take on the responsi-

bility of rearing Clifford, he replied that: "We discussed it but he was in such good hands I felt best just to continue on."

The defendant is a half sister of Susans, being one of the two children born to Mae Hartman by a previous marriage which ended in the death of the children's father in about 1942. At the time this hearing commenced in April of 1965, she was 25 years old. She was working as a teller at the Omaha National Bank, earning $340 per month, and had been so employed for 7 years. With the exception of the utilities which her grandmother paid out of a small railroad pension, and the $50 monthly child support, Nadine had been the sole support of the family during the last several years.

Since September 16, 1964, Nadine had been engaged to Airman 2nd Class Richard Schwierking, whom she met the previous January, and married in the summer of 1965. Mr. Schwierking has been closely in touch with the family situation during the course of Mae's terminal illness, has developed a close bond with Susan, and he and Nadine have discussed and made what appear to be well-considered plans for Susan's welfare.

Although the minor child gave no formal sworn testimony, she was interviewed in chambers by the trial judge and the attorneys for both parties in each other's presence, and expressed a desire to remain in the custody of the defendant, and a definite wish not to go with the plaintiff.

On January 24, 1966, further proceedings were had which involved a conference among the parties, their attorneys, Mrs. Maxwell from the county welfare office, and the trial judge, and again on February 4, 1966, a conference was held by the trial judge with the minor child-and Mrs. Maxwell. Although there was no agreement by the attorneys for plaintiff that this latter conference be held, the court's intent to have the same was announced in advance, and no objection appears of record. It is this latter conference particularly that

plaintiff attacks as erroneous because it permitted the court to take into account improper investigations conducted by the court and not submitted to either litigant or included in the record.

However, the result of this "extra judicial" hearing served only to amplify the minor child's previously stated desire to remain with the defendant, and her opposition to going with the plaintiff, after trial attempts in that direction, and confirmed the anticipation of a fit and proper atmosphere and intelligent arrangement in the defendant's home. What confirms an opinion already reached as the result of competent evidence cannot be said to have induced it. As stated in Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537: "In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision, considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidense was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment."

The record affirmatively stresses the fitness of defendant to have custody of the minor child. Since early 1964, during the illness of the child's mother, past her death in March of 1965, defendant has had Susan's care and custody. The fact that Susan appears to be bright, healthy, happy, and well adjusted indicates that her best welfare lies in a continuation of that custody. "After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court." State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615. This is further amplified by Susan's very strong wishes to remain with her half sister. "This court said in State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677: 'While the wishes of a child under the age of fourteen years are not controlling where in conflict with what the courts regard as the

minor's best interest, still "Even though an infant is under the age of fourteen, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian." 28 C. J. 1077.' In the present case Carolyn, Sue and Danny were respectively 14 and 15 years of age at the time of trial. It is true that the foregoing statement was made in a guardianship matter but the question involved was fitness to be custodian of children." Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40.

Plaintiff cites the case of Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, wherein this court, by a four to three decision, held: "Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. * * * The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right."

There is no question of moral unfitness on the part of the plaintiff. He has made his support payments, as ordered by the court, although in 1952 he made application to have them cut in two because of an alleged change in financial circumstances and deprivation of visitation rights, and has informed the court that he does not intend to continue support of the child if not granted her custody. Therefore, he has not been guilty of abandonment in the classic sense. However, proper concern for the welfare of a child encompasses something more than dutiful adherence to a court's order as to financial support. It includes love and friendship; presence and care; and concern and interest, all of which have been withhold by the plaintiff. As stated in Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445, "Children are not chattels," and to entitle one to parental

rights he must show something more than mere indicia of title. Plaintiff contends that he had the welfare of the child at heart when over a decade ago, he discontinued all efforts at visitation so as not to upset her, and deprived her of his parental concern during her formative years. He appears now as an absolute stranger to her, and under the guise of concern for her welfare, has no hesitation in seeking to uproot her at an age when she is approaching the threshold of adulthood. An effective abandonment or forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time. State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615. The plaintiff here has defaulted in his responsibilities, and has forfeited what rights he had. When this has occurred, a consideration of the child's best interests are paramount. Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543.

We conclude, for the reasons hereinbefore set forth, that the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

DOROTHY L. COOK ET AL., APPELLEES, V. W. IRVING WILKIE, APPELLANT.

150 N. W. 2d 124

Filed April 14, 1967. No. 36347.

1. **Accounting: Equity.** A proper basis for equity jurisdiction is a suit for an accounting, where both parties asked for a determination of the amount due resulting from a large number of interrelating transactions taking place over a period of many years and where both parties asked for equitable relief.
2. ———: ———. The basis for equity jurisdiction in an action for an accounting is the inadequacy of the remedy at law.
3. **Appeal and Error.** When evidence on material questions of fact is in irreconcilable conflict this court will consider the fact that the trial court observed the witnesses and their man-

ner of testifying and must have accepted one version of the facts rather than the opposite.

4. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and ordinarily such a construction should be enforced.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Kartman & Fike, for appellant.

Kennedy, Holland, DeLacy & Svoboda and Thomas R. Burke, for appellees.

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

WHITE, C. J.

Stripped of nonessentials, this is an accounting suit to determine the date of payment and the amounts due plaintiff, Dorothy L. Cook, from her father, W. Irving Wilkie, as the result of an agreement between the parties in 1953. Defendant is in the real estate business and was interested in the purchase and sale of a tract of land near Seventy-second and Dodge Streets in Omaha, Nebraska. Plaintiff's version of the original agreement in 1953 was that the defendant was to make a gift to her of $10,000; purchase a one-fourth interest with this money in plaintiff's name in the partnership of Pirruccello and Company, which was buying the property at Seventy-second and Dodge Streets; she was to deliver the profits from the sales of the property to the defendant; and from the proceeds, less expenses and income tax, defendant would set up a trust fund payable to plaintiff when her daughter Susan reached the age of 18 in April 1965. Defendant's version, which we will analyze later, was to the effect that he was to keep the profits and use them as he saw fit; that after the payment of expenses and income taxes, the profits from the sales were to be loaned to him; and that they were re-

payable to the plaintiff as a claim against his estate after his death, except for a modification of the agreement made after 1953 by which he was to pay for the college expenses of plaintiff's two children.

The evidence is undisputed that the gift of $10,000 was made and a gift tax return filed; that with this money the one-fourth interest in plaintiff's name in the partnership was purchased; that the property at Seventy-second and Dodge Streets was purchased; that the property was sold in various sales over about a 10-year period; that plaintiff signed all of the necessary and numerous papers and documents for completing these transactions; and that she delivered the proceeds to the defendant. Each year the defendant would have the income tax return prepared for the plaintiff and her husband and would pay the necessary taxes to plaintiff.

The trial court found in favor of the plaintiff and entered judgment in the sum of $99,285.91 against the defendant. We affirm the judgment.

Although the theories discussed in the briefs are numerous and the record is voluminous, the issues in this case under the pleadings, admissions of fact, and the stipulation entered herein, are narrow. In his answer, defendant admits the gift of $10,000, admits the ownership of the plaintiff in the partnership and property involved, admits receiving and owing money to plaintiff, and specifically alleges, "* * * that after deducting such sums received by plaintiff directly or for her benefit there remains a balance due plaintiff, subject to the terms of the agreement between plaintiff and defendant as hereinafter set forth, of $86,501.39."

By his answer, defendant further alleges he was to have the use of these funds during his life and that they were payable to plaintiff on his death, with the exception of the payment of college expenses of plaintiff's two children. Defendant affirmatively asks that, "a determination be made of the sums due plaintiff, Dorothy L. Cook; that said sums be decreed payable to

Dorothy L. Cook upon the death of defendant, * * *."

In the defendant's answer to requests for admissions he specifically admits, "that the amount due Dorothy L. Cook from W. Irving Wilkie is $100,549.44," except that said amount is subject to correction by virtue of small amounts retained by Dorothy L. Cook, the exact amount of which were not known by the defendant at the time.

The issue as to the amounts due the plaintiff was further narrowed by a stipulation filed in the case and introduced in evidence by agreement at the trial. This stipulation, prepared by certified public accountants, showed a total of $114,361.67 distributed to defendant by plaintiff, subject to credits for income taxes and expenses in the sum of $25,325.76 paid by the defendant, leaving a net sum due plaintiff of $89,035.91. This stipulation specifically recited that it left unresolved three items of $250, $10,000, and $2,534.52, which will be discussed later in this opinion.

Much of the discussion in the briefs is devoted to the nature of the relationship between the plaintiff and defendant as to whether there was a trust or a debtor-creditor relationship. As we see it, in light of the pleadings, undisputed facts, and admissions of the defendant, it is unnecessary to resolve this question. As defendant states in his brief, the recovery of the money itself is not the true issue, "but rather the time for payment of the money due is the real substance of this action, and basically, that is all that was tried."

The trial court, having heard and seen the witnesses, resolved this question in favor of the plaintiff, and we agree. Plaintiff's testimony, starting with the inception of the transactions involved, was clear, direct, and unequivocal to the effect that these sums were payable to her when her daughter Susan reached the age of 18 in April 1965. For a period of about 10 years, until April 1963, plaintiff unreservedly signed all papers and documents and endorsed all checks necessary to implement

the agreement. Her testimony, undenied by the defendant, is that defendant repudiated the entire agreement after getting her to sign the income tax return on April 15, 1963, which repudiation precipitated this litigation. The defendant's testimony on the other hand, is evasive, uncertain, and contradictory. He admits the gift of $10,000, the purchase for the plaintiff of the partnership interest in the property, and that he had no interest in the property and that it belonged entirely to her. But he testified that originally in 1953 the profits or proceeds, after the payment of income taxes and expenses, were to be given to him. His exact testimony is, "that the balance of the money I was to get and I was to keep." He further testified: "Q. Was she to ever receive that money in any way? A. There was positive understanding to that and there was no understanding that she was to receive any of it in the original agreement." Later, on direct examination, he testified: "She wasn't to give me the money out of the proceeds of the sales of these properties, she was to loan me the money, that was the original agreement, and if she would have given it to me, we would have been in a difficult situation again as to the filing of the gift returns, and it wasn't to be my money, it was a loan." It is significant that in this testimony there is no mention of the money being payable on defendant's death. Then, in the last part of the defendant's direct examination, in response to specific questions, he did testify that she was to receive the profits on his death and that was part of the original agreement. Earlier in his direct testimony defendant testified: "Q. Was anything said (in the original agreement) as to when it would be - when she would receive any of these profits? A. No, never a word was said about it. The first eight years, I think, about, of the Pirruccello and Company - in fact, almost the entire Pirrucello and Company length of tenure, not a word was ever said." On cross-examination, defendant testified that he did have a conversation with plaintiff as to

when the money was going to be repaid to her. Brevity forbids a further analysis of defendant's testimony. Suffice to say that underlying these transactions and testimony was an investigation by the Internal Revenue Service as to the bona fides of this gift and these "loans" by the plaintiff to the defendant. Much of the evidence is devoted to the details of the showings made by plaintiff and defendant in this respect. At no time was it ever represented that these sums were due and payable on defendant's death. In fact, the contrary appears.

Very persuasive, if not conclusive, proof that the defendant intended that this money be repaid to the plaintiff during her lifetime, as she testified, is the execution of a series of notes to the plaintiff beginning with the inception of the agreement in 1953. Exhibit 42 is a series of four notes, signed by defendant payable to plaintiff in 6 months at 6 percent interest, in sums varying from $2,166.67 on September 1, 1953, to one for $29,046.52 executed on May 6, 1957. Another note, exhibit 43, dated March 16, 1955, in the sum of $28,796.52 and payable in 3 years appears. This note states, "Renew $25,046.52 plus $3,750.00 new loan." On November 1, 1957, defendant executed another renewal note for $28,266.52 plus a $10,000 loan, in the total sum of $38,266.52, exhibit 44, at 6 percent interest due in 2 years. In none of these notes was there any mention that the obligation was payable on defendant's death.

If any doubt remained, it was cleared up in an affidavit prepared by defendant, through his attorney, to be signed by the plaintiff and then furnished to the Internal Revenue Service. This affidavit listed the notes referred to above and stated, "as listed below and that such amounts and advances are considered by me as legal and bona fide loans to my father which are legally and actually due me as follows." This affidavit was presented to the plaintiff in May 1964 for her signature which was refused. At the same time, however, plaintiff was tendered a note in the sum of $37,079.52, exhibit 26, which

was payable within 10 days of the death of the defendant, which she refused to accept. All of this occurred over 1 year after the defendant had repudiated the entire agreement on April 16, 1963, in a conversation with the plaintiff which is undenied by defendant. Except for the uncertain and equivocal testimony of the defendant, the note of May 1964 is the first appearance of any evidence of intention that the obligation was payable on death. Underlying this case in the background are investigations and representations made to the Internal Revenue Service. In the investigation of 1958-1959, and at other times, it was necessary to establish that the plaintiff was the bona fide owner of this property and that the proceeds of the sales belonged to her. It appears conclusively that the defendant arranged, engineered, and manipulated all of the transactions involved. He was caught in the dilemma of desiring to use and control the property and proceeds as against the necessity to demonstrate divestiture for tax purposes. Interwoven was the desire of the defendant to do something for his daughter and her two children. He concedes that he agreed to finance the college education of the two children.

As defendant states, the basic question here is when the money is due. Both parties ask for a determination of that issue. In determining that question we are aided by the rule that when evidence on material questions of fact is in irreconcilable conflict this court will 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. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc., 179 Neb. 858, 140 N. W. 2d 813; Hawthorne v. Cassidy, 179 Neb. 245, 137 N. W. 2d 818. Applying this rule, and considering all of the evidence, much of it undisputed, we come to the conclusion that plaintiff has sustained her burden of proof, and that the sums of money, less expenses, delivered to the defendant were repayable

to her when her daughter reached the age of 18 in April 1965.

We proceed to a determination of the amount due. This is not in dispute except for three items. The stipulation shows that $114,361.67 was received by the defendant from the plaintiff, and credits (income taxes and expenses, etc.) in the sum of $25,325.76, with a balance due of $89,035.91. Defendant claims a further credit of $2,534.52, being the balance due on a note from B. H. Buras to the plaintiff. The evidence shows that this was a personal obligation of Buras to plaintiff and defendant admitted never having received it. It was entirely outside the transactions in issue. He had no interest in this transaction whatsoever. He claims that this amount was erroneously charged to him in the accounting contained in the signed stipulation. But the defendant could not identify this item as being charged to him in the list of items recited in the stipulation, nor can we find any reference to it, directly or indirectly, in the stipulation. There is no evidence to support this claim for credit and we disallow it, as the trial court did. The next two items, totaling $10,250 were added to the $89,035.91 figure in the stipulation, by the trial court, to reach the final judgment in the sum of $99,-285.91. The defendant does not deny receiving and owing this additional sum, but contends it involves the sums due from the sale of land not related to the profits arising out of the partnership transaction at issue in this case, and therefore not recoverable in this action. We do not so construe the pleadings in this case. Taken as a whole, the petition alleges numerous transactions stretching over the years, by which plaintiff delivered to defendant various sums pursuant to the original agreement in 1953. She alleges that she is without exact knowledge of these transactions and asks that she "have and recover of the defendant all monies to which she is entitled * * *." The two items involved are "loans" of $250 and $10,000 received by defendant

on May 6, 1957, and November 1, 1957, respectively. In exhibit 29, defendant lists these two items in his own handwriting along with numerous other items admittedly part of the transaction, and shows a balance due of $37,079.52. In exhibit 24, an affidavit of the defendant dated May 12, 1964, he again includes these items as chargeable to him along with other sums admittedly due the plaintiff as the result of this transaction. And defendant testified that exhibit 24 was a correct statement of the transaction at that time, May 12, 1964. There is no doubt that the defendant received this money and that he listed and considered it as a part of the agreement and transactions with the plaintiff. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and ordinarily such a construction should be enforced. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. These sums do not appear in the stipulation because it covered only the audit of the partnerships involved, Pirruccello and Company and Buras and Cook, its successor. The trial court was correct in including these sums in the total judgment entered in the sum of $99,285.91.

Finally defendant contends, since a money judgment only was entered, that he was entitled to a jury trial. This is a suit for an accounting. Both parties ask for a determination of the amount due resulting from a large number of interrelated transactions that took place over many years. Both ask for equitable relief. This is a proper basis for equity jurisdiction because of the inadequacy of the remedy at law. See, Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N. W. 2d 845; Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396. There is no merit to this contention.

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

AFFIRMED.

RESERVE INSURANCE COMPANY, APPELLEE, V. ALEX AGUILERA, APPELLEE, IMPLEADED WITH THE FIRST NATIONAL BANK OF OMAHA, APPELLANT, ELIZABETH BOSKIND, INTERVENER-APELLANT.

150 N. W. 2d 114

Filed April 14, 1967. No. 36374.

1. **Automobiles: Insurance.** The first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future.
2. **Insurance.** The general rule is that under a simple loss payable clause in a policy of insurance issued to a mortgagor and payable to the mortgagee, as his interest may appear, the mortgagee is simply an appointee of the insurance fund whose right of recovery is no greater than the right of the mortgagor.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Gaines, Spittler, Neely, Otis & Moore, for appellant.

Shrout, Hanley, Nestle & Caporale, for intervener-appellant.

Eisenstatt, Morrison, Higgins, Miller, Kinnaman & Morrison, for appellee Reserve Ins. Co.

Levin & Gitnick, for appellee Aguilera.

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

MCCOWN, J.

This is an action by plaintiff Reserve Insurance Company for a declaratory judgment seeking to void an automobile insurance policy ab initio on the ground that the policy was obtained by fraud, misrepresentation, and concealment of facts in the application for the policy. The defendant, Alex Aguilera, was the applicant and named insured; the defendant, First National Bank of Omaha, was a loss payee; and the intervener, Elizabeth

Boskind, was the widow of Harry L. Boskind, who was killed in an accident while the automobile involved was being driven by the defendant Aguilera. The district court entered judgment in favor of the plaintiff and against the defendants and intervener. The defendant bank and intervener have appealed.

The defendant Aguilera went to the Gem Insurance Center in Omaha in October 1963, and talked with an agent of plaintiff about automobile insurance. He returned on October 22, 1963, and completed and signed an application for a preferred driver's automobile insurance policy in the presence of the agent and paid the premium. The agent issued a receipt for the premium, and sent the application to the home office in Chicago where the application was reviewed and the policy issued on October 24, 1963. On the same day, an investigative report was requested and a motor vehicle driving record of Aguilera was ordered. On the 26th day of October 1963, an automobile driven by the defendant Aguilera was involved in an accident that resulted in the death of Harry L. Boskind. On November 13, 1963, the investigative report was completed and returned to the plaintiff. On November 14, 1963, plaintiff notified defendant Aguilera by letter that his policy was voided as of inception, and the premium was returned with the notice. The First National Bank of Omaha filed proof of loss December 17, 1963, and was advised to the same effect on December 20, 1963. Subsequently this action was brought by the plaintiff.

The particular representations relied on refer to Item 8, statements 2 and 3 of the application, later made a part of the policy. These are: "2. Had driver's license revoked or suspended? 3. Been convicted of a felony or misdemeanor?" Aguilera answered each question in the negative by a penned mark. The answers were admittedly false. The driver's license of Aguilera had been suspended in 1955, and he had been convicted of a felony. Aguilera contends that he made a full and complete

disclosure of both matters to the agent, but the agent advised him that the matters could be disregarded. The agent denies that a full or any disclosure was made of the facts relating to questions 2 and 3. The agent's denial of disclosure by the insured is strengthened by the "binder" provision immediately following item 8. That provision reads in part as follows: "Binder does not apply if answer to questions * * * 2, 3 * * * above is Yes * * *." Aguilera admitted that he asked the agent what that meant and was told that if any of that was not true, he wouldn't be covered.

The intervener contends that under the requirements laid down in Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400, the evidence did not establish that the misrepresentations were made knowingly by the insured with the intent to deceive. We deem it necessary only to note that the district court found that Aguilera had full knowledge of the falsity of the statements material to the risk, and that the statements were made with the intent to deceive. The record supports the findings.

The appellants also contend that under the provisions of section 60-538, R. R. S. 1943, which is a part of the Motor Vehicle Safety Responsibility Act, the liability of the insurer under the policy became absolute when the accident occurred. The first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future. Cohen v. Metropolitan Casualty Ins. Co., 233 App. Div. 340, 252 N. Y. Supp. 841; Buzzone v. Hartford Accident & Indemnity Co., 23 N. J. 447, 129 A. 2d 561; Hoosier Casualty Co. of Indianapolis, Indiana v. Fox (Iowa), 102 F. Supp. 214; Aetna Casualty & Surety Co. v. Simpson, 228 Ark. 157, 306 S. W. 2d 117.

There was no union mortgage clause here providing that a loss payable to the loss payee should not be

avoided by any act or neglect by the mortgagor or owner of the property. The bank contends that the ordinary loss payable clause here ought to be interpreted as a union mortgage clause or, in any event, the bank should be entitled to the 10-day notice of cancellation provided for in the policy.

It is tacitly conceded that the general rule is that under a simple loss payable clause in a policy of insurance issued to a mortgagor and payable to the mortgagee, as his interest may appear, the mortgagee is simply an appointee of the insurance fund whose right of recovery is no greater than the right of the mortgagor. Exceptions to the rule seem to be limited to situations in which the mortgagee paid for the insurance or procured the policy or where, under the circumstances, an independent contractual relationship exists between the mortgagee and the insurer. See State Credit Co. v. National Old Line Life Ins. Co., 122 Neb. 345, 240 N. W. 426.

Courts are ordinarily reluctant to hold that third persons have higher rights under a policy of insurance than the insured in the absence of express contractual or statutory provisions. A balancing of equities as between the insurance company and the bank adds little. Either, or both, could have protected themselves. It is undisputed that the insurance policy here was procured and paid for solely by Aguilera. We see no compelling reason to vest in the bank a right superior to that of Aguilera himself, nor to give validity in favor of the bank to an instrument void as between the parties. See Hoosier Casualty Co. of Indianapolis, Indiana v. Fox, *supra*.

The district court's finding that the loss payee had no greater rights under the policy than Aguilera was correct. The judgment is affirmed.

AFFIRMED.

T. H. LUNDT, DOING BUSINESS AS T. H. LUNDT CONSTRUCTION COMPANY, APPELLEE, V. PARSONS CONSTRUCTION COMPANY, A CORPORATION, APPELLANT.

150 N. W. 2d 108

Filed April 14, 1967. No. 36392.

1. **Contracts: Damages.** Where a contract for the construction of a sewer provides that the contractor shall protect existing property and repair damage resulting from the construction, a property owner whose property is damaged as a result of the construction may sue the contractor directly on the contract to recover his damages.
2. **Trial.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
3. **Damages.** Testimony as to the rental value of construction equipment is admissible as evidence of the reasonable value of the use of such equipment.
4. **Interest.** 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.
5. **Trial.** A verdict which is excessive because of the erroneous inclusion of interest may be cured by remittitur if the amount is subject to exact determination.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded with directions.

Cassem, Tierney, Adams & Henatsch, for appellant.

Foulks, Wall & Wintroub, for appellee.

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

BOSLAUGH, J.

This is an action for damages brought by T. H. Lundt, doing business as the T. H. Lundt Construction Company, against the Parsons Construction Company. The jury returned a verdict for the plaintiff in the amount of $43,000. The defendant's motion for new trial was overruled and it has appealed.

Commencing November 12, 1959, and pursuant to a contract with the city of Omaha, Nebraska, the plaintiff constructed a storm sewer along the north edge of Dodge Street from about Seventy-second Street west to Little Papillion Creek. On April 19, 1960, the defendant commenced construction of a sanitary sewer along the north edge of Dodge Street. From about Seventy-seventh Street to the Little Papillion Creek, the sanitary sewer was parallel to and just north of the plaintiff's storm sewer. On that date the plaintiff's project was complete and its request for payment had been approved by the supervising engineer, but the storm sewer had not been accepted by the city of Omaha.

During the construction of the sanitary sewer by the defendant, damage to the plaintiff's storm sewer was observed. After the construction of the sanitary sewer had been completed, the city required the plaintiff to reconstruct that part of the storm sewer which was adjacent to the sanitary sewer constructed by the defendant. This action was brought to recover the expense incurred by the plaintiff in the reconstruction of the storm sewer.

The petition alleged two causes of action. The first cause of action alleged that the defendant had negligently damaged the storm sewer. The second cause of action alleged that the defendant's contract required it to protect all property along its line of construction and pay for all damage by it, and that the plaintiff was entitled to recover its damages under these provisions of the contract. The trial court submitted both causes of action to the jury. The defendant contends this was error and that the plaintiff has no right of recovery upon the theory of contract.

The defendant's contract in this case provided that it was required to use care in excavating for the sewer and that all utilities encountered must be protected at its expense. The contract further provided: "The Contractor shall, at his own expense, protect by false work,

braces, shoring or other effective means, all buildings, walls, fences and other property along his line of work or affected directly by his work, against damage and shall repair or repay the injured owners for such damage. * * * The Contractor shall exercise care to protect from injury all water pipes, existing sanitary sewer pipes, gas mains, telephone cables, electric cables, service pipes, and other fixtures which may be encountered during the progress of the work. Water and other service pipes and fixtures, if damaged, shall be repaired by the Contractor without additional compensation. * * * The Contractor shall personally check and verify utility information on plans. Protection is Contractor's responsibility."

The plaintiff's theory is that he is a third-party beneficiary entitled to sue the defendant directly for the damage to the storm sewer caused during the construction of the sanitary sewer. This court has recognized the right of a materialman to sue directly on a bond guaranteeing the performance of a construction contract where the contractor has promised to pay for all materials. Fowler v. Doran, 123 Neb. 37, 241 N. W. 759. In other jurisdictions a similar rule has been applied to property owners where the contractor promises to protect existing utilities and other property and agrees to repair damage caused by the construction. Oman Constr. Co. v. Tennessee Central Ry. Co., 212 Tenn. 556, 370 S. W. 2d 563; Baker v. S. A. Healy Co., 302 Ill. App. 634, 24 N. E. 2d 228; Louisville Gas & Electric Co. v. Longley & Co., 250 Ky. 324, 62 S. W. 2d 1036; Keefer v. Lombardi, 376 Pa. 367, 102 A. 2d 695; Bator v. Ford Motor Co., 269 Mich. 648, 257 N. W. 906; La Mourea v. Rhude, 209 Minn. 53, 295 N. W. 304; Freigy v. Gargaro Co., Inc., 223 Ind. 342, 60 N. E. 2d 288; Hayunga Holding Corp. v. Rodgers & Hagerty, Inc., 82 N. Y. S. 2d 340; Coley v. Cohen, 258 App. Div. 292, 17 N. Y. S. 2d 101; New York Pneumatic Service Co. v. P. T. Cox Contracting Co., 187 App. Div. 1, 175 N. Y. S. 153. See, also, Restate-

ment, Contracts, § 145, p. 173; 43 Am. Jur., Public Works and Contracts, § 82, p. 825; 17A C. J. S., Contracts, § 519 (7), p. 993. Although there is a division of authority on the question, we believe the better rule permits a property owner to sue the contractor directly where the contract contains a promise to protect existing property and repair damage resulting from the construction.

The defendant further contends that the evidence was not sufficient to support a finding that the damage to the storm sewer was caused by the defendant's construction of the sanitary sewer. In determining this question, the evidence must be considered in the light most favorable to the plaintiff. McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579.

The storm sewer was constructed of corrugated metal pipe 54 inches in diameter. The pipe itself was fabricated from 12-gauge metal which is approximately 1/10 of an inch in thickness. The pipe is relatively flexible and requires lateral support from the soil or fill adjacent to it to maintain its circular shape and support the loads above it.

The sanitary sewer constructed by the defendant was located from 3 to 5 feet north of the storm sewer. The defendant excavated its trench by using a machine described as a "three-quarter yard backhoe." This machine was supported upon crawler tracks which were positioned upon either side of the trench. The jury could find that one track of this machine operated on the newly replaced fill above the storm sewer and exerted a heavy downward pressure as the trench for the sanitary sewer was dug. The jury could also find that the lateral support along the north side of the storm sewer was removed by the excavation of the trench for the sanitary sewer.

The construction of the storm sewer was supervised by the Leo A. Daly Company. Robert K. Dickerson, an engineer and a vice president of the Daly firm, testified

that in his opinion the failure of the storm sewer was caused by the removal of the fill from one side of the pipe and subjecting the fill above the pipe to heavy loads from construction equipment.

The construction of the sanitary sewer was supervised by Henningson, Durham & Richardson, Inc. Paul R. Ombruni, an engineer employed by the Henningson firm, designed the sanitary sewer constructed by the defendant. Ombruni testified that it was his opinion that the failure of the storm sewer was caused by the removal of lateral support in excavating for the sanitary sewer. Ombruni also testified that he felt that the defendant did not do a workmanlike job in protecting the storm sewer and that some other protection was necessary to protect the storm sewer during construction of the sanitary sewer.

Exhibit 29 is a copy of a letter from Henningson, Durham & Richardson, signed by Ombruni, dated June 17, 1960, and addressed to the sewer engineer of the city of Omaha. It is a five-page report concerning the damage to the storm sewer. After reviewing the circumstances involved, the report makes this comment: "Results of the inspection on the storm sewer previously described, after Parsons Construction Co. had completed work on the sanitary sewer, indicates failure of the storm sewer at numerous points. It is felt that these failures did occur during the construction of the sanitary outfall sewer. Heavy construction equipment was moving over the top of the storm sewer and at the same time the sewer's lateral support was removed by the open excavation for the sanitary sewer. The combination of these conditions were factors leading to the storm sewer failure."

The defendant produced evidence which contradicted that of the plaintiff and tended to establish its theory that the failure of the storm sewer was due to faulty construction. The effect of the defendant's evidence was to present a question for the jury. The defendant's

contention that the evidence was not sufficient to support the finding for the plaintiff cannot be sustained.

The plaintiff claimed damages of $35,164.70. The claim included material, labor, and equipment used in reconstructing the storm sewer, 15 percent of those amounts for overhead and similar charges, and $4,740 for engineering supervision. The defendant claims that the rental value of the equipment used, the 15 percent added for overhead, and the engineering supervision were not proper items of damage.

Much of the equipment used in reconstructing the storm sewer was owned by the plaintiff. In an effort to establish the value of the use of this equipment, the plaintiff proved, over objection, the rental value of the equipment. The defendant contends that the proper measure would have been the depreciation in the value of the equipment for the time involved. As pointed out by the plaintiff, the use of depreciation figures alone would not take into account maintenance and repair costs and other similar expenses connected with the ownership and use of the equipment. We think the trial court was correct in allowing the plaintiff to prove the rental value of the equipment as evidence of the value of its use in reconstructing the storm sewer.

In regard to the 15 percent added for overhead, the plaintiff's evidence established that the usual method of computing overhead and supervisory costs on a construction project was to add 15 percent to the total cost of the project and that 15 percent was a fair and reasonable rate. The evidence established that this was a proper item of damage.

The engineering supervision expense represented the charges made by the Daly company in connection with its supervision of the reconstruction of the storm sewer. Although the Daly company was employed by the city of Omaha, the statement for its services was sent to the plaintiff. This expense was a part of the cost of reconstruction of the storm sewer. We think it was a proper

item of damage as between the parties to this action.

By instruction No. 31, the trial court directed the jury to include interest in any verdict for the plaintiff on the second cause of action. The defendant contends that this instruction was erroneous. Since the verdict exceeded the amount of damages claimed by the plaintiff, it is apparent that the verdict included interest.

We have recently stated the rule concerning the right to recover interest on an unliquidated claim in a contract action. In Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913, we held that 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. See, also, Colvin v. John Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900; National Fire Ins. Co. of Hartford v. Evertson, 157 Neb. 540, 60 N. W. 2d 638; School Dist. No. 65R v. Universal Surety Co., 178 Neb. 746, 135 N. W. 2d 232.

In this case there was a reasonable controversy as to the plaintiff's right to recover damages as well as to the amount thereof. The amount of the damages depended upon a determination of the reasonable value of material, labor, use of equipment, overhead expenses, and professional services. The claim was unliquidated and incapable of being fixed by computation. Although the defendant did not produce evidence as to the reasonable value of the various items of damage, the amount of the plaintiff's damages, under the circumstances in this case, remained a question of fact.

Instruction No. 31 advised the jury to include interest in a verdict on the second cause of action at the rate of 6 percent per annum from the date of the breach of the contract. The petition prayed for interest from February 25, 1961, the date on which reconstruction of the storm sewer was substantially complete. The verdict was returned on March 2, 1966. If February 25, 1961, is

assumed to be the date of the breach of the contract, the verdict included interest in the amount of $9,944.29. We determine that the verdict is excessive by that amount.

A verdict which is excessive because of the erroneous inclusion of interest may be cured by remittitur if the amount is subject to exact determination. Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165.

The judgment is reversed and the cause is remanded to the district court with directions to enter a judgment for the plaintiff in the amount of $33,055.71 if a remittitur in the amount of $9,944.29 is filed in the office of the clerk of that court within 10 days after the receipt of the mandate of this court. In the event a remittitur is not filed, a new trial as to the issue of damages shall be granted.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN WATKINS GOODWIN, JR., APPELLANT.

150 N. W. 2d 135

Filed April 14, 1967. No. 36396.

Narcotics: Criminal Law. In the Narcotic Drug Act the section exempting transactions by a transferor of medicinal preparations has no application to the section that prohibits attempted obtainment by misrepresentation. §§ 28-458 and 28-467, R. R. S. 1943.

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

Shrout, Hanley, Nestle & Caporale, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

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

SMITH, J.

Defendant was convicted of attempting to obtain a narcotic drug, Robitussin A. C. containing codeine, by misrepresentation. The question is whether an exemption of certain medicinal preparations is applicable to the statute under which he was convicted.

Robitussin A. C. is a commercial cough syrup which may be purchased without a prescription, but the transaction must be recorded. The evidence is undisputed that an ounce of syrup contained less than one grain of codeine phosphate.

The Narcotic Drug Act provides in part: "Except as otherwise specifically provided therein, this act shall not apply to the following cases: Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce * * * not more than one grain of codeine or any of its salts * * *. The exemption authorized by this section shall be subject to the following conditions: * * * (2) that * * * (the) preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this act." § 28-458, R. R. S. 1943.

"(1) No person shall * * * attempt to obtain a narcotic drug * * * (a) by * * * misrepresentation * * *. * * *

"(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 28-458, in the same way as they apply to transactions under all other sections." § 28-467, R. R. S. 1943.

Read literally or otherwise, the statutory language does not except transferees of the medicinal preparations from the penal section. See, People v. Bowlby, 51 Ill. App. 2d 51, 201 N. E. 2d 136; Merritt v. State, 245 Ind. 362, 198 N. E. 2d 867; State v. Sanchez, 13 Utah 2d 307, 373 P. 2d 695; but see, Stone v. Sacks (Ohio App.) 191 N. E. 2d 185; Folenius v. Eckle, 109 Ohio App. 152, 164 N. E. 2d 458. Considering the purposes of the Nar-

cotic Drug Act, we should not associate the fraudulent buyer with the good-faith seller under the exemption provision. The case of defendant is no different. The exemption being inapplicable, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS O'KELLY, APPELLANT.

150 N. W. 2d 117

Filed April 14, 1967. No. 36475.

1. **Criminal Law.** Circumstances surrounding a confession of a defendant held in police custody may be consistent with his right to counsel in spite of absence of his lawyer and prior filing of the information.
2. ———. Unless a miscarriage of justice is shown, the post conviction remedy is not available for reconsideration of questions that were determined by this court.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

John C. Gourlay, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

SMITH, J.

This post conviction motion was overruled without an evidentiary hearing, and defendant has appealed. The court had admitted in evidence at the criminal trial defendant's confession made after filing of the information and in absence of counsel. The principal ground of the motion is violation of defendant's right to counsel at the time of the confession.

Defense counsel had been appointed August 9, 1962. Eleven days later, while police were holding defendant in custody, Dr. James M. Reinhardt visited him. The

two men were alone 1½ hours, and the outcome was the confession in question. Reinhardt was a professor of criminology at the University of Nebraska and a doctor of philosophy in anthropology, social psychology, and criminology. He had testified in many cases. The confession was elicited by an expert.

Reinhardt testified: "* * * I am interested in motivations and intent of murders, and this is an interesting case and I wanted to talk to him so I simply went over. I was not sent by anyone. * * * I told him what my business was and why I wanted to see him and told him I was not sent there by anyone from the prosecutor's office or by the defense, and that I was interested in knowing how such a murder could happen, and I wanted him to talk with me frankly and freely. And I did not know at that time that I would testify in this case at all. I did not know that I would be subpoenaed in this case. * * * I assumed he had murdered the girl * * *, at least my conversation rested upon that assumption."

The jury heard defendant also. He testified to his belief that defense counsel had enlisted Reinhardt: "* * * he told me who he was and that he was a criminologist at the University and he was interested in such things and he told me he had talked to you (defense counsel) and that he was up here to see what he could find out about this. The impression I got from him was that he was working with you. * * * he asked me to tell him the same thing I told the police that night. * * * I knew he had talked to my lawyer and he told me he was wanting to hear the story to see if he could try and help in any way."

The record is said to show a violation of the right to counsel. The argument assumes that Reinhardt intended to further only his private interests. The assumption excludes deliberate overreaching, which was condemned in Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246. Wrongness of an act, however, is judged also by its end. A statement may be

inadmissible because of defects in a procedure that the state has authorized. See McLeod v. Ohio, 381 U. S. 356, 85 S. Ct. 1556, 14 L. Ed. 2d 682. Although statements to civilian classification interns were part of a worthy routine of a jail, the exclusionary rule was applied in Harrison v. United States, 359 F. 2d 214, and Killough v. United States, 336 F. 2d 929. One constant in all those cases is official influence upon defendants.

In the present case the relationship between police action and confession is tenuous. Nothing implies that Reinhardt's purpose was known or that anyone, except the two men, might reasonably anticipate the advantage to the prosecution. A violation of the constitutional right has not been shown. Compare Evalt v. United States, 359 F. 2d 534, with Stowers v. United States, 351 F. 2d 301.

Defendant's request for an evidentiary hearing is now bottomed upon the hope that participation by the State will be proved. The request comes too late. The post conviction motion in that respect was limited to the fact that the State had permitted the meeting. No one says that the district court denied defendant reasonable use of discovery techniques. The candid argument of counsel negates any inadvertence or technicality in pleading. Denial of an evidentiary hearing was correct. See § 29-3001, R. S. Supp., 1965.

Defendant also raises issues that were determined on direct appeal in State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211 (Nov. 1, 1963), certiorari denied 376 U. S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (March 23, 1964). There is no ground for relief. Unless a miscarriage of justice is shown, the post conviction remedy is not available for consideration of questions that were determined by this court. State v. Sheldon, *ante* p. 360, 148 N. W. 2d 301. See, also, American Bar Association, Standards Relating to Post-Conviction Remedies, Tent. Dr., § 6.1, p. 85.

The judgment is affirmed.

AFFIRMED.

HAROLD SHEETS, ADMINISTRATOR OF THE ESTATE OF SHIRLA SHEETS, DECEASED, APPELLANT, V. ORVILLE DAVENPORT, ADMINISTRATOR OF THE ESTATE OF DANIEL DAVENPORT, DECEASED, APPELLEE.

OTIS LARREAU, ADMINISTRATOR OF THE ESTATE OF SONJIA LARREAU, DECEASED, APPELLANT, V. ORVILLE DAVENPORT, ADMINISTRATOR OF THE ESTATE OF DANIEL DAVENPORT, DECEASED, APPELLEE.

150 N. W. 2d 224

Filed April 21, 1967. No. 36294.

1. **Death: Evidence.** The presumption in an action for wrongful death, that a decedent exercised reasonable care for his own safety, has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
2. **Trial: Evidence.** A jury should not be instructed about the presumption that a decedent exercised reasonable care.
3. **Pleading: Evidence.** In proving an admission against interest contained in a pleading, a party is only required to offer so much of the pleading as is necessary to show the admission.
4. **Evidence.** Admissions are words or conduct of a party opponent offered as evidence against him.
5. ———. An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission.
6. **Trial: Evidence.** Where an admission against interest contained in a pleading is introduced in evidence, the party affected may offer other parts of his pleadings which tend to explain or destroy the admission, but this right does not entitle him to offer self-serving statements unrelated to the subject matter of the admission.
7. **Evidence: Appeal and Error.** Error cannot be predicated upon the admission of evidence to which the complaining party has stipulated.
8. **Trial.** A jury should not be informed or instructed about a covenant not to sue.
9. ———. A court is required to enter an order reflecting the record of the proceedings of a pretrial conference, and in the absence of objections promptly made thereto, such order becomes final and controls the subsequent course of the action, unless modified to prevent manifest injustice.

10. **Witnesses: Evidence.** One who has no direct legal interest in the result of a civil action wherein the adverse party is the representative of a deceased person, is not incompetent to testify as a witness under the dead man's statute. § 25-1202, R. R. S. 1943.
11. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, it is required that appropriate reference be made to the specific evidence against which the complaint is made.
12. **Automobiles: Evidence.** Evidence of tire marks at the scene of an accident is admissible in a civil action where sufficient foundation is laid by showing the condition of the road was the same as at the time of the accident, had not been changed by weather or traffic, and marks are identified as made by vehicles involved in the accident.
13. ———: ———. Skilled or expert opinion is not admissible as to the point of impact or collision in a motor vehicle collision case.
14. ———: ———. In the absence of proof of skid marks made by vehicles involved in a collision and sufficient foundational evidence, expert testimony of speed of the vehicles is inadmissible.
15. **Trial.** In its discretion, a trial court may permit counsel in jury summation to use schematic drawings not in evidence by way of illustration or elucidation of evidence, provided the jury is sufficiently informed and understands they are employed for such purposes and are not to be regarded as evidence.
16. **Trial: Appeal and Error.** Where the trial court refuses to permit counsel in jury summation to use schematic drawings and such drawings are not preserved in the record, no reviewable error is presented.

Appeal from the district court for Custer County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

Miles N. Lee and Smith Brothers, for appellants.

Roy E. Blixt and Murphy, Pederson & Piccolo, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and POLLOCK, District Judge.

POLLOCK, District Judge.

The administrator of the estate of Shirla Sheets, deceased, and the administrator of the estate of Sonjia

Larreau, deceased, filed claims against the estate of Daniel Davenport, deceased, to recover for the alleged wrongful deaths of their decedents. They sought recovery under the guest statute, claiming gross negligence on the part of Davenport in the operation of a motor vehicle. The actions were consolidated in the county court, we assume by agreement. Upon ultimate trial in the district court, the jury returned verdicts for the defendant and plaintiffs appeal.

Plaintiffs' decedents were two of three guest passengers riding in a 1955 Ford automobile operated by defendant's decedent on October 25, 1960, when it was in a motor vehicle collision and all four occupants, young people ranging in age from 15 to 20 years, were killed. The automobile was proceeding in a southerly direction on Highway No. 40, and collided with a 1959 Ford truck proceeding in a northerly direction on said highway. The collision occurred near the northwest corner of a bridge across the South Loup River a short distance south of the village of Arnold, Nebraska. The bridge was 66 feet long and 23 feet wide between the caps. It was a straight truck with dual wheels in the rear, 21 feet long, operated by William J. Halouska, owned by his employer James C. Davenport, a brother of Daniel Davenport, and was loaded with 250 bushels of milo.

The plaintiffs contend that the trial court erred by giving to the jury instruction No. 11a, as follows: "There is a presumption that a driver of an automobile who was killed in an accident used due care in the operation of his automobile and operated it lawfully. The instinct of self preservation gives rise to such presumption."

The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety is without evidentiary value. Aeschleman v. Haschenburger Co., 127 Neb. 207, 254 N. W. 899. It is a mere rule of law which obtains only in the absence of direct or circumstantial evidence justifying an inference as to whether or not the deceased used due care, and

when evidence is produced, the presumption disappears and is not entitled to be considered. O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

In the instant case the presumption did not arise because there was direct evidence sufficient to justify an inference of negligence on the part of Daniel Davenport. Truck driver Halouska, an eyewitness, testified that Davenport was driving on his "wrong side" of the roadway and at a rate of speed of approximately 85 miles per hour. It is true that he made some conflicting statements, but the weight of his evidence is for the jury, and regardless of the weight to be given thereto the presumption could not obtain.

The effect of the instruction was to permit the jury to determine whether the evidence of negligence outweighed the presumption to the contrary. We regard this to be prejudicial error requiring reversal of the judgment and a new trial.

Further, we think the presumption should not be mentioned in jury instructions. It is a rule of law to be applied by the court. It has no probative force. Jurors are triers of the facts, and should only be permitted to determine the weight of the evidence, and not whether the presumption has been overcome by evidence.

Where evidence of negligence on the part of a deceased is sufficient to present a jury question, the presumption does not arise and the jury should not be instructed about it. Where the evidence is insufficient to present a jury question, the jury is not instructed.

Plaintiffs urge error in the reception in evidence of pleadings and covenants not to sue offered by the defendant as admissions against interest. The pleadings included four claims of petition length filed by plaintiffs in the county court to recover against the estate of Daniel Davenport for alleged wrongful death, six petitions filed on appeal in the district court, and two petitions they filed in the district court in separate actions against the operator and the owner of the truck.

In the actions last mentioned, plaintiffs claimed that the accident was proximately caused by negligence of Halouska in the operation of the truck. In the other actions plaintiffs claimed that negligence of Halouska combined and concurred with gross negligence of Daniel Davenport in proximately causing the accident, then plaintiffs amended herein, after making settlements with the owner and operator of the truck, and claimed that gross negligence of Daniel Davenport was the sole proximate cause of the accident. Prayers and allegations about damages were generally deleted.

It is obvious that but a very small part of the pleadings introduced in evidence bear the remotest relationship to any alleged admission against interest. In some cases it has been said that pleadings may be received in evidence as admissions against interest. However, it is more accurate to say that admissions in pleadings may be so received. Pleadings are only admissible so far as they relate to the subject matter of the admission.

In proving an admission against interest in a pleading, a party is only required to offer so much of the pleading as is necessary to show the admission. Sibert v. Hostick, 91 Neb. 255, 135 N. W. 1054. Only that part of a pleading which is material to the subject matter of the admission is admissible in evidence.

What may be received as admissions? Admissions are words and conduct of a party opponent offered as evidence against him. An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission. McNealy v. Illinois Central R.R. Co., 43 Ill. App. 2d 460, 193 N. E. 2d 879.

Our decisions tend to discourage the unrestricted offering in evidence of pleadings. For example, where a party to an action introduces in evidence the pleading of an adversary without any reservation or limitation, all statements offered, whether they are favorable to or against the pleader, are to be taken together, and the

party offering them is bound thereby where not rebutted or controverted by other evidence. Warnick v. Warnick, 107 Neb. 747, 187 N. W. 51.

A party against whom an admission in his pleading has been offered in evidence is privileged to offer other parts of the same pleading or of his other pleadings which tend to explain or destroy the admission, but this right does not permit him to introduce self-serving statements which are unrelated to the admission. Southall v. Columbia Nat. Bank (Mo. App.), 244 S. W. 2d 577.

After defendant introduced pleadings, the plaintiffs had their turn. Over objections of defendant, the court received in evidence various county court pleadings, including notices of appeal, praecipes for transcript, and orders approving settlements and authorizing execution of covenants not to sue. We have not been favored with any explanation of how any of these exhibits served in the least in weakening or destroying the effect of any admission.

The covenants not to sue which defendant introduced in evidence were executed by plaintiffs in connection with their settlements of the separate actions against William J. Halouska and James C. Davenport, each in consideration of $3,000. After some deletion, they were received in evidence, and like the pleadings received, were read to the jury, including the amounts of the settlements. At defendant's request, the court instructed the jury, in substance, that it should not take into account the amounts paid plaintiffs by James C. Davenport or William J. Halouska or other persons, but should make any award to them in the full amount of the damages, and the court would subtract such sums of money as plaintiffs had received in settlements.

A jury should not be informed or instructed about the fact of settlements or the amounts thereof. Issues relating thereto are solely for the court.

However, plaintiffs cannot complain of the reception in evidence of pleadings or covenants not to sue offered by

defendant. Plaintiffs joined in stipulating for their admission "in keeping with the directions of the Court made at a pretrial conference and in further keeping with the directions and the order of the Court as made and entered before impaneling of the jury and commencing of the trial of the cause." Several days later, near the end of the trial, plaintiffs sought to object, but this was too late.

Where a plaintiff, in the presence of the jury, joins in stipulating for the admission in evidence of covenants not to sue and for the disclosure of the amounts of settlements, he cannot urge error. A late case involving covenants not to sue cites an earlier case involving them. See Neill v. McGinn, 175 Neb. 369, 122 N. W. 2d 65, where this court said: "In Tankersley v. Lincoln Traction Co., 101 Neb. 578, 163 N. W. 850, this court held that it was prejudicial error to allow counsel for the plaintiff to state to the jury the fact of such settlements and the amounts thereof. * * * Where the plaintiff joins with the defendant in a stipulation made in open court before the jury which discloses the existence of a settlement with a joint tort-feasor and the amount thereof, plaintiff cannot on appeal urge error * * *."

The reception in evidence of the pleadings and covenants not to sue, chiefly by stipulation, resulted in placing before the jury some twenty exhibits of a few pages each, thereby encumbering the record, extending the trial, and, we have no doubt, in confusing the jury. We think that a trial court, under such circumstances, regardless of stipulations, would be justified in rejecting the proffered exhibits until there had been a separation of the grain from the chaff.

There is reference in the bill of exceptions to a pretrial conference although there was no order reflecting the proceedings thereof as required by the rules of this court providing as follows: "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, * * *

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." Revised Rules of the Supreme Court, 1963, p. 35.

No objection was interposed because of the lack of an order reflecting the pretrial proceedings, nor to the pretrial order announced during the trial, as follows: "I give you the alternative of use as to William Halouska and this goes in plus the covenant not to sue, otherwise, William Halouska is not permitted to testify."

The defendant objected to testimony of Halouska, asserting that he was incompetent to testify under section 25-1202, R. R. S. 1943, known as the dead man's statute. However, he had no direct legal interest in the result of the action being tried and was not disqualified. His testimony should have been received unconditionally.

We conclude that plaintiffs cannot urge error in the reception in evidence of pleadings and covenants not to sue offered by defendant.

Plaintiffs contend that the court erred by instructing the jury that they had the burden to prove that gross negligence of Daniel Davenport was "the" proximate cause of the accident rather than "a" proximate cause. This contention has no merit. The court instructed that plaintiffs must prove "That such gross negligence of Daniel Davenport was the sole, proximate cause of the accident, or, if not the sole, proximate cause of the accident, concurred with negligence or other conduct of William Halouska, if you so find, as a proximate cause of said accident." All claims of the parties as to proximate cause were clearly presented.

Plaintiffs also assign error as follows: "The court erred in refusing to allow the expert testimony of W. J. Wieland regarding his opinion as to the speed of the vehicles and the place and location of the impact and

other facts * * * concerning the accident and has sufficient knowledge of such facts to make the calculations upon which his opinion was based."

There was no effort to point out specific evidence, particularly with respect to the "other facts" tending to show the position of the vehicles. The rule is stated in Barton v. Wilson, 168 Neb. 480, 96 N. W. 2d 270, as follows: "In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, this court said: 'In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.' See, also, Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628." Notwithstanding, we shall examine the record and ascertain whether or not a plain error has been committed.

Bert Troyer was a village marshal and a former deputy sheriff. He testified that milo was scattered along the highway with more on the east side than the west, chiefly for 20 to 25 feet north of the bridge with some of it 40 or 50 feet north of the bridge. He found debris, metal, and glass, in the first 25 feet, with little beyond. He remained until the vehicles had been separated. His observations included no marks of either vehicle on the pavement.

Lieutenant Hubka of the Nebraska Safety Patrol said the vehicles collided on the northwest corner of the bridge although he could not fix the point of impact. He said the vehicles were jammed together. Except for its box the truck was junk. The left front wheel of the car was under the front end of the truck. The right front wheel of the car was 4 feet, 5 inches, from the west edge of the bridge, and the right rear corner was on the west rail of the bridge and south of the bridge sign. The distance from the left rear wheel of the truck to the south end of the bridge was 44 feet. The truck was

stopped diagonally on the bridge, with its front driven back beneath its transmission.

There was milo under the truck and surrounding its right rear wheel. Milo was a foot deep in front of the truck and extended as a blanket over the roadway for some 25 or 30 feet north. Lieutenant Hubka helped remove the milo with scoops and brooms, then made a careful search of the surface of the highway and found that neither of the vehicles had made any marks of any kind. He said that gouge marks and stains were made when the vehicles were dragged away and their wheels would not turn. He identified these marks on photographs, exhibits 7 and 10.

Cecil Gunther, a mechanic, moved the truck from on top of the automobile. He first moved it about 30 feet by backing the wrecker and dragging the truck. Then he removed the driveshaft so the wheels could turn, and towed the truck to town. He said that marks were made on the paving when he dragged the truck, and that no marks were there before the truck was moved.

Halouska testified the empty truck weighed about 7,800 to 8,000 pounds. He said he was driving about 30 miles per hour, saw Daniel Davenport about a quarter mile away, proceeding across the bridge, relaxing his throttle and slowing down to about 28 miles per hour, saw a flash of light which blinded him, possibly a reflection of the sun from the Davenport car, and then found himself on top of the truck. Davenport had been in his lane for a ways.

The witness Wieland was a professor emeritus of mechanical engineering. He made amazing claims of his ability to discern and identify tracks of the truck when he went to the scene of the accident on November 7, 1960, 13 days after the accident. According to offers of proof, he was prepared to testify that there were discernible tracks made by the right rear wheels of a truck commencing about 2 feet west of the east side of the highway at a point 30 feet north of the bridge, thence

south for 15 feet where there was an apparent mark made by the outer wheel which continued and extended in a southwesterly direction to a point which would have been the exact location of the rear inner dual wheel of the truck where it rested after the collision, and that the debris and milo would substantiate the tracks he found, and would be associated with, and it could be established that it was made by the dual wheels on the right hand side of the truck operated by Halouska; that these tracks proceeded through an oil spot before it was oily; that he found marks or gouges on the surface of the highway he could associate with vehicles involved in the collision; that these marks were on the photographs in evidence (which Lieutenant Hubka said were not there until the truck was moved); that he inspected the truck and pictures of the car, considered that the milo weighed about 13,400 pounds (loaded truck over 21,000 pounds), applied laws including "Conservation of Momentum," that in his opinion the collision occurred some 48 feet north of the north end of the bridge (where no other witness placed it); and that in his opinion the automobile was traveling at a speed of not less than 96 miles per hour. This would have meant the 1955 Ford occupied by four young people collided with an oncoming truck which, with cargo, weighed some four or five times as much, and drove it backward about 48 feet. Wieland pointed out on photographs identified as exhibits 7 and 10, gouge marks on the paving which he was prepared to say he could associate with and identify as having been made by vehicles involved in the accident. They were the gouge marks the other witnesses said were made when the vehicles were dragged apart.

Evidence of tire marks at the scene of an accident is admissible in civil actions where a sufficient foundation is laid by showing that the condition of the road was the same as it was at the time of the accident and had not been changed by weather or traffic, and where there is a sufficient identification of the marks to show that

they were made by vehicles involved in the accident. Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

We have held that it is error to admit evidence of foot and tire marks observed some 15 or 16 hours after the accident, in the absence of proof that the conditions at the scene of the accident were the same as they were after the accident. Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436. In another case we held that the trial court had not abused its discretion by admitting evidence of the sheriff as to the location of the vehicles and the presence of debris and skid marks, where he arrived 17 minutes after the accident. Spani v. Whitney, 172 Neb. 550, 110 N. W. 2d 103.

The gouge marks and tire marks Professor Wieland claims to have discerned 13 days after the accident were not shown to have been made by vehicles involved in the accident. There was no evidence that the conditions were the same. There was no foundation laid as a prerequisite to the admissibility of his testimony as to his observations made at the scene of the accident. The elapsing time is an important consideration.

Our jurisdiction is one which does not permit skilled or expert opinion as to the point of impact or collision in motor vehicle collision cases. Petracek v. Haas O.K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466.

We think that the trial court very properly refused to permit the witness Wieland to say what he claimed to have discerned or what he opined.

Plaintiffs complain because the trial court refused to permit counsel to use schematic drawings in their closing argument to the jury. Generally, a trial court may in its discretion permit counsel, in addressing a jury, to display and use schematic drawings, diagrams, and maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury is sufficiently informed and understands that they are employed for such purposes and are not of themselves evi-

dence in any sense. Egenberger v. National Alfalfa Dehydrating & Milling Co., *supra*.

However, the schematic drawings which counsel for plaintiff proposed to use in addressing the jury were not preserved in the record, no reviewable error is presented, and we are unable to determine whether there was any abuse of discretion. Necessarily, we must assume that the trial court did not abuse its discretion in this respect.

For the reasons stated, the judgment is reversed and the cause remanded for new trial.

REVERSED AND REMANDED.

CLEMENT C. BUHRMAN, APPELLANT, V. INTERNATIONAL HARVESTER COMPANY, A CORPORATION, ET AL., APPELLEES.
150 N. W. 2d 220

Filed April 21, 1967. No. 36403.

1. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means.
2. **Torts.** One who causes intended or unintended harm to another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm.
3. **Fraud.** The essential elements of fraud are: The making of a false representation, knowing it was false or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that injury resulted.
4. **Duress.** To constitute duress, there must be an application of such pressure or constraint as compels a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demands of another.

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

Vogeltanz & Kubitschek, for appellant.

Fitzgerald, Brown, Leahy, McGill & Strom and William J. Brennan, Jr., for appellees.

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

NEWTON, J.

This is an action wherein appellant Clement C. Buhrman charged appellees with a civil conspiracy. He alleged that he had a dealership agreement with appellee International Harvester Company. He had sold two tractors on which he was indebted to International Harvester Company and International Harvester Credit Corporation for which he had not made remittance to said appellees on their mortgage lien. Appellees falsely informed him that by reason of such action, he was guilty of a criminal offense and would be prosecuted therefor, and believing such threat, in reliance thereon, and acting under duress, he permitted appellees to repossess his entire stock of merchandise, which was converted by appellees to their own use. He further alleges appellees have failed to account to him for any excess received over and above $33,205.56, the amount owed by him to appellees, International Harvester Company and International Harvester Credit Corporation. All such acts were performed by appellees pursuant to a conspiracy to destroy his business, and he has been damaged by the destruction of his business, his credit, his reputation, his health, and by failure of appellees to account for the value of property converted in excess of his indebtedness.

Appellees generally denied the allegations of the petition and appellee, International Harvester Credit Corporation, cross-petitioned for money claimed to be due it by reason of the insufficiency of the property received from appellant to pay indebtedness due it from appellant. For reply appellant denied the allegations of such cross-petition.

Trial was had to a jury and the parties stipulated that appellant would first proceed with evidence relating to the question of conspiracy alone, its existence, and per-

formance. At the conclusion of appellant's evidence on this phase, a verdict was directed and returned for appellees, and the action dismissed.

The evidence introduced reflects the following facts. Appellant had been with International Harvester Company since 1946 and in October 1960, entered into the dealership agreement with International Harvester Company under which he was operating at the time in question. The agreement provided that International Harvester Company could terminate it at any time the dealer defaulted on payment of any obligation due the company, or failed to account for the proceeds of the sale of goods for which he was indebted to the company or to International Harvester Credit Corporation. On termination of such agreement, the company could repossess all goods on hand for which the dealer was indebted to it.

Appellant financed purchases with either International Harvester Company or International Harvester Credit Corporation under a mortgage or trust receipt arrangement and if with International Harvester Company, the notes were assigned to International Harvester Credit Corporation. He owed money to International Harvester Company and International Harvester Credit Corporation on open account, and under financing arrangements covering, among other items, two tractors and other equipment which had been financed, sold, and not accounted for. He admits International Harvester Company had a legal right to terminate his dealership contract on April 4, 1961, when such action occurred.

In the latter part of March 1961, appellee Devan, an employee of International Harvester Company, called, noted two tractors which had not been accounted for were missing, and was informed by appellant that they were out on demonstration. Devan returned April 3, 1961, and seeing the tractors were still missing, was going out to call on the farmers who had them when appellant informed him that he had sold them, but had

not made remittance on them to International Harvester Company. Devan then made demand for payment but was not paid. Appellant testified at various times that Devan then said, "he could be subject to a penitentiary offense," or, "he would be subject to a penitentiary offense." Such statement was made on only the one occasion. The following day, April 4, 1961, appellant signed a letter canceling his dealership contract, and also signed a repossession agreement pursuant to which International Harvester Company repossessed all machinery, parts, and equipment appellant had in stock. Appellant says he signed these instruments under duress.

Appellees John Devan, Harold Toner, Dick Cavanee, Elmer Patracek, Robert Freeman, and Donald Mullen were employees of International Harvester Company; Devan, Cavanee, and Mullen were also representatives of International Harvester Credit Corporation; and all participated in the repossessing of appellant's property and received orders by telephone from another individual who represented both companies.

Appellant assigns as error the action of the trial court in directing a verdict and dismissing his petition.

In Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N. W. 2d 701, the following principles were stated: "* * * The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire. * * * Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever. * * * One who causes intended or unintended harm to another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm." Appellant's contract with International Harvester Company authorized it, under the circumstances which existed, to terminate the contract,

and to repossess all property financed, or for which appellant was indebted to International Harvester Company or International Harvester Credit Corporation. He contends, but does not prove, that other property was also taken.

"A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means." Peters v. Woodman Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490. See, also, Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764. Since appellees were acting within their legal rights in terminating the dealership contract and repossessing property not settled for, there could not be a conspiracy to perform or attain an "unlawful object." Did appellees conspire to obtain a lawful object by unlawful means? Appellant has alleged fraud. The essential elements of fraud are: The making of a false representation, knowing it was false or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that injury resulted. See Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427. Here the only representation alleged is that regarding appellant's possibly having committed a criminal offense. Assuming that such a statement could be the basis for fraud, its falsity has not been shown, nor does it appear to have been made with knowledge of its falsity or recklessly, nor as a positive assertion.

If no unlawful act occurred by means of fraud, did appellees act unlawfully in any other respect? As heretofore noted, no unlawful conversion appeared, but did appellant agree to the termination of his dealership contract and the repossession of his property under duress as he claims? It is conceded that appellees acted within their legal rights under the dealership contract providing for such actions in the event of appellant's default

and that such objects could have been attained by appellees in any event. To constitute duress, there must be an application of such pressure or constraint as compels a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demands of another. Carpenter Paper Co. v. Kearney Hub Pub. Co., 163 Neb. 145, 78 N. W. 2d 80; 17 C. J. S., Contracts, § 175, p. 960. The statement appellant relies on as the basis for his claim of "duress" is that he was told his sale of mortgaged property and failure to account for the proceeds "could or would be a penitentiary offense." Appellant was a businessman of many years standing and thoroughly familiar with the financing of business transactions by means of chattel mortgages, conditional sales agreements, and trust receipts. He did not dispute the fact that he had committed a criminal offense and doubtless was aware of it long before the foregoing statement was made. Such statement only served to confirm what he already knew. The statement was made the day before he signed the termination letter and repossession agreement, and was not repeated, nor was he ever threatened with prosecution. Knowing what he had done, he was no doubt apprehensive and may have deemed it advisable to accede to appellees' legal demands, but certainly such remark, under the existing circumstances, did not serve to overcome his volition, compel him to go against his will, prevent him from exercising his free will, or destroy his power to refuse to comply with unjust demands. Smith v. Morgan, 214 Iowa 555, 240 N. W. 257.

It appears, therefore, that appellees were not guilty of either attempting to perform an unlawful act or of performing a lawful act by unlawful means, and that no conspiracy occurred. There being no conspiracy, and appellant having failed to prove any other grounds for recovery against any of the appellees, it must be con-

cluded that the trial court acted correctly and its judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STUART CARPENTER, APPELLANT.

150 N. W. 2d 129

Filed April 21, 1967. No. 36507.

1. **Constitutional Law: Criminal Law.** Any person charged with a criminal offense in the State of Nebraska is guaranteed, under the Constitution of the United States and of this state, due process of law, which includes the right to trial by jury and the right to defend in person or by counsel.
2. ———: ———. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived, and Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, is overruled on this point.
3. **Municipal Corporations: Officers.** The policemen of a second-class city shall have power to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as the sheriff or constable, and keep them in the city prison or other place, to prevent their escape, until trial can be had before the proper officer.
4. **Courts: Officers.** Constables shall be ministerial officers of the courts held by justices of the peace in criminal cases, within their respective counties, and it shall be their duty to apprehend and bring to justice felons and disturbers of the peace, to suppress riots, and to keep and preserve the peace within their respective counties. They shall have power and they are hereby authorized to execute all writs and process in criminal cases throughout the county in which they may reside and where they were elected or appointed.
5. **Arrest.** Every temporary restriction of the absolute freedom of movement is not an arrest.
6. **Criminal Law.** It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible.
7. ———. The existence of probable cause must be determined by a practical and not by any technical standard.
8. **Searches and Seizures.** It is not a search to observe that which is open and patent either in daylight or in artificial light.

9. ———. If, without a search and without an unlawful entry contraband is seen, the police are not required to close their eyes, walk away, and leave the article where they see it.

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

Kerrigan, Line & Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Merritt E. James and Miles W. Johnston, Jr., for amicus curiae.

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

SPENCER, J.

This is a felony action in which the defendant was prosecuted under two separate informations, one charging possession of burglary tools, and the other breaking and entering. On defendant's motion, the informations were consolidated for trial. Jury was waived by the defendant and the State, and the court, sitting without a jury, found the defendant guilty on both informations. Defendant has perfected an appeal to this court.

Essentially, the question presented by the defendant is legality of a search and seizure. The defendant concedes the evidence was sufficient to sustain a conviction if it was properly admitted. There are two other incidental questions involved, one of which is germane to the primary question, whether police officers of the city of Blair may stop a car just across and outside the city limits of Blair. The other question is whether a defendant may waive a jury in a felony case. We first address ourselves to this latter point.

As stated above, a jury was waived by both the defendant and the State. Defendant, who believes a jury was properly waived, suggests our consideration sua sponte because the case of Michaelson v. Beemer, 72 Neb.

761, 101 N. W. 1007, which has never been expressly overruled, states: "The judge of a district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused." That case held in essence that the right to a trial by jury, as encompassed by Article I, sections 6 and 11, of the Constitution of Nebraska, was designed for the protection of the state as well as the defendant, and may not be waived. We now determine that holding was made under a misapprehension of the nature of the right involved. The right to a jury trial is personal to the defendant, and the state is without power to require one if the defendant wishes to waive it.

Subsequently, but without expressly overruling Michaelson v. Beemer, *supra,* we abandoned the position there taken. In Johnson v. State, 169 Neb. 783, 100 N. W. 2d 844, we held: "Any person charged with a criminal offense in the State of Nebraska is guaranteed, under the Constitution of the United States and of the state, due process of law, which includes the right to trial by jury and the right to defend in person or by counsel.

"The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived."

Johnson v. State, *supra,* and the citations therein are sufficiently clear on this issue, and no further explanation is necessary. We do, however, expressly overrule Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, on this point.

The pertinent facts herein may be briefly summarized as follows: The defendant was driving his automobile, which was licensed in Dodge County, around the city of Blair sometime between 3 and 3:30 in the morning of April 12, 1966. He was accompanied by one Hawkins. His car was observed by two Blair police officers who were cruising in a patrol car. His car was first observed by the officers when they turned east off Nineteenth

Street and onto Grant Street in the city of Blair. It was then coming slowly toward them from the east. When the officers reached Thirteenth Street, defendant's car was turning north onto Lincoln Street, which was two blocks east, so the officers turned north on Thirteenth Street and then noticed the car go across Lincoln Street on north, so they went north one more block and turned east on Washington Street. When they turned east, defendant's car was stopping for a stop sign at Washington Street, and it then turned east ahead of them. The officers followed the car, turned on their red light, and stopped defendant's car on the east of Ninth Street, in a bulk station driveway, just outside the Blair city limits. The officers then observed that defendant's car was an Oldsmobile, licensed in Dodge County.

The defendant got out of his car on the left side, came back to the left side of the patrol car, and was questioned by officer Austin. Officer Cowan went to the Oldsmobile when defendant approached the patrol car, and asked the passenger to step out which he did, and as he did his feet struck something on the floor which gave off a metallic sound. As the passenger descended, Cowan flashed his light through the open door and saw what he recognized as pry bars. Cowan then asked officer Austin to take a flashlight and look in the front seat of the car which he did. Austin also saw pry bars sticking out of a bag. Defendant, in response to a question, said that these were tools he used in his job. Defendant was then asked to drive his car to the police station which he did, followed by the police car.

The officers testified that there had been burglaries in the vicinity where the car was cruising, and that not too long before a local business in that area had been entered by the aid of a pry bar. They had instructions to note any car in the vicinity they didn't recognize. They were suspicious of a car cruising slowly in that neighborhood in the early morning hours, and particularly of the fact that it appeared to turn off when they

approached it. They decided they should require the occupants to identify themselves.

The pry bars were sticking out of a bag in the front seat and were clearly visible to the eye when light was flashed into the front seat. The officers testified that they merely stopped the car for identification purposes. When they saw the pry bars they felt some investigation was necessary, and requested the occupants of the car to go to the police station. The officers called the sheriff who recognized defendant's associate as a known burglar with a previous conviction in Washington County. The defendant and his companion were then arrested and lodged in jail. Later that morning a search warrant was secured and the bag which was found to contain burglary tools was removed from the car.

It is the defendant's contention that the police officers were without statutory authority to act in an official capacity outside the territorial limits of the city. We do not agree with the defendant that an arrest was made at that time, so the question becomes one of whether the police officers had a right to stop the defendant's vehicle outside the city limits. Under the circumstances, we find they did.

We call attention to section 29-206, R. R. S. 1943, which provides as follows: "Every city, town or village marshal, lawfully holding such office, shall be the appropriate ministerial officer of the police court or mayor's court of the city or town or incorporated village, and as such shall have all the powers and be charged with all the duties of constables in the making of arrests, serving process and preserving the peace, as prescribed in criminal matters in sections 29-204 and 29-205."

Section 17-118, R. R. S. 1943, covering cities of the second class and villages provides: "The policemen of the city shall have power to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as the sheriff or constable, and keep them in the city prison or other place, to prevent their

escape, until trial can be had before the proper officer."

Further, section 29-204, R. R. S. 1943, should also be considered. It provides: "Constables shall be ministerial officers of the courts held by justices of the peace in criminal cases, within their respective counties, and it shall be their duty to apprehend and bring to justice felons and disturbers of the peace, to suppress riots, and to keep and preserve the peace within their respective counties. They shall have power, and they are hereby authorized to execute all writs and process in criminal cases throughout the county in which they may reside and where they were elected or appointed."

We also call attention to section 29-829, R. S. Supp., 1965, which provides as follows: "A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. For purposes of this section, peace officer shall include credentialed conservation officers of the Game, Forestation and Parks Commission."

Defendant is laboring under the misapprehension that the same rule on probable cause applies when a person is merely stopped and questioned as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and the right of an individual. His premise is false and would cripple law enforcement. To require that a police officer must have probable cause for arrest before he can stop and question a person would extend the Constitution beyond

the realm of reasonable intendment. By so holding, we would be unduly limiting police power for the mere sake of limitation. To do so would emasculate crime prevention and render peace officers impotent and useless. Individual rights on occasion must give way to the rights of society. This is the very purpose of law—to restrict the rights of the individual to provide protection for society. It is not possible to ignore the fact that police officers are charged with the duty to prevent crime as well as to detect it. Often an immediate inquiry is an indispensable attribute to the prevention and discovery of crime. This is particularly true where a moving vehicle is involved. Then, time is of the essence. Unless the vehicle is stopped and the occupants identified, it may be impossible to connect them to the area if a crime is later uncovered.

Here, defendant was cruising after 3 o'clock in the morning, in an area where burglaries had occurred. The officers had been alerted to check suspicious cars. They knew of no crime that had been committed, but they might reasonably believe one had been or was in the process of being committed. The situation was such that the officers wanted to identify the car and its occupants with the area. When it became apparent the car was from another county, this was even more pertinent. The action was certainly within the range of good, or at least justifiable, police procedure. A prompt inquiry, because time was of the essence, was in order and the officers made it.

As we interpret this record, defendant was not arrested upon mere suspicion, as he here contends. This case is not in any sense analogous to Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142, relied on by the defendant. Here no search, as that term must be interpreted under the facts herein, was made until after a search warrant was secured. Defendant was stopped because of suspicious actions in a routine attempt to ascertain his identity. This was not in any sense an ar-

rest. In the process, and without entry into the car, the police officers saw objects which justified temporary detention for further investigation. At that stage, sufficient grounds existed for a reasonable belief that the objects seen in the car were burglary tools.

Every temporary restriction of the absolute freedom of movement is not an arrest. There is a detailed dissertation on arrest, and the right to stop and question, in United States v. Bonanno, 180 F. Supp. 71, where the distinctions are analyzed and explained. Particularly pertinent here is the following from Justice Burton, quoted in United States v. Bonanno, *supra:* " 'It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible.' "

The existence of probable cause must be determined by a practical and not by any technical standard. The sight of what appeared to be burglary tools in the car, under the circumstances, was at the very least an exceptional circumstance, and was justification for investigation. By doing as they did, the officers were giving the defendant a chance to exculpate himself if no cause for arrest existed. The defendant was requested to drive to the police station where his companion was identified as a known burglar. This, in the light of the other circumstances, was sufficient for any police officer of reasonable caution to believe probable cause existed for an arrest for the possession of burglary tools. The arrest was then made.

This is not an attempt, as defendant argues, to establish probable cause by the fruits of an unlawful search and seizure. Defendant's entire argument on suppression of evidence is premised on his assumption that when the police officer flashed his light into the front seat of the car, through the open door, this constituted an unlawful search of the car.

It is questionable as to whether any search was actually made until after the search warrant was secured.

It is not necessary to decide this point, because by no stretch of the imagination could what defendant terms a search be considered an unlawful search. A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light. See, Smith v. United States, 2 F. 2d 715; Davis v. United States, 327 F. 2d 301; United States v. Ball, 344 F. 2d 925.

In Davis v. United States, *supra,* the rule is thus stated: " 'It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light. United States v. Lee, 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202; Boyd v. United States, 4 Cir., 286 F. 930; Smith v. United States, 4 Cir., 2 F. 2d 715; Safarik v. United States, 8 Cir., 62 F. 2d 892, 895 * * *.' Petteway v. United States, 261 F. 2d 53, 54 (4 Cir. 1958). As was said by Judge Holtzoff in United States v. McDaniel, 154 F. Supp. 1, 2 (D. C. 1957), affirmed 255 F. 2d 896 (D. C. Cir., 1958) and cert. denied, 358 U. S. 853, 79 S. Ct. 82, 3 L. Ed. 2d 87 (1958), Williams v. United States, 363 U. S. 849, 80 S. Ct. 626, 4 L. Ed. 2d 1732 (1960), 'if, without a search and without an unlawful entry into the premises, a contraband article * * * is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it.' "

In Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, police officers entered the apartment of a narcotic suspect to arrest him, and when his wife emerged from an adjoining room, one of the officers walked over and looked into the room without entering, and saw a scale and what appeared to be a brick of marijuana. In that case, Justice Clark, in the majority opinion, said: "We cannot say that it was unreasonable for Officer Berman, upon seeing Diane Ker emerge from the kitchen, merely to walk to the doorway of that adjacent room. We thus agree with the California court's holding that the discovery of the brick of mari-

juana did not constitute a search, since the officer merely saw what was placed before him in full view."

In State v. Huffstutler, 269 Minn. 153, 130 N. W. 2d 347, the Minnesota court said: "In answer to defendant's claim that he was prejudiced by the admission in evidence of the flashlight which he claimed was illegally seized, we need only point out that the flashlight was not the fruit of a search at all since it was seen by the police through the window before the car was entered. 'To see that which is in plain sight is not a search.' People v. Davis, 188 Cal. App. (2d) 718, 10 Cal. Rptr. 610, 613. See, also, People v. Cardella, 233 Mich. 505, 207 N. W. 141; Halbach v. State, 200 Wis. 145, 227 N. W. 306."

Under the facts of this case, it would strain credulity to hold that turning the beam of a flashlight into an open automobile was an unlawful search. The automobile was not entered until after the defendant was arrested and a search warrant secured. There is nothing in the procedure followed in this case which would in any manner taint the evidence secured under the search warrant, and the motion to supress it was properly overruled.

For the reasons stated, the judgment herein is affirmed.

AFFIRMED.

RONALD CARLEY, APPELLANT, V. EDWARD MILAN MEINKE, APPELLEE.

150 N. W. 2d 256

Filed April 28, 1967. No. 36359.

1. **Negligence.** Whether or not gross negligence exists must be determined from the facts and circumstances of each particular case.
2. ———. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, when considered together, they may constitute evidence of gross negligence. In such a case, whether or not gross negligence exists is for the jury.

3. **Trial.** In considering a motion for a directed verdict, the party against whom the motion is made is entitled to have every disputed question of fact in the evidence resolved in his favor, and to have the benefit of every inference that can reasonably be drawn therefrom.
4. **Automobiles: Negligence.** The speed at which a motor vehicle is being driven under all the circumstances shown in the evidence is an important circumstance in determining questions of negligence on the part of the driver.
5. ———: ———. Evidence as to the drinking of intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence.
6. ———: ———. The familiarity of a driver with the road upon which he is driving when an accident occurs is a circumstance to be considered in determining negligence or the degree thereof.
7. ———: ———. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, however, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

William H. Mecham and Jack L. Spence, for appellant.

Sodoro & Meares, for appellee.

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

CARTER, J.

This is an action for damages for personal injuries sustained by the plaintiff while riding as a guest in an automobile owned and operated by the defendant. The defendant denied the existence of gross negligence and alleged contributory negligence and assumption of risk by the plaintiff. At the close of the evidence, the trial court sustained the defendant's motion for a directed verdict and dismissed the action. The plaintiff has appealed.

The plaintiff was an unmarried man about 23 years of age. On the evening of January 4, 1964, after drinking two bottles of beer, he rode with one Tomsu to the

home of Steve Prerost to participate in a going away party. There he engaged in dancing, listening to music, and drinking. There he drank three or four beers, possibly more. Tomsu left early and the plaintiff sought and obtained a ride home with the defendant. They left the Prerost home in the defendant's car with the defendant doing the driving. Plaintiff was in the front seat with the defendant and Don Petrovich and Patrick Abbott occupied the back seat. Upon leaving the party, plaintiff observed that the defendant walked normally, talked coherently, and observed nothing unusual about him. No objection was made to the defendant as the driver at that time.

The defendant drove to Thirty-second Avenue and Vinton Street where the defendant stopped for a stop sign. No complaint is made of the defendant's condition or of his driving up to this point.

After crossing Thirty-second Avenue, the defendant began to increase his speed. When he crossed the viaduct over the interstate highway, plaintiff testified the defendant was traveling at a rate of 55 to 60 miles per hour. When he crossed the bridge over the railroad tracks, plaintiff said the defendant was traveling slightly over 60 miles per hour. Defendant admitted in a deposition that he was traveling 55 to 60 miles per hour in passing over this section of the road.

Immediately east of the railroad overpass, a railroad track crosses Vinton Street. There were dips on each side of the track and the crossing itself was rough. Defendant hit the dip and plaintiff testified that he told the defendant "to take it easy." Defendant applied his brakes after hitting the dip. The defendant continued to drive from the dip to Twenty-fifth Street at 55 to 60 miles per hour, the defendant admitting that he drove this section of the road in excess of 50 miles per hour, but not more than 60 to 65 miles per hour. The defendant failed to negotiate a jog in the road at Twenty-fifth Street and the car sheared off a telephone pole, crashed

through a fence on a private lot, and overturned. That plaintiff sustained serious injuries is not disputed. A police investigator estimated the distance from the dip to Twenty-fifth Street to be 600 to 700 feet. He found tire marks on the pavement for a distance of 70 feet which led to the sheared-off telephone pole. The police investigator talked with the defendant at the scene of the accident and smelled the odor of alcohol on his breath. The investigator testified that the surface of the street was armor-coated asphalt. The street was dry. It was dark and his measurements were made by the aid of car lights and a flashlight.

Defendant testified that he drank one glass of beer before he went to the party and that he drank from 6 to 10 cups of tap beer after his arrival. He testified that he felt no effects from the beer and that he was sober. He stated that he had driven this road many times and was familiar with the jog that he failed to negotiate. He said he had an appointment later to meet other friends at a cafe which he had intended to keep. He testified that he applied his brakes after hitting the dip but said he was going in excess of 50 miles per hour thereafter, but not to exceed 60 or 65 miles per hour. He testified that he heard no warning as to his driving from the plaintiff or anyone else in the car. He said that the plaintiff wanted him to drive faster by telling him several times: " 'Go faster; get on it.' "

Petrovich, one of the occupants of the rear seat, was called by the defendant as a witness. His testimony was substantially as follows: When they entered the car, plaintiff said: " 'Nice car! '62 Chevy.' * * * 'How fast will the thing go?' " Defendant replied: " 'It goes pretty good.' " The witness said that Ed (Meinke) "got on it" and plaintiff said: " 'Love it! Love it!' " He stated that plaintiff told defendant, " 'Faster! faster,' " on five or six occasions. He said: "We told Meinke to slow down; but Ron (plaintiff)—every time * * * said, 'Faster, baby!'," and we told Ron to shut up quite a few times.

In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can be drawn therefrom, construed in the light most favorable to him. McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Crusinberry v. Merryman, 176 Neb. 479, 126 N. W. 2d 481; Countryman v. Ronspies, 180 Neb. 76, 141 N. W. 2d 425. We think there is evidence by the plaintiff in this case which, if believed, would sustain the following findings: (1) That defendant was driving at an excessive speed under all the circumstances; (2) that defendant did not exercise proper control of his automobile and that he failed to exercise a proper lookout; (3) that defendant drank excessive quantities of beer and had an alcoholic breath at the time of the accident; (4) that plaintiff warned the defendant of his negligent driving; and (5) that other passengers in the automobile warned the defendant to slow the speed of the automobile. It is true that there were conflicts in the evidence.

It is also true that any one of the foregoing acts of negligence might not, standing alone, constitute gross negligence. The case falls within the class of cases represented by Smith v. Damato, 172 Neb. 811, 112 N. W. 2d 21, wherein it is said: "It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence,

when taken as a whole, fails to reach the degree of negligence that is considered gross. Here the jury were not bound to find that defendant's acts were negligence in a very high degree, but a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do amounted to negligence in a very high degree, i.e., gross negligence." See, also, Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591; O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322; Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201.

In determining questions of negligence and the degree thereof, the speed at which a motor vehicle is being driven under all the circumstances shown by the evidence is an important circumstance to be considered. Evidence as to the drinking of intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining questions of negligence. Kaufman v. Tripple, *supra.* The familiarity of a driver with the road upon which he is driving when an accident occurs is a circumstance to be considered in determining questions of negligence and the degree thereof. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises.

What amounts to gross negligence is a question to be ascertained from the facts and circumstances of each particular case. Robinson v. Hammes, 173 Neb. 692, 114 N. W. 2d 730. There is evidence in this case which, if believed, will sustain a finding of gross negligence. There is conflicting evidence which, if believed, will sustain a finding that gross negligence did not exist or, if it did, that plaintiff was guilty of contributory negligence. These issues upon which the evidence was conflicting are for the jury.

We think the evidence is sufficient to make a case of gross negligence for the consideration of a jury. The

defendant denied the existence of gross negligence and produced evidence in support of his contention. The resolution of these conflicts in the evidence is for the jury. Defendant also asserted contributory negligence by the plaintiff upon which there is conflict in the evidence. We conclude that these issues are for the jury and that the trial court was in error in directing a verdict. The judgment of the district court is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

GWENDOLYN KAY ZIMMERMAN, APPELLEE, V. CONTINENTAL CASUALTY COMPANY, A CORPORATION, APPELLANT.
150 N. W. 2d 268

Filed April 28, 1967. No. 36367.

1. **Insurance: Statutes.** Section 44-710.14, R. R. S. 1943, did not repeal by implication section 44-358, R. R. S. 1943, but must be read as in pari materia.
2. **Insurance: Fraud.** Under the particular facts of this case, the issues of whether the insured's misrepresentations or false statements in the application for insurance were made knowingly with intent to deceive and the company was thereby deceived to its injury were for the jury.
3. ———: ———. While we do not hold that fraudulent misrepresentations in an application for accident insurance must also contribute to the accident or the loss, the jury is entitled to consider the facts as to how the loss occurred in connection with its determination of fraudulent intent, and whether the insured's misrepresentations or false statements were made knowingly with intent to deceive and that the company was thereby deceived to its injury.
4. **Trial.** A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon.
5. **Trial: Appeal and Error.** An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous.

6. ———: ———. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not mislead.

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

Tye, Worlock, Knapp, Tye & Jacobsen, for appellant.

Munro, Parker, Munro & Grossart, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and WEAVER, District Judge.

MCCOWN, J.

The plaintiff recovered judgment for $2,000 on an accident insurance policy for the death of her husband, the insured. The defendant insurer has appealed.

The insured decedent died September 9, 1964, when struck by a train engine. He was operating a paving breaker run by compressed air and breaking out cement on a railroad bridge backwall as a member of a bridge and building crew for the Union Pacific Railroad. He was facing south with the back of his legs up against the south rail of the eastbound track. Other members of the bridge crew were also working in the immediate area. Some of the others saw the train before it hit the decedent. At least one "hollered"; one threw gravel at the decedent which hit him on the back; and he "jerked his head to the right and by that time the train hit him." The insured apparently died almost instantly.

The accident insurance policy involved had been sold by defendant's agent to the insured decedent on August 6, 1964, while the insured was working with a bridge crew near Sutherland, Nebraska. The application for the insurance was filled in by the soliciting agent at that time, and signed by the insured. The agent testified that: "He looked at it and signed it. Whether he read it or not, I can't answer." The policy was an accident policy covering only disability and death benefits "caused by an accident occurring while this policy is in force and re-

sulting directly and independently of all other causes in loss covered by this policy."

The policy specifically excluded suicide or any attempt thereat. The form of application was for accident and health or accident policy. Question number 6 was: "To the best of your knowledge and belief have you ever been medically treated for or had any of the following: Abnormal blood pressure, ulcers, tuberculosis, appendicitis, hernia, diabetes, cancer, gall bladder, syphilis, goiter, paralysis, sciatica, arthritis, rheumatism, any disorder of the mental, nervous, genito-urinary, respiratory or digestive systems, rectum, eyes, back, spine or heart?" This question was checked "Yes," the word "ulcers" was underlined, and to the right the agent wrote: "Minor case apparently under control Acc. only being applied for."

Question number 7 was: "To the best of your knowledge and belief have you had medical or surgical advice or treatment, or been hospital confined during the past 5 years other than stated above?

Question number 8 was: "To the best of your knowledge and belief do you now have any physical impairment, deformity, or disease other than stated above?"

Both of these questions were answered: "No."

Immediately above questions 6 through 8 appeared the language: "Check 'Yes' or 'No,' circle condition and explain in space provided. If 'yes' is checked or any part of No's. 6, 7, or 8, state type of condition, treatment, dates, duration, results, doctors' and hospitals' names."

The insured, while confined in the city jail of Hastings, Nebraska, on June 30, 1963, attempted suicide and was taken from the jail to the Hastings State Hospital where he was confined from June 30, 1963, to July 13, 1963. On October 28, 1963, the insured was again returned to the Hastings State Hospital because he had been drinking and threatened both his own life and that of his wife. He was in the hospital on that occasion until December 2, 1963, when he was again released. His condition in

the hospital had been diagnosed as psychoneurotic disorder, depressive reaction.

The defendant insurance company alleged fraud and misrepresentation by the insured with reference to the application; that it had relied upon the truthfulness of the answers and was deceived thereby to its injury; and that had truthful answers been given, no policy would have been issued. It alleged the tender of premiums paid and rescission of the policy, and prayed for dismissal. The issues were submitted to the jury and the jury's verdict was for the plaintiff beneficiary.

Essentially, the assignments of error on the part of the defendant might be summarized as contending that the defendant was entitled to judgment as a matter of law, and that the case should not have been permitted to go to the jury and that, in any event, the instructions were prejudicially erroneous.

The fundamental issue is whether a portion of a statute relating to sickness and accident insurance adopted in 1947 prevails over a general insurance statute adopted in 1913, both of which are still in effect.

In 1913, the Legislature adopted a statute which is now section 44-358, R. R. S. 1943, which provided: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

The provision adopted in 1947 applied only to sickness and accident insurance. The title, among other things, recited: "to provide for construction of applications and to prohibit alteration thereof." The act provided

for repeal only of sections 44-504, 44-505, and 44-506, R. S. 1943. The provision was recodified in 1957 and now appears as section 44-710.14, R. R. S. 1943, and provides: "The falsity of any statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer."

It is the position of the defendant that the later act constituted special provisions relating to particular subject matter and prevails over the provisions in the earlier statute. We cannot agree. That rule of construction applies only insofar as there is a conflict between the two. We can find no authority to support the proposition that the adoption of such provisions repeals, by implication, all provisions of the general act, including those not in conflict. We believe rather that the two statutes should be read in pari materia. This conclusion is supported by the fact that the primary purpose of the Legislature in adopting such statutes is to protect the insured or his beneficiary. See 7 Couch on Insurance (2d Ed.), § 35:170, p. 196. The repeal by implication of specific requirements of the earlier statute would, for example, remove the requirement that the insurance company be "deceived to its injury." It should also be pointed out that the language of the older general statute is mandatory, using the word "shall" while the later statute uses the word "may."

The later statute, if construed as the defendant contends, would require only proof that the statement in an application was false, and that it materially affected either the acceptance of the risk or the hazard assumed. It is pleaded that the insured's answers and representations in the application were misleading, false, and fraudulent; were knowingly made with intent to deceive and mislead the defendant; that the defendant relied and and acted upon said statements and misrepresentations; and that as a result thereof defendant was damaged.

These allegations are drawn in the language applicable to the general statute, in addition to the later or special statute, and we think quite properly so. The requirement of the older statute that the company be "deceived to its injury," and the judicial interpretation of the older statute requiring that the statements or misrepresentations "were made knowingly by the insured with the intent to deceive," lie at the crux of the matter. This court has consistently held, at least since 1940, under the older statute, that in order for misrepresentations in an application for insurance to constitute a defense to an action on the contract it is incumbent upon the insurance company to plead and prove, among other things, that the statements or misrepresentations were made knowingly by the insured with the intent to deceive and that the insurance company relied and acted upon such statements or representations and was deceived by them to its injury. See Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N. W. 400. This rule has been consistently adhered to, at least with respect to questions calling for opinion, judgment, or belief, down through the case of Vackiner v. Mutual of Omaha, 179 Neb. 300, 137 N. W. 2d 859, although the issue of whether section 44-710.14, R. R. S. 1943, applied rather than section 44-358, R. R. S. 1943, was not raised in that case.

In this type of case, the rules as to materiality, fraud, intent, deceit, and injury are in somewhat hopeless confusion where applied to particular factual situations, and further complicated by the variety and extent of statutory variations from state to state. There is even more confusion when it comes to the question of when a given case is for the jury and when it is for the court to determine as a matter of law.

Under the particular facts of this case, the issues of whether the insured's misrepresentations or false statements in the application for insurance were made knowingly with intent to deceive and the company was thereby deceived to its injury were for the jury. The insur-

ance involved was accident insurance only, and specifically excluded suicide or attempts thereat. The jury specifically found the death accidental. The agent who solicited the sale of the policy filled in the blanks himself, indicating "accident only" being applied for. The application form was a form for both accident and health or accident insurance. While we do not hold that fraudulent misrepresentations in an application for accident insurance must also contribute to the accident or the loss, the jury is entitled to consider the facts as to how the loss occurred in connection with its determination of fraudulent intent, and whether the insured's misrepresentations or false statements were made knowingly with intent to deceive and that the company was thereby deceived to its injury.

In the case before us, however, there were three separate instructions, each purporting to cover the general area of the proof necessary for the defendant to establish its defense. Instruction No. 7 specifically placed the burden on the defendant to establish its defense and detailed the elements required to be proved. This instruction did not require the defendant to prove that the statements were made with intent to deceive nor that the company was deceived to its injury. Instruction No. 9 likewise went into the same detailed requirements in somewhat different language omitting the requirement that the statements were made with intent to deceive. Instruction No. 10, again in different language, repeated the general elements preceded by a qualification that the plaintiff's decedent "was suffering from mental illness which afterwards contributed to his death."

An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858.

Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not mislead. Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278.

The combination of misstatement of defenses and conflicting requirements, coupled with repetition and a tendency to mislead the jury must, therefore, be deemed prejudicial and require reversal.

Since the case must be retried, we refer also to the defendant's assignment of error that the court improperly excluded evidence involving privileged communications between the insured and his physicians where the evidence was obtained after a waiver had been withdrawn. At the time of the withdrawal of the waiver, the trial court required the defendant insurer to disclose what information had been discovered while the waiver was in force and permitted its introduction, but excluded evidence involving privileged communications obtained after the waiver was withdrawn. A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon. See Herpolsheimer v. Citizens Ins. Co., 79 Neb. 685, 113 N. W. 152. The rule was properly applied by the court here.

For the reasons stated, the defendant's alternative motion for a new trial should have been granted, and the judgment is, therefore, reversed.

REVERSED AND REMANDED.

WHITE, C. J., dissenting.

I respectfully dissent. As the majority opinion states, the crucial issue is whether section 44-710.14, R. R. S. 1943, governs this case. This provision was last enacted as section 15 of Laws 1957, chapter 188, page 658. The title to this act states that its purpose is, "to prescribe uniform provisions for individual accident and sickness insurance policies, * * * to describe the effect of statements made in the application * * *." The act consists of 22 sections and repeals about 49 previously existing sections of the statute relating to accident and health insurance. It provides, among other things, that when any policy provision is in conflict with any provisions of the act, that the rights and duties of the insurer, in-

sured, and the beneficiary shall be governed by the provisions of the act. Other provisions are to the same effect. It seems to me that no one could doubt that this act was a comprehensive independent act designed to govern the insurance and liability provisions of accident and health policies. I do not see how the Legislature could have more clearly expressed its intent to comprehensively regulate the subject matter of the act, accident and health policies. What then, is the posture of section 44-358, R. R. S. 1943, enacted in 1913 with relation to section 44-710.14, R. R. S. 1943?

A preexisting statute will be considered as modified, superseded, or repealed by implication insofar as it is in conflict or inconsistent with a subsequently enacted statute, which is complete in itself, and inclusive of the same subject. And where a legislative act is complete in itself, it is adequate, without numerical designation and specific amendment or repeal, to supersede, supplement, or modify earlier acts or parts of acts in conflict with them. The last expression of the legislative will is the law. Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396; Mogis v Lyman-Richey Sand & Gravel Corp., 189 F. 2d 130, rehearing denied 190 F. 2d 202, certiorari denied 342 U. S. 877, 72 S. Ct. 168, 96 L. Ed. 659; Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852; Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188. See, also, Nebraska Digest, Statutes, key numbers 159 and 161 (1). There can be no question that section 44-710.14, R. R. S. 1943, the new statute, prevails.

By its terms, the statute intended to cover the area of the requirements to bar recovery, of a statement that was false and material to the *acceptance* of the risk. Under the 1913 statute (section 44-358, R. R. S. 1943) the false statement material to the risk must have been made knowingly by the insured with the intent to deceive. Carpenter v. Sun Indemnity Co. (1940), 138 Neb. 552, 293 N. W. 400.

The Legislature is presumed to have had knowledge

of this requirement when it enacted section 44-710.14, R. R. S. 1943. It did require that the falsity of the statement be material to the acceptance of the risk but there is no requirement that it be made by the insured knowingly with intent to deceive. In my opinion, we have no right to write that requirement into the statute. The statute now says that recovery may be barred if the statement is false and material to the acceptance of the risk. The majority opinion states, in effect, that it may not bar recovery unless knowingly made by the insured with intent to deceive and was material to the acceptance of the risk. This flies in the face of the plain, unambiguous language of the statute itself. Furthermore, it is difficult to see how a statement make knowingly with intent to deceive could relate to the degree of risk incurred by the company in the acceptance of the application. The degree of risk in the acceptance of the application would exist irrespective of whether the false statement was made knowingly with intent to deceive. The Legislature had a right to say that the insurance company had a right to make a determination as to the degree of risk involved based on the true facts irrespective of whether the insured's statement was knowingly false with intent to deceive.

The undisputed facts in this case are that the insured made false statements material to the acceptance of the risk. He falsely stated in writing that he had not been hospital confined in the past 5 years prior to August 6, 1964, when in fact he had been confined in the Hastings State Hospital for 2 weeks in July 1963, and for over a month from October 28, 1963, to December 2, 1963. He had attempted suicide by slashing his wrists and attempted hanging on or about June 30, 1963, had been treated by doctors in the hospital, had been confined to the Lincoln Veteran's Hospital within the 5-year period of time, had discussed his hospitalization many times with the plaintiff, his wife, and drank to excess and threatened both of their lives. It is not suggested in the

majority opinion that these conditions and facts were not material to the acceptance of the risk. The evidence is conclusive that a person with a mental disorder, including hospital confinements, is more prone than the average person to accidents, particularly self-inflicted accidents, and the hazard of self-destruction which could be construed as an accident. The evidence is also conclusive that the insurance company would not have accepted this risk and application if it had known the true facts as to hospitalization and treatment.

Furthermore, even assuming that there is a requirement that the false statements were made knowingly, with intent to deceive, I submit that the evidence meets that test also. Intent is buried in the recesses of a man's mind. We determine intent from what he says or by his conduct. Can it reasonably be said that the insured did not know the facts or inadvertently overlooked answering these pertinent questions truthfully? The only answer is that the truth was knowingly and fraudulently concealed. How else could the insurance company, absent the presence of the deceased, prove the knowing concealment of the facts, other than in the manner present in this case?

The defendant was entitled to a directed verdict. Can anyone say that the grounds here shown are not reasonable grounds for the insurance company to say that it would not have issued the policy if the insured had truthfully revealed them in his application? If the concealed facts in this case do not affect the acceptance of the risk, then what facts will? If such facts do not affect the acceptance of the risk, then what benefit is there in taking an application requiring disclosures as to health, physical or mental condition, treatment in hospitals, and the like?

CARTER, J., joins in this dissent.

LEONARD C. YOUNT, APPELLEE, v. HOWARD L. SEAGER, APPELLANT.

150 N. W. 2d 245

Filed April 28, 1967. No. 36372.

1. **Juries: Appeal and Error.** Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
2. **Trial: Appeal and Error.** It is not error for counsel in opening statements to the jury to suggest flat amounts of recovery for different elements of damage if such amounts and elements bear some real relation to what the party expects to prove by the evidence.
3. ———: ———. An instruction on burden of proof need not be given where the charge given clearly defines the issues and requires the jurors to base their verdict on a preponderance of the evidence believed by them to be true. So a failure to give an instruction as to the burden of proof is immaterial if the evidence fully justifies a verdict in favor of the party on whom the burden properly rested, or where the burden has been tacitly assumed by the right party.
4. **Trial: Evidence.** The question of the necessity of expert evidence to warrant submission to the jury of the issue as to the permanency of an injury or as to future pain or suffering depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective. Where the injury may be characterized as one of an objective nature and it is plainly apparent from its nature that it will be permanent or that the injured person will necessarily undergo pain and suffering in the future, the presentation of expert testimony is not essential; and in such cases it is proper for the jury to pass upon such question without the aid of medical or other expert testimony.
5. **Evidence: Damages.** Direct expert evidence is not, according to the general rule, always essential to establish the permanency or future effects of an injury. The need for future medical services and the reasonable value thereof may be inferred from proof of past medical services and their value. The test is whether or not the particular issue can be determined from the evidence adduced and the common knowledge and usual experience of jurors.
6. **Damages: Appeal and Error.** Where the recovery is not a mere matter of computation, it will not be interfered with unless so

excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misrepresentation, or on a consideration of elements not within the scope of the action.

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

John E. Dougherty, for appellant.

Warren C. Schrempp, Schrempp, Rosenthal, McLane & Bruckner, and Carl E. Willard, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

LYNCH, District Judge.

This case arose out of an automobile accident which occurred on July 28, 1963, involving vehicles driven by the plaintiff and defendant. Prior to trial the defendant admitted liability. The plaintiff, his son, and plaintiff's employer testified relative to the plaintiff's health, employment, and condition before and after the accident; and an orthopedic surgeon, an internist, and a dentist testified as to plaintiff's injuries. An itemized list of special damages was received in evidence pursuant to stipulation that if qualified witnesses were called they would testify that the amounts were fair and reasonable. The list included doctor, dentist, drug, hospital, ambulance, nurse, and brace company charges totaling $1,791. No evidence was offered by the defendant. The jury returned a verdict for the plaintiff in the sum of $48,600.

In his appeal to this court, the defendant contends that the trial court erred in overruling his objections to voir dire questions; in denying a mistrial because of misconduct of counsel during opening statement; in improperly instructing on burden of proof and measure of damages; and in submitting to the jury the questions of future pain and suffering, future disability, future medical expense and disfigurement, and future loss of earnings. The de-

fendant also feels that the verdict is excessive.

During the voir dire examination of jurors, plaintiff's counsel asked if anyone "* * * would hestitate to deal in figures that are large and substantial figures if the testimony justified it?"; and "* * * would any of you make an award for less than what you felt the evidence justified out of sympathy for defense of the defendant?" Objections to the questions were overruled by the court. Apparently no challenges were made based upon the questions and the issue was not included in defendant's motion for new trial. On appeal defendant argues that the questions were designed to pledge the jury to a substantial sum.

This court held in Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483, that: "The nature and extent of voir dire examination rests in the discretion of the trial court. If a party makes no challenge for cause and accepts the jurors, ordinarily he waives any objection to their selection as jurors." In 31 Am. Jur., Jury, § 138, p. 120, it is stated: "Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby." This contention of the defendant has no merit.

Defendant's alleged error by the trial court in not granting a mistrial during the opening statement is based upon the following remarks of plaintiff's counsel: "That is, briefly, what the testimony will be in connection with the jaw area. In that regard, ladies and gentlemen of the jury, we will state at this time, because it is the only issue in this case, on that particular injury we feel that the evidence will justify an award in the amount of $3,000. * * * He was still working at his age earning $1,200 a year. We will have his employer here to verify that. * * * The evidence will further show that up to the present time on the earning loss, I was going to dis-

cuss he has lost earnings and will lose the total amount of $13,000 as I worked out to the expectancy of life given to you by the Nebraska statute. This, of course, will be up to you whether or not he worked the full time or how long he would have worked in that regard." A motion for mistrial was made after each statement.

In support of this complaint defendant cites section 25-1107 (1), R. R. S. 1943, and Lybarger v. State, 177 Neb. 35, 128 N. W. 2d 132. The defendant properly quotes from the Lybarger case that: "Counsel in referring to matters which he subsequently does not attempt to prove may be guilty of inexcusable misconduct prejudicial to the opposing side, justifying, in the case of proper objection, a new trial or a reversal." However, one cannot read into this, or the statute cited, a prohibition against suggesting realistic amounts for the elements of damage a party expects to prove. The circumstances of a particular case, wherein counsel attempts to influence jurors into thinking big by stating astronomic figures either in voir dire examination or opening statement, or both, may require the court to declare a mistrial. The court as a matter of discretion must decide whether fanciful or factual figures are being used and whether there exists the danger of an unfair verdict being induced for either side.

In the case of Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393, this court stated that: "It is not error for counsel in final argument to the jury to suggest flat amounts of recovery for different periods of pain, suffering, and disability, if such different periods of pain and suffering bear some real relation to differences demonstrated in the evidence." We can see no logical basis for barring reasonable suggestions during opening statements concerning intended proof of damages, especially in cases where the jury's only task is the fixing of damages. "In all cases considerable latitude must be allowed in the statement of what the party 'expects' to prove. The fact that he may fail to establish the facts which he may have

expected to prove does not necessarily establish the fact that the statement was intentionally false." Lybarger v. State, *supra.*

Nothing about the instant case requires a conclusion that the jury was improperly influenced and the defendant prejudiced by counsel's remarks during the opening statement. The ruling of the trial judge on each motion for mistrial was a proper exercise of discretion.

The court's instruction No. 5 reads in part as follows: "* * * you will return a verdict for the plaintiff in such an amount as you find from a preponderance of the evidence plaintiff's damages are as a proximate result of the accident. * * * In this connection, your attention is directed to Instruction No. 6 with reference to the measure of damages." The defendant contends that this instruction was prejudicially erroneous because it failed to specifically inform the jury that the burden was upon the plaintiff to prove the damages and their cause. In instruction No. 4 the court correctly defined preponderance of the evidence and proximate cause.

Mindful that the defendant admitted liability and that the only evidence presented to the jury was done so by the plaintiff, we cite the following proposition relative to instructing on the burden of proof: "Likewise, the instruction need not be given * * * where the charge given clearly defines the issues, and requires the jury to base their verdict on a preponderance of the evidence believed by them to be true. So a failure to give an instruction as to the burden of proof is immaterial if the evidence fully justifies a verdict in favor of the party on whom the burden properly rested, or where the burden has been tacitly assumed by the right party." 88 C. J. S., Trial, § 308, p. 824. The instruction given was not necessary; however, it was appropriate, and the defendant's claim of prejudice for lack of detail is unfounded.

The defendant contends that in instructions No. 1 and No. 6 the court submitted to the jury certain elements of damage not sustained by the evidence. Instruction

No. 1 included, among other matters, the injury allegations set out in the plaintiff's petition. Instruction No. 6 was the court's detailed instruction on damages. The claimed prejudicial elements contained in both instructions are specified in the following paragraph from instruction No. 6: "You will also consider any future pain and suffering, mental or physical; future disability and future loss of earnings; future medical expenses; and disfigurement; which you find by a preponderance of the evidence and with reasonable certainty will result to the plaintiff as a proximate result of the accident."

The expert medical testimony adduced by the plaintiff established that as a result of the accident the plaintiff's right leg is 2½ inches shorter than the left; that consequently he walks with a limp, must use a cane, and wear a built-up shoe; that the leg will tire more easily than the normal and "probably gives him a lot of discomfort because of the shift in the pelvis"; that plaintiff will always have a deviation of his jaw to the left; that dental plates were devised in an attempt to equalize the bite; that the plates tend to slip to one side when plaintiff's mouth is opened; and that plaintiff will always experience numbness because of the jaw problem.

The plaintiff testified that he loses his balance going over curbs, he must get up from bed frequently to exercise the leg, and that when he drinks coffee or eats hot food it seems to leak on the outside. And, of course, the court and jury could observe the plaintiff's jaw and leg conditions.

As to future pain, disability, and medical expense, the defendant's principal objection is that no doctor testified concerning them. He relies on the rule that expert testimony must be adduced showing the reasonable certainty of and necessity for such elements of damage.

Although expert opinion testimony is allowed, desired, and often necessary to establish certain elements of damage, such is not required just because the case may concern a matter of science or special knowledge. The

rule applicable in the instant case is set forth in 20 Am. Jur., Evidence, § 778, p. 649, as follows: "The question of the necessity of expert evidence to warrant submission to the jury of the issue as to permanency of an injury or as to future pain or suffering depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective. Where the injury may be characterized as one of an objective nature and it is plainly apparent from its nature that it will be permanent or that the injured person will necessarily undergo pain and suffering in the future, the presentation of expert testimony is not essential; in such cases it is proper for the jury to pass upon such question without the aid of medical or other expert testimony." See, also, Annotation, 115 A. L. R. 1149. In the case at bar the court instructed from Nebraska Jury Instructions, Function of Judge and Jury, No. 1.01, which includes the accepted principle that jurors may apply to the subject before them that general knowledge which anyone may be presumed to have.

Although the occasion was a workman's compensation case, this court quoted the rule in Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15, as follows: "In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary." In 22 Am. Jur. 2d, Damages, § 312, p. 411, it is stated that: "* * * the need for future medical services and the reasonable value thereof may be inferred from proof of past medical services and their value." And in 25A C. J. S., Damages, § 162 (9), p. 110, it is stated: "* * * direct expert evidence is not, according to the general rule, always essential to establish the permanency or future effects of an injury." The test is whether or not the particular issue can be determined from the evidence presented and the common knowledge and usual experience of jurors.

In the present case no one questioned the cause, obviousness, gravity, or permanency of the plaintiff's injuries which shall always impair some of the most essential and treasured functions of life, namely: Eating, talking, and walking. Also, the cost of medical and dental examinations and prosthetic devices, such as dentures and built-up shoes, are medical expenses not completely outside the knowledge of most people. Twelve persons of ordinary intelligence can form correct opinions concerning these matters where the injuries are apparent and the medical expenses to date of trial are in evidence. It was not error in this case to submit to the jury the issues of future pain and medical expense.

The defendant next contends that the trial judge's use of the term "loss of future earnings" instead of "loss of earning capacity" gave the jury no way of determining when loss of earning power commenced or ended and, hence, there could be a double recovery. An examination of instruction No. 6 reveals that in addition to the portion quoted above the court properly explained the difference between lost earnings and loss of or impairment of earning capacity. The parties and jurors actually received more enlightenmost than is required and customarily given. The defendant could not have been harmed by the court's handling of this subject.

The defendant's final contention is that the verdict is excessive. For support he reiterates in his brief the matters considered before in this opinion. The plaintiff suffered severe injuries of a permanently crippling nature. The special damages in comparison were minimal. "* * * where the recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misinterpretation, or on a consideration of elements not within the scope of the action." 25A C. J. S., Damages, § 196, p. 262. "The amount of

damages in cases of this type is not based on any legal rule or formula for measuring them and rests largely in the sound discretion of the jury." Zawada v. Anderson, *ante* p. 467, 149 N. W. 2d 329.

This case was properly tried and submitted. The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF WILLIAM SCHMITZ, DECEASED. LELAND THOMAS, APPELLANT, V. EVELYN VAUGHAN, APPELLEE, WILLIAM F. DAVIS, GUARDIAN AD LITEM OF DAVID JOHN VAUGHAN ET AL., APPELLANT.

150 N. W. 2d 241

Filed April 28, 1967. No. 36422.

1. **Wills: Appeal and Error.** Where the evidence is not sufficient to sustain a verdict for the contestant as to the due execution of a will, it is error to submit that issue to the jury.
2. **Wills.** A presumption of due execution arises from the presence of an attestation clause to a will which recites the facts necessary to its valid execution.
3. ———. A testator who, at the time of the execution of the will, knows the extent and character of his property, the natural objects of his bounty, and the proposed disposition of his property, is mentally competent to make a will.
4. **Wills: Witnesses.** A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based.
5. ———: ———. It must appear that a witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances testified to are sufficient upon which to base an opinion.
6. ———: ———. It is a matter within the sound discretion of the trial court as to whether a nonexpert witness is qualified to express an opinion as to testamentary capacity.
7. **Wills: Trial.** Where the evidence presents a jury question as to whether a testator was subject to undue influence, the opportunity to exercise it existed, there was a disposition to ex-

ercise it for an improper purpose, and the result appears to be the effect of such influence, the issue should be submitted to the jury.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Reversed and remanded.

Spencer & Hoch and William F. Davis, for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

BOSLAUGH, J.

This is an appeal from a decree refusing to admit the will of William Schmitz to probate. The will was admitted to probate in the county court, but upon appeal to the district court the will was denied probate. The executor named in the will and the guardian ad litem for two minor beneficiaries have appealed. For convenience, they will be referred to as the proponents.

William Schmitz died on July 19, 1963. He was survived by a daughter, Evelyn Vaughan, his only child and the contestant, and four grandchildren. His wife, Anna, had died in 1937.

In September 1947, the testator suffered a stroke of paralysis and was hospitalized until January of 1948. He then returned to his home on an 80-acre farm in Otoe County. As a result of the stroke, the testator's left side was paralyzed and he remained an invalid until his death in 1963.

The testator owned an undivided three-fourths interest in the Otoe County farm and in some Kansas land. His daughter, Evelyn, owned the other one-fourth interest. Jesse Vaughan, Evelyn's husband, farmed the Otoe County land and lived on it with his family. The testator lived in a small house which was separate from the house occupied by the Vaughan family.

On January 31, 1953, the testator was moved to a

nursing home in Nebraska City. On February 19, 1953, a guardian was appointed for the person and property of the testator. The order for the appointment of the guardian described the testator as "Mentally Ill."

The will which was offered for probate in this proceeding is dated April 27, 1954. It contains provisions regarding payment of debts, expenses of last illness and burial, and a bequest of $500 for the saying of masses. The will gives the remaining personal property and a life estate in the real property to Evelyn. The remainder interest in the real property is devised to the grandchildren, naming them, and any additional children of Evelyn.

The contestant alleged that the will was not executed, published, or declared according to law; that the testator lacked testamentary capacity; and that the will was the result of undue influence. These issues were submitted to the jury by the trial court. The proponents' principal assignments of error relate to the sufficiency of the evidence to sustain a finding for the contestant upon each issue.

With respect to the execution of the will, there was evidence that the testator asked Joseph Schreiner, his brother-in-law, to ask Vantine A. James, a Nebraska City lawyer, to come to the nursing home and make a will for him. Schreiner and Leo Kreifels, another brother-in-law of the testator, then went to the office of Mr. James and informed him of the testator's request. Mr. Kreifel's wife was a sister of the testator. Mr. Schreiner's wife had been a sister of the testator's wife.

Later on the same day, Mr. James and Dolores Paap, his secretary, went to the nursing home. Joseph Schreiner and Leo Kreifels were there when they arrived. Mr. James talked with the testator and then dictated the will to Mrs. Paap in the presence of the testator. Mrs. Paap typed the will at the nursing home on a typewriter that had been brought for that purpose. The testator examined the will and it was read aloud to him by

Mr. James. The testator declared that the document was his will and signed it in the presence of Mr. James, Mrs. Paap, Joseph Schreiner, Leo Kreifels, and Mary Sullivan, a registered nurse who was then operating the home. Then, at the request of the testator, Mrs. Sullivan, Mrs. Paap, and Mr. James signed as witnesses. This evidence established compliance with the statutory requirements for due execution. § 30-204, R. R. S. 1943.

The will contained an attestation clause which recited the facts necessary to its valid execution. A presumption of due execution arises from the presence of such a clause. In re Estate of Bucy, 150 Neb. 263, 34 N. W. 2d 265; Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506.

The contestant produced no evidence which might be said to contradict directly the positive testimony of the proponents' witnesses who were present at the time the will was executed. The contestant produced documents dated July 12, 1941, and January 19, 1946, which contained the signature of the testator. These signatures, which were received in evidence, were of little value for the purpose of comparison because they had been made a number of years before the will and before the testator's illness. The testator's signature on a previous will, dated December 9, 1947, compares very favorably with the signature on the April 27, 1954, will. Under the circumstances of this case, the evidence of the contestant was not sufficient to create a question for the jury as to the execution of the will. The issue should not have been submitted to the jury.

The evidence regarding testamentary capacity was in sharp conflict. A person is mentally competent to make a will if, at the time of the execution of the will, he knows the extent and character of his property, the natural objects of his bounty, and the proposed disposition of his property. In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513.

The proponents' witnesses testified that the testator

remained mentally alert although he was partially paralyzed. Mr. James testified that the testator recognized him and Mrs. Paap when they entered the room; that the testator told him in detail how he wanted the will made; that the testator described his property and stated how it was to be devised; that he gave the names of the grandchildren to him; that he examined the will and asked that it be read out loud to him; and that he said that the will was made the way he wanted it.

A number of lay witnesses called by the proponents testified that in their opinion the testator had testamentary capacity. Dr. A. H. Bonebrake, who had been associated with Dr. Ramaciotti and who cared for the testator after the death of Dr. Ramaciotti, testified that in his opinion the testator had testamentary capacity.

The contestant's witnesses testified that after the stroke the testator's speech was slurred and it was difficult to understand him; that he spoke mostly of the past and would repeat the same story over many times; that he cried frequently for no apparent reason; that he would refer to his daughter and the ladies taking care of him as "Annie"; and that he seemed to have no interest in his land or the condition of the crops.

A number of lay witnesses called by the contestant testified that in their opinion the testator did not have testamentary capacity. Dr. John P. Gilligan, who cared for the testator before his removal to the nursing home in January 1963, testified that the testator suffered from cerebral vascular arteriosclerosis which was a progressive condition; that after the stroke the testator was in a very weakened physical condition and was emotionally disturbed; that the testator did not have confidence in his own judgment and stated that he wanted to have a guardian appointed for him because he felt that he was "not up to handling his own affairs"; that the change in his personality was incident to the disease; and that his mental condition was such that he was subject to persuasion by other persons. Dr. Gilligan did not express an

opinion as to the testamentary capacity of the testator.

The evidence with respect to undue influence was largely circumstantial. The previous will, dated December 9, 1947, to which Joseph Schreiner was a witness, gave Evelyn a life estate in the 80-acre Otoe County farm until she reached the age of 50 years, at which time she was to receive the remainder interest. She also received the residue of the estate, both real and personal, after payment of debts and expenses and a $1,000 bequest for the saying of masses. The effect of the 1954 will was to reduce Evelyn's share in her father's real estate to a life estate.

There was evidence of friction between Evelyn's husband and Leo Kreifels that had its origin in religious matters. Evelyn eventually divorced her husband in 1959, some 5 years after the 1954 will was made.

The circumstances surrounding the removal of the testator from his home on the farm to the nursing home were somewhat unusual. Without prior notice to Evelyn, Mr. and Mrs. Kreifels appeared at the farm on January 31, 1953, with an ambulance and moved the testator to the nursing home in Nebraska City. Evelyn and her husband were in Nebraska City on business at the time and did not know what had happened until after the testator had been removed.

Evelyn testified that in May of 1954, Joseph Schreiner asked her to come to his house. Schreiner had also asked Harvey Neumeister, a lawyer from Nebraska City, to be present. Schreiner said that Evelyn's father had made another will, that it was "a good will" for Evelyn but that he could not tell her what was in it. In response to her question as to why another will had been made, Schreiner stated: "We made another will because we wanted to see that everything was the way it should be."

Evelyn further testified that about 2 weeks later she had a conversation with Leo Kreifels. In that conversation, in referring to the making of the will, Kreifels said:

"We wanted to fix it up so everybody would be satisfied, and we took good care of you."

Vantine A. James testified that he had never handled any business for Mr. Schmitz prior to the drafting of the 1954 will. Harvey Neumeister appears as a witness on the 1947 will, as an attorney for the testator on a petition for a decree of heirship of the testator's wife in 1946, and as an attorney for the contestant in this proceeding.

The evidence, considered as a whole, was such that the jury could find that the testator was subject to undue influence, that the opportunity to exercise it existed, that there was a disposition to exercise it for an improper purpose, and that the result appears to be the effect of such influence. The evidence presented a jury question as to both testamentary capacity and as to undue influence. These issues were properly submitted to the jury.

A number of lay witnesses were permitted to testify over objection as to their opinion whether the testator had testamentary capacity. A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. Schlitz v. Topp, 158 Neb. 583, 64 N. W. 2d 116. It must appear that the witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances testified to are sufficient upon which to base an opinion. In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203.

Two of the grandchildren, Barbara Mullenax and Judy White, were permitted to testify over objection that in their opinion the testator did not have testamentary capacity. This testimony was against their interest because they are remainder beneficiaries under the will. These witnesses were more than 21 years of age at the time of trial, but their opinions were based upon ob-

servations which had been made when they were much younger. They were about 10 years old on the date that the will was made. Objection was made on the ground that they were not of sufficient age to have formed an opinion.

All of the witnesses who testified as to testamentary capacity expressed opinions based upon observations made between 1947 and 1963. It was a matter within the sound discretion of the trial court as to whether any of these witnesses, including the grandchildren, were qualified to express an opinion as to whether the testator had testamentary capacity on April 27, 1954. In re Estate of Goist, *supra*. We think the record fails to show an abuse of discretion and that the objections to the opinion testimony went to weight and credibility rather than admissibility.

It is unnecessary to consider the other errors assigned.

The judgment of the district court is reversed and the cause remanded for new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JOHN HIZEL, JR., APPELLANT.

150 N. W. 2d 217

Filed April 28, 1967. No. 36520.

1. **Constitutional Law: Criminal Law.** The purpose of the Post Conviction Act, Chapter 29, article 30, R. S. Supp., 1965, is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Constitutions have been denied or infringed so as to render the judgment and sentence void or voidable.
2. **Criminal Law.** The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may properly be denied.

3. ———. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
4. ———. Under section 29-3004, R. S. Supp., 1965, of the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

John Hizel, Jr., pro se.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

CARTER, J.

This is an appeal from the overruling of a motion to vacate a conviction and sentence for second degree murder brought under the provisions of the Post Conviction Act.

The record shows that on October 15, 1964, the defendant, John Hizel, Jr., was charged in the district court for Scotts Bluff County with unlawfully and feloniously, purposely and maliciously, but without deliberation and premeditation, killing Elbert Eugene Hendren. Defendant filed proof of indigency and the trial court appointed Willard F. McGriff, the public defender of Scotts Bluff County, to represent the defendant as his legal counsel. Subsequently, on request, the court appointed Alfred J. Kortum, a member of the bar, to assist in defendant's defense. The two named attorneys represented defendant in his trial in the district court. Defendant was found guilty by a jury and sentenced to life imprisonment by the court. An appeal was taken to the Supreme Court and the judgment and sentence were affirmed in State v. Hizel, 179 Neb. 661, 139 N. W.

2d 832. In his appeal to the Supreme Court, defendant was represented by the same two attorneys. The opinion of the Supreme Court was filed on January 28, 1966.

On September 19, 1966, defendant filed his motion to vacate the judgment of conviction and sentence on two grounds, first, that he was interrogated by the sheriff and other law enforcement officers without advising him of his right to remain silent and in not advising him of his right to legal counsel, and, second, that defendant was incapable of malice and wrongful intent. The trial court, after a consideration of the motion to vacate and an examination of the files and records of the case, denied an evidentiary hearing. Defendant filed notice of appeal and requested the appointment of counsel at the expense of the state which was likewise denied. Defendant brought his appeal to this court pro se. The transcript of the pleadings and the evidence taken in defendant's trial for second degree murder are before the court under the rule adopted in State v. Fugate, 180 Neb. 701, 144 N. W. 2d 412.

It is contended by the motion filed in the post conviction proceeding that because of the condition of the defendant at the time of the alleged crime, defendant could not have had a purpose to kill and was incapable of the malice required to be proved by the State. This issue was tried before the jury. Defendant called a neuropsychiatrist who testified as to his mental deficiency and brain damage, and the contribution made to his mental deterioration by a history of excessive drinking. The issue of malice and purpose to kill was submitted to the jury under proper instructions. The jury found against the defendant on the issue and, on appeal, this court affirmed. The defendant is not entitled to have the issue retried in a post conviction proceeding. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765; State v. Parker, 180 Neb. 707, 144 N. W. 2d 525; State v. Sheldon, *ante* p. 360, 148 N. W. 2d 301.

Defendant further alleges that he was interrogated by

law enforcement authorities without being advised of his right to remain silent and to have legal counsel. These do not appear to have been issues on the appeal from his conviction. The reasons why the issues were not presented are that there was no police interrogation of the defendant, that no confession was offered against him at the trial, that there were no objections of counsel on any such ground, and that the evidence on the trial shows the correctness of the foregoing statements. In addition thereto, the defendant testified in the case. The contention that the sheriff interrogated defendant immediately after he was brought to the county jail is dissipated by the defendant's own testimony. He testified that when he was brought to the sheriff's office that he was informed by the sheriff that Hendren was dead, a fact the defendant did not previously know. The evidence of defendant then is: "Q And was there any other conversation? A (Witness shook head in the negative.) He asked me if I wanted to make a telephone call. I said, 'It's too late now.' Q So you made no telephone call? A So I didn't make no telephone call. Q And were you interrogated or talked to any more after that by Steve (Warrick)? A No. Then they put me upstairs." The evidence shows that defendant made no confession that was offered in evidence against him. He did volunteer some statements which were consistent with the evidence he gave on the trial. The claim that defendant's constitutional rights were violated is shown by the record to be without any basis in fact. Any statements made were shown to have been voluntary and no objections were made on the theory that they amounted to anything else.

The trial court found from the records before it that there was no issue raised as to defendant's constitutional rights. Under such circumstances, the trial court may properly deny an evidentiary hearing.

The defendant complains of the refusal of the court to appoint counsel to assist him in an appeal from the

denial of his motion to vacate the judgment and sentence. Under the provisions of section 29-3004, R. S. Supp., 1965, it is discretionary with the district court as to whether or not an attorney shall be appointed to represent a defendant on appeal in a post conviction proceeding. Although such proceeding resembles a criminal action, it is in fact a civil proceeding in which a defendant is not entitled as a matter of constitutional right to the appointment of legal counsel. In the absence of an abuse of discretion by the trial court, no error can be predicated on the refusal of the court to appoint counsel in a post conviction case. State v. Burnside, *ante* p. 20, 146 N. W. 2d 754. Here the defendant has raised nothing tending to show that his constitutional rights have been violated. It is not an abuse of discretion to deny the appointment of counsel under such circumstances. What we said in State v. Clingerman, *supra,* has application here: "We interpret Laws 1965, c. 145, p. 486, to be intended to provide relief in those cases where a miscarriage of justice may have occurred, and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. To hold otherwise will be to permit defendants to misuse and abuse a remedy intended to provide relief for those exceptional cases where the rights of a defendant have been ignored or abused."

We find no error on the part of the trial court in denying an evidentiary hearing, or in refusing to appoint counsel to take an appeal therefrom.

AFFIRMED.

STATE OF NEBRASKA EX REL. MARGARET L. HARTMAN, APPELLEE, V. HARL M. WEISS, DOING BUSINESS AS PHYSICIANS & SURGEONS' COLLECTION BUREAU, ACE METROPOLITAN COLLECTIONS, BAD CHECK BUREAU, CREDIT ENTERPRISES CO., AND MERCHANTS ADVISORY COUNCIL, APPELLANT.

150 N. W. 2d 264

Filed April 28, 1967. No. 36521.

1. **Appeal and Error.** In the absence of a bill of exceptions, no questions requiring the examination of evidence produced in the trial court will be considered on appeal.
2. ———. When a bill of exceptions has not been filed, the only issue on appeal is the sufficiency of the pleadings to support the judgment of the trial court.
3. **Statutes.** When a statute which is penal in nature is required to be strictly construed, it should be given a sensible construction.
4. ———. A guide to the meaning of a statute is found in the evil which it is designed to remedy.
5. ———. Statutes comprising a single legislative act must be construed as a whole and the intent of the Legislature as deduced from the whole will prevail over that of a particular part considered separately.
6. **Licenses: Statutes.** One holding a license issued by the Nebraska Collection Agency Board who fails within 45 days after the close of each calendar month to report to and pay to his client the net proceeds of all collections made during the preceding calendar month and due to such client is in violation of the intent and purposes expressed in sections 81-8,158 to 81-8,183, R. R. S. 1943, and is guilty of conduct justifying a revocation of his license.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Alfred A. Fiedler and Stephen E. Sturek, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and MURPHY, District Judge.

NEWTON, J.

Respondent is a duly licensed collection agency operator. Complaint was filed against him by the relator who stated therein that she was a bookkeeper for her husband, Dr. C. M. Hartman, and during January, February, and April of 1963, turned over 14 accounts to respondent. She had demanded a report on said accounts on several occasions but had not received one. Respondent collected various sums on such accounts and failed to make remittance thereon to Dr. C. M. Hartman within 45 days after the close of the calendar month during which such collections were made and did not make remittance thereon for more than 2 years after making the first collections, but did remit on August 6, 1965. Relator further states that respondent has failed to comply with the intent and purposes of sections 81-8,158 to 81-8,183, R. R. S. 1943.

For answer to the complaint, respondent admitted receipt of the Hartman accounts in January, February, and April of 1963, and the collection of various sums thereon, but alleged that he made remittance on such collections on June 14, 1965. He further alleged that he had an agreement with relator wherein he was to withhold remittance until full collection was made on such accounts, and for that reason, had failed to make remittance within the 45 day period provided by statute, and denies that he has failed to comply with the intent and purposes of the statutes mentioned in the complaint.

On hearing before the Nebraska Collection Agency Board, the board found that respondent had received the accounts mentioned in the complaint for collection; had made collections thereon for which he failed to remit within 45 days after the close of the calendar month during which such collections were made; and made no remittance thereon for more than 2 years after making the first collection. The board further found that respondent had no agreement authorizing him to retain the funds he collected until such time as he had fin-

ished working on the accounts and that he had failed to comply with the intent and purposes of sections 81-8,158 to 81-8,183, R. R. S. 1943. The board thereupon recommended to the Secretary of State that respondent's license be canceled and terminated. On appeal to the district court, the action of the Nebraska Collection Agency Board was affirmed and it was ordered that respondent's license be revoked.

No bill of exceptions has been filed on appeal to this court. In the absence of the bill of exceptions, no questions requiring the examination of evidence produced in the trial court will be considered. Bulger v. McCourt, 179 Neb. 316, 138 N. W. 2d 18. Under such circumstances, the only issue on appeal is the sufficiency of the pleadings to support the judgment. State ex rel. Stulp v. Muscheites, 179 Neb. 674, 139 N. W. 2d 887. Respondent does not contend that the complaint is insufficient to sustain the findings and decision of the Nebraska Collection Agency Board. His only assignments of error are that the district court erred in finding that respondent had failed to comply with the intent and purposes of sections 81-8,158 to 81-8,183, R. R. S. 1943, and in further finding that the Nebraska Collection Agency Board had not exceeded and abused its discretion in recommending that respondent's license be revoked.

Respondent urges that the Nebraska Collection Agency Board acted unreasonably, arbitrarily, and capriciously, and exceeded its authority since section 81-8,176, R. R. S. 1943, fails to specifically provide for the revocation of a collection agency license under the circumstances existing in this case. The Collection Agency Act comprises section 81-8,158 to section 81-8,183, R. R. S. 1943. This act was passed by the 1963 Legislature and has not been subsequently amended. Section 81-8,168, R. R. S. 1943, provides in part that a license: "* * * shall be granted only to applicants who are trustworthy, have a good reputation for honesty and fair dealings, who are financially responsible, and who are, in the

opinion of the board, competent to engage in the collection of accounts and claims of others." Section 81-8,169, R. R. S. 1943, requires licensees to post bond: "* * * payable to and approved by the Secretary of State and conditioned that the licensee shall faithfully and truly perform all agreements entered into with the licensee's clients or customers and shall, within forty-five days after the close of each calendar month, report to and pay to his or its client or customer the net proceeds of all collections made during the preceding calendar month and due to each client or customer, * * *." Section 81-8,173, R. R. S. 1943, directs the Secretary of State to cancel and terminate a collection agency license upon final conviction of the licensee for fraud or embezzlement, or upon final judgment against the licensee for fraud, embezzlement, or failure to account to his or its client or customers within the time provided for in section 81-8,168, R. R. S. 1943, or upon termination of the licensee's bond without renewal thereof, and upon various other grounds specified in the statute concluding with the provision that: "Such license or solicitor's certificate shall also be canceled and terminated if after a hearing, as provided in sections 81-8,158 to 81-8,183, the board recommends to the Secretary of State that such license or certificate be canceled and terminated." Section 81-8,174, R. R. S. 1943, provides for the filing of a complaint with the board, and section 81-8,176, R. R. S. 1943, provides for a hearing upon such complaint and that: "If the board finds that the cited licensee or solicitor has failed to comply with the intent and purposes of sections 81-8,158 to 81-8,183 or, in the case of a licensee, has failed to account to a customer or client as provided for in section 81-8,168 or is not financially responsible, the Secretary of State shall cancel such license or certificate."

Section 81-8,168, R. R. S. 1943, does not contain any provision for an accounting by the licensee to his client within a specified time as suggested in sections 81-8,173

and 81-8,176, R. R. S. 1943, yet, it would appear that the intention of the Legislature is clear.

The statutory provisions above set forth dealing with the revocation of licenses are penal in nature and as such are ordinarily to be strictly construed. In State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157, this court set out two rules which are applicable here. First, "When a statute is required to be strictly construed such statute should have a sensible construction." Second, "A guide to the meaning of a statute is found in the evil which it is designed to remedy." The Collection Agency Act is regulatory in nature and obviously intended for the correction of abuses and the protection of the public. A major abuse which can be indulged in by a licensee is a failure to properly account to his or its client with reasonable promptness and is one form of abuse which the Legislature sought to regulate. The statutes comprising the act must be construed as a whole and the intent of the Legislature as deduced from the whole will prevail over that of a particular part considered separately. Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700. Also, statutes pertaining to the same subject matter should be construed together as if they were one law and effect given to every provision. Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

Respondent contends that the Nebraska Collection Agency Board, under the provisions of section 81-8,176, R. R. S. 1943, may revoke his license only if he were convicted of fraud or embezzlement, or if judgment had been rendered against him for fraud, embezzlement, or failure to account to a client; and that since he was not the subject of such conviction or judgment, the board acted without authority. Were this construction to be placed upon section 81-8,176, R. R. S. 1943, it would serve to completely emasculate this section of the statute as section 81-8,173, R. R. S. 1943, provides that under such circumstances, the Secretary of State shall cancel and

terminate the license without a hearing. Section 81-8,176, R. R. S. 1943, contemplates action by the board after a hearing held as required by the various provisions in the act, and further provides for revocation of a license if the licensee has failed to comply with the "intent and purposes" of the act. As heretofore noted, this is a regulatory act aimed at the correction of abuses indulged in by collectors and the primary abuse is the failure to account within a reasonable time for collections made. Certainly consideration of the act as a whole indicates that a failure to so account is a violation of the "intent and purposes" of the act and confers authority on the board to direct a revocation of respondent's license. Under such circumstances, the judgment of the district court should be and is affirmed.

AFFIRMED.

JIMMY D. MADDOX, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
ROBERT NICHOLSON, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.

150 N. W. 2d 251

Filed April 28, 1967. Nos. 36524, 36525.

Criminal Law. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the trial.

Appeals from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Jimmy D. Maddox and Robert Nicholson, pro se.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MURPHY, District Judge.

SMITH, J.

Prisoners serving sentences petitioned in these proceedings for writs of habeas corpus. They alleged that the sentences were the outcome of irregularities in extradition proceedings. The district court denied the writs without hearings, and petitioners have appealed.

The orders denying the writs were correct. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the trial. Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541; Howell v. Hann, 155 Neb. 698, 53 N. W. 2d 81.

AFFIRMED.

RALPH S. MOSELEY, SPECIAL ADMINISTRATOR OF THE ESTATE OF OTTO W. MILLER, DECEASED, ET AL., APPELLEES, V. MARY S. ZIEG ET AL., APPELLANTS.

150 N. W. 2d 736

Filed May 5, 1967. No. 36286.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On reargument. See 180 Neb. 810, 146 N. W. 2d 72, for original opinion. Affirmed.

Joseph J. Cariotto, for appellants.

Kier, Cobb & Luedtke, for appellees.

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

CARTER, J.

On November 4, 1966, the judgment in this case was affirmed by this court. Moseley v. Zieg, 180 Neb. 810, 146 N. W. 2d 72. Subsequently a reargument of the case was granted. This opinion is on reargument of the case.

We have reexamined the evidence in the case. We again conclude that the evidence shows there was no de-

livery of the deed during the lifetime of the grantor and that the facts show an attempted testamentary disposition of the property, which can only be done by compliance with the will statute.

The trial court, after seeing and hearing the witnesses testify, found that there was no delivery of the deed during the lifetime of the grantor. On a consideration of the evidence de novo on appeal, we come to the same conclusion. We conclude, therefore, that the trial court's decree was correct and its judgment should be affirmed, as was done by our former opinion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOWARD LEROY WILLIAMS, APPELLANT.
150 N. W. 2d 260

Filed May 5, 1967. No. 36430.

1. **Constitutional Law: Criminal Law.** Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request.
2. **Criminal Law.** When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it cannot be inferred from defendant's failure to specifically request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel.
3. **Constitutional Law: Criminal Law.** Under the circumstances, to apply the time limitations of the jurisdictional requirements for appeal would be an unconstitutional deprivation of the defendant's right of appeal. The jurisdictional statute must be interpreted within the framework of the germane constitutional provisions, both state and federal.
4. **Criminal Law.** Where the defendant has invoked appellate jurisdiction in the original criminal case as well as in the post conviction proceeding, the post conviction remedy is cumulative and is not intended to be concurrent with any other remedy. It cannot serve the purpose of an appeal to secure a review of the conviction.
5. ———. When, after conviction, an indigent defendant has

requested his court-appointed trial counsel or the public defender to appeal and, for any reason, such counsel does not wish to proceed with the appeal, he must immediately, in writing filed with the court, request the right to withdraw and advise the trial court of the indigent defendant's desire to appeal and to have counsel on appeal. This rule will be in effect on and after May 10, 1967.

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

Robert W. Haney, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

MCCOWN, J.

Defendant moved, under the Post Conviction Act, to vacate a 4 to 6 year sentence for attempted burglary. The district court, after a hearing, overruled the motion and the defendant has appealed. He has alleged errors in the trial and deprivation of the right of appeal.

A jury found defendant guilty of attempted burglary on April 9, 1965, and motion for new trial was overruled on April 21. Judgment and sentence were entered May 3, 1965.

Defendant took action in the criminal case prior to expiration of the time for appeal. The affidavit of his trial counsel discloses that the defendant made known his desire to appeal from the conviction, was advised that his trial counsel would file a motion for new trial on his behalf, but that he would have to make other arrangements for appeal. The district court in this post conviction proceeding specifically found "that the defendant did in fact, within the time required, demand of his trial counsel that an appeal be taken, and that the counsel refused to do so." On May 3, 1965, defendant filed a handwritten motion entitled: "Submission of motion to demur the sentence, and set aside the convic-

tion, consolidated with a notice of appeal." The first paragraph of this document constituted a sufficient notice of appeal.

The fact of defendant's indigency is not disputed and the appeal he was attempting to make was the only appeal which the state affords him as a matter of right. Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request. Carnley v. Cochran, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70.

When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it cannot be inferred from defendant's failure to specifically request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel. Swenson v. Bosler, 386 U. S. ——, 87 S. Ct. 996, 18 L. Ed. 2d 33.

The defendant, on December 14, 1965, filed a "second" notice of appeal, with a request for appointment of counsel and an affidavit of poverty. These were out of time under the requirements of section 29-2306, R. R. S. 1943. On December 29, 1965, the court appointed counsel to represent the defendant "for the purpose of perfecting, or attempting to perfect, an appeal by defendant of the conviction against him." Thereafter counsel filed the motion for post conviction relief involved. The post conviction proceeding alone has been docketed here.

Under the circumstances, to apply the time limitations of the jurisdictional requirements for appeal would be an unconstitutional deprivation of the defendant's right of appeal. See, Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811; Swenson v. Bosler, *supra*. The jurisdictional statute "must be interpreted within the framework of the germane constitutional provisions, both state and federal." Ford v. State (Iowa), 138 N. W. 2d 116.

Were appellate jurisdiction denied, one of three results

would occur: A new sentence for the sole purpose of appeal, a new trial, or a discharge of defendant. The prospect clashes with the public interest in the efficient administration of criminal justice.

Where the defendant has invoked appellate jurisdiction in the original criminal case as well as in the post conviction proceeding, the post conviction remedy "is cumulative and is not intended to be concurrent with any other remedy * * *." § 29-3003, R. S. Supp., 1965. It cannot serve the purpose of an appeal to secure a review of the conviction. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765; State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447.

The overruling of defendant's motion for relief under the post conviction remedy was correct because of the pending appeal in the criminal case, but the denial of post conviction relief is, of course, without prejudice.

The necessity for court-appointed trial counsel to advise the trial court of matters directly affecting the right of an indigent defendant to appellate counsel is apparent. We hold that when, after conviction, an indigent defendant has requested his court-appointed trial counsel or the public defender to appeal and, for any reason, such counsel does not wish to proceed with the appeal, he must immediately, in writing filed with the court, request the right to withdraw and advise the trial court of the indigent defendant's desire to appeal and to have counsel on appeal. This rule will be in effect on and after May 10, 1967.

The Clerk of this court is directed to designate this proceeding as a criminal appeal. The parties are granted 60 days in which to submit supplemental transcript, bill of exceptions, and briefs, if desired.

The post conviction judgment is affirmed.

AFFIRMED WITH DIRECTIONS.

WHITE, C. J., dissenting.

The statute, section 29-2306, R. R. S. 1943, sets out the requirements for jurisdiction of a criminal case in

this court. A notice of appeal and the filing of a docket fee or an affidavit of poverty in lieu thereof are required. These requirements were not complied with. Nobody suggests that this statute setting out the requirements of an appeal is unconstitutional or unreasonable in any respect. It is true that this defendant was an indigent but the statute on appeal does not require the payment of any money in order to docket an appeal. All he needed to do was file a poverty affidavit and a notice of appeal. The defendant was entitled to the same rights as any other citizen, neither more nor less. We see no reason why the defendant should not be required to comply with the statute the same as any other defendant desiring to take an appeal.

Under the majority holding, the defendant entirely disregarded the jurisdictional time limit for appeal, waited for an indefinite period of time, and then had an appeal granted based upon a claim that he desired to appeal with nothing in the record to substantiate such a claim. An indigent defendant has a right to counsel in the original trial, right to counsel on appeal, and a right to appeal without the payment of any fees or the costs or expenses of counsel. But it is not unreasonable to require a defendant to comply with the law applicable to every other citizen as to the procedural steps to be taken to perfect an appeal. Of course, the defendant had a constitutional and statutory right to counsel on appeal. The record shows that the court granted his request for counsel when he applied for it. He knew about his right to appeal and his right to a lawyer. He neither requested the court to appoint a lawyer at the proper time nor did he comply with the jurisdictional requirements on appeal.

Unless we are going to grant automatic appeals in all criminal cases there are certain minimal and simple statutory requirements that must be made by anyone desiring to take an appeal in a criminal case. These were

not met in this case and therefore the appeal should not have been granted.

CARTER, J., joins in this dissent.

SPENCER and SMITH, JJ., concurring.

We are in full agreement with the majority opinion herein, but believe that a statement therein should be reiterated to demonstrate the fallacy of the premise on which the dissent herein is based.

As stated in the majority opinion, the trial court specifically found "that the defendant did in fact, within the time required, demand of his trial counsel that an appeal be taken, and that counsel refused to do so." As the dissent concedes, the defendant had a right to an appeal. He also had a court-appointed counsel, and had a right to expect that counsel, upon request, to perfect his appeal. If counsel, for sufficient reason, does not wish to proceed further, he must do what is necessary to protect his client's rights and then request the appointing court for leave to withdraw from the case. Until such leave is granted, counsel is required to protect his client's rights. Swenson v. Bosler, 386 U. S. ——, 87 S. Ct. 996, 18 L. Ed. 2d 33, requires no less.

IN RE PRESCRIPTION OF REASONABLE RATES AND CHARGES FOR MOTOR CARRIERS OF PROPERTY.

READY MIX, INC., BLOOMFIELD, NEBRASKA, ET AL., APPELLEES, V. NEBRASKA RAILROADS OF WESTERN TRUNK LINES COMMITTEE, APPELLANT, IMPLEADED WITH NEBRASKA SAND, GRAVEL AND READY MIXED CONCRETE ASSOCIATION, APPELLEE, HARGLEROAD INC., A CORPORATION, ET AL., INTERVENERS-APPELLEES.

150 N. W. 2d 275

Filed May 5, 1967. No. 36481.

1. **Railroads: Motor Carriers.** Freight rates and classifications that are properly found to be reasonably useful in the public

interest are necessary within the meaning of section 75-118, R. R. S. 1943.

2. **Administrative Law.** Procedural fairness does not ordinarily require an opportunity for oral argument in addition to written argument.
3. **Public Service Commissions: Administrative Law.** The refusal of the Nebraska State Railway Commission to hear any argument at all prior to entry of a rate order was not arbitrary under the circumstances.

Appeal from the Nebraska State Railway Commission. Affirmed.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Einar Viren and James E. Ryan, for appellee Ready Mix, Inc.

Robert A. Skochdopole and James W. Hewitt, for appellee Nebraska Sand, Gravel & Ready Mixed Concrete Assn.

Robert E. Powell, Richard A. Peterson, Nelson, Harding, Acklie, Leonard & Tate, and James E. Ryan, for interveners-appellees.

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

SMITH, J.

The Nebraska State Railway Commission authorized commodity rates for intrastate transportation of cement by motor common carrier, and protesting railroads have appealed. We review (1) sufficiency of the evidence, which was received at a trial type of hearing before an examiner, and (2) denial of a request for oral argument to the commission.

Cement has been produced and distributed at noncompetitive points. Class rates regulated intrastate transportation by motor common carrier, but they were paper rates, two and three times higher than the rates under review. In 1965 and prior to the present proceeding

the commission introduced commodity rates known as ex-rail rates. They were applicable only in the event of a prior line haul movement of bulk cement by rail. Competition has been virtually nonexistent.

Prima facie evidence of reasonable rates may consist of the lowest rates published by any common carrier for substantially the same kind of service. See § 75-123, R. R. S. 1943. The commission based its order on a scale of distance rates published by two motor common carriers in interstate commerce. The scale applied to transportation of cement from designated points of origin in Nebraska to destinations in Iowa, Missouri, Kansas, South Dakota, North Dakota, and Minnesota. The commission also considered a tariff on cement transported between points in Iowa. The tariff had been filed by a motor carrier certificated in Iowa and Nebraska. Its president compared transportation conditions: "A * * * Actually all rates in Iowa are a few percentage points lower than they are in Nebraska both on petroleum and bulk commodities. Q Is that the only difference * * *? A In our operations, and we operate about 40% in Iowa, that is the only difference that I can see."

Some of the rates in cents on a barrel (376 pounds) of portland cement in bulk show the general levels:

Mileage Factor	Nebraska Under Review	Nebraska Ex-rail	Iowa	Interstate
6- 10	29	24.44	28	29
11- 15	32	28.20	30	32
16- 20	34	31.96	32	34
26- 30	38	39.48	36	38
41- 45	44	45.12	42	44
56- 60	50	56.40	48	50
66- 70	55	62.04	52	55
96-100	67		64	67
146-150	99		92	99
196-200	130		124	130
241-250	162		154	162
291-300	193		184	193

381-400	256	244	256
481-500	319	304	319

Many companies manufacturing concrete products, selling cement, or constructing highways protested the rates. The board of directors of the Nebraska Sand, Gravel and Ready Mixed Concrete Association had stated: The "* * * long established policy of this association * * * is that the movement of cement by rail is in the best interest of the ready mixed concrete industry in Nebraska, * * *." The equipment and plants of the companies are substantial assets, and they are served satisfactorily by rail. Witnesses said that authorization of the proposed rates would create these risks: Diminution of rail service; higher rail rates, high motor carrier rates; unrest among teamsters; increase of price to users of cement products; and competition from ready-mix plants to be served by motor carriers.

The railroads introduced evidence to show that diversion of traffic would be detrimental not only to them but to shippers also. Transportation of cement is a substantial business, and the railroads are building many hopper cars at great cost. A decrease of revenue would affect their building program and freight tariffs. Raising no issue of cutthroat competition from noncompensatory rates, they requested one limitation—a prior line haul movement of the cement by rail.

In contrast complaints were made by two operators of ready-mix plants. Their businesses were small and their needs debatable. One motor carrier besides the applicant carrier displayed interest in lower rates.

The commission has a duty to prescribe necessary rates and classifications of freight. § 75-118, R. R. S. 1943. The meaning of the word "necessary" has been shaped by the policy of the Legislature "to (1) regulate * * * motor carriers * * * in such manner as to recognize and preserve the inherent advantages of * * * such transportation * * * in the public interest; (2) promote * * * service by

motor carriers, and reasonable charges therefor, without * * * unfair or destructive competitive practices * * *." § 75-301, R. R. S. 1943. The statutes require nothing more than reasonable usefulness in the public interest. See Causey v. Jones, 193 Miss. 495, 10 So. 2d 356.

The railroads are insisting that the commission must hold truck rates up in order to protect railroad business. Their reasons are unconvincing. The practical results of actual operation may necessitate adjustment of rates in the future, but the possibility should not abort legislative and administrative policy. The evidence left the commission free to select commodity rates instead of class rates, and authorization of the distance scale was reasonable. See, Chicago, B. & Q. R.R. Co. v. Herman Bros., Inc., 164 Neb. 265, 82 N. W. 2d 405; Chicago, B. & Q. R.R. Co. v. Herman Bros., Inc., 164 Neb. 247, 82 N. W. 2d 395; Schaffer Transp. Co. v. United States, 355 U. S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117.

The commission denied a request for oral argument prior to decision, but it heard argument on the motion of the railroads for rehearing. Common carriers are entitled by statute to be heard in rate cases to the end that justice may be done. A rate order is not a rule, and in contested cases opportunity is afforded all parties to present argument. On any matter heard by an examiner a decision should be filed within 30 days after oral argument to the commission. See, §§ 75-110, 75-119, 75-128, 84-901(2), and 84-913, R. R. S. 1943; 1 Cooper, State Administrative Law, p. 122.

Our decisions illustrate the elastic meaning of procedural fairness. Relying on a statute in force at the time, we criticized the commission for failing to listen to arguments over rate changes. Oakdale Tel. Co. v. Wilgocki, 171 Neb. 425, 106 N. W. 2d 486; Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715. Denial of oral argument in this court, however, did not violate the constitutional right to be heard in the court of last resort. Schmidt v. Boyle, 54 Neb. 387,

74. N. W. 964; In re Supreme Court Commissioners, 100 Neb. 426, 160 N. W. 737. We conclude that opportunity for oral argument is not an absolute requirement, that written argument alone is ordinarily enough for fairness. See, Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U. S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353; Dyke Water Co. v. Public Utilities Commission, 56 Cal. 2d 105, 14 Cal. Rptr. 310, 363 P. 2d 326. The generalization does not answer the immediate question: Was the refusal of the commission to hear any argument at all so unfair that the order should be reversed?

Circumstances disclosed by the transcript are relevant. The commission prescribed temporary rates April 13, 1966, three weeks subsequent to the evidentiary hearing before the examiner. The testimony had been tape recorded, and the commission listened to a playback prior to June 8, 1966. On the latter date a final order granting the application was entered, one commissioner dissenting. A month later the commission in compliance with a restraining order stayed the effective date of the rate order. On July 20, 1966, it set aside its final order, but it found that two orders for temporary rates should be reinstated. On July 26, 1966, the examiner filed his summary of the evidence, copies of which were apparently not served upon the parties. The next day the order under review was entered, one commissioner dissenting.

Although the railroads desired to keep the traffic, the proceeding involved the public interest. Existing truck rates were apparently indefensible, and the commission mastered the evidence before it acted. Under the circumstances denial of the request for oral argument was not arbitrary.

The order is affirmed.

AFFIRMED.

CARTER, J., concurring.

The carriers in this case complain of the refusal of the commission to grant oral argument before the commis-

sion on the merits of the case. This question raises an issue of considerable concern since the requirement for a hearing implies the taking of evidence and an argument on the issues if requested.

The evidence in this case was taken by an examiner for the commission. There was no argument before the examiner. It is provided by Rule 15(e), Rules of the Nebraska State Railway Commission, as follows: "Ordinarily no oral argument will be permitted at the close of a hearing. The hearing officer may request or permit such argument." By Rule 15(f) of such rules, it is provided in part: "Briefs may be required by the hearing officer or the Commission. Any party desiring to submit a brief may do so by indicating such desire at the close of the hearing." It is evident from these rules that the commission does not authorize oral argument by rule, but does authorize the filing of written briefs before the examiner and the commission by indicating a desire to do so. No such desire was manifested or request made in the instant case. Admittedly, the holding that the failure to grant an oral argument by the commission is not a violation of due process in this case is highly technical. But we must assume that oral arguments are too time consuming in handling the work of the commission and briefs are permitted on request as an alternative to oral argument.

It is noteworthy, however, that the commission provides for oral argument on motions for a rehearing by Rule 18(b)(1)(i) in part as follows: "The Commission shall hear oral argument on motions for rehearing if there is a prior request therefor in writing." While no objection can be raised to the granting of oral argument on rehearing, due process requires the granting of argument, oral or written, before decision on the merits. It is not conceivable to me that the commission has the time to hear oral arguments on rehearings but has no time to hear oral arguments on the merits of the case when they would be more helpful in avoiding error.

The granting of oral arguments on rehearing, after mistakes have possibly been made, as a substitute for an argument on the merits before decision, cannot be justified from the standpoint of due process. In matters involving complicated issues of law and fact, as in the case before us, oral arguments ought to be granted as a matter of justice and fairness. The denial of argument on the merits by courts and administrative agencies alike implies an infallibility not possessed.

IN RE APPLICATION OF CITY OF SCHUYLER, NEBRASKA. CITY OF SCHUYLER, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. CORNHUSKER PUBLIC POWER DISTRICT, APPELLEE, SPENCER PACKING COMPANY, AN IOWA CORPORATION, INTERVENER-APPELLEE.

150 N. W. 2d 588

Filed May 5, 1967. No. 36490.

1. **Administrative Law.** An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act.
2. **Municipal Corporations.** A municipal corporation may be estopped by its official acquiescence in, and approval of, acts originally unauthorized.
3. **Electricity: Municipal Corporations.** Ordinarily, a municipality which operates a system for the sale of electrical energy at retail shall have the right to serve new customers in its zoning area at retail. Upon expansion of its corporate limits, such a municipality is entitled to modify its retail service area to include extensions of its zoning area.
4. **Administrative Law.** An order of the Nebraska Power Review Board which is not sustained by the evidence will be reversed.

Appeal from the Nebraska Power Review Board. Reversed.

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Mattson, Ricketts & Gourlay, for appellee.

Stewart, Calkins & Duxbury and David L. Crawford, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and MURPHY, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the Nebraska Power Review Board denying an application of the City of Schuyler, Nebraska, to modify its service area. The protestant and appellee is the Cornhusker Public Power District.

The applicant owns and operates an electrical generation and distribution system which serves the area within its corporate limits and certain areas beyond the limits. The protestant owns and operates transmission and distribution lines in Colfax, Platte, Nance, and Boone Counties and a part of Greeley County. It obtains its power supply by purchase of energy from the Nebraska Public Power System.

The Spencer Packing Company, which intervened in support of the application, plans to construct a large meat-packing plant near Schuyler, Nebraska, on a part of the northwest quarter of Section 16, Township 17 North, Range 3 East of the 6th P. M., in Colfax County, Nebraska. The plant will have a capacity of 150 cattle per hour. It will be a fully integrated plant with killing floors, coolers, and facilities for edible and inedible rendering. Because of the nature of the plant and the products which will be handled, the packing company wants to obtain the most reliable service that is available with a minimum of outages. The anticipated connected load is approximately 3,500 kilowatts.

A revised service area agreement, approved by the Power Review Board on May 12, 1965, shows the east line of the west half of Section 16 as the boundary between the service areas of the applicant and the protestant. According to this agreement, the northwest quarter of

Section 16 is included in the service area of the protestant.

On March 25, 1966, the applicant by ordinance approved the voluntary annexation of a tract situated in a part of the northeast quarter of Section 16. On May 10, 1966, the applicant by ordinance approved the voluntary annexation of an additional tract situated in the northeast quarter of Section 16. The effect of the annexation was to include a part of the area immediately east of the packing plant site within the corporate limits of the applicant, and to include the packing plant site within the zoning area of the applicant. The application sought a modification of the applicant's service area so as to include the new zoning area of the applicant within its service area.

The protestant alleged that the annexations were void and that the application should be denied.

A hearing was had upon the application on May 18, 1966. Thereafter, the parties moved for permission to withdraw their rest and introduce additional evidence. On July 6, 1966, the board sustained a motion of the protestant to reopen the hearing, and a further hearing was held on August 3, 1966. On August 4, 1966, the board entered its order denying the application, one member dissenting. The applicant's motion for rehearing was overruled and it has appealed.

The board found that it had no statutory authority to determine the validity of the annexation ordinances of the applicant and made no finding in regard to the validity of the annexation. The board was correct in recognizing its lack of jurisdiction to determine the validity of the annexation of territory to a municipality. An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629. So far as this pro-

ceeding is concerned, the annexation must be presumed to be valid.

The board found that the service area agreement between the parties, approved May 12, 1965, was a valid, existing voluntary service area agreement. The applicant claims that the agreement is not binding on it because there is no evidence that the execution of the agreement by the superintendent of its department of utilities was authorized by the mayor and council.

The statute, which became effective May 16, 1963, provides that on or before July 1, 1964, suppliers shall enter into agreements specifying their service areas. § 70-1002, R. R. S. 1943. A supplier which has not entered into a service area agreement by July 1, 1964, is required to file a statement showing what it claims as its service area. § 70-1004, R. R. S. 1943.

The agreement approved on May 12, 1965, is a revised agreement. The record indicates that a previous service area agreement between the parties had been approved on July 14, 1964. Upon their joint application the earlier agreement was revised and the boundary between the service areas was moved to the east to permit the protestant to serve a customer that the applicant did not wish to serve.

The evidence shows that the superintendent of utilities was specifically authorized to execute other service area agreements on behalf of the applicant. The applicant does not claim that the agreement, approved May 12, 1965, was filed without its knowledge or consent or that a dispute existed and it had attempted to comply with section 70-1004, R. R. S. 1943. There is nothing to indicate that the applicant raised any question as to the validity of the May 12, 1965, agreement until the present controversy arose.

Under the circumstances of this case, the applicant should not be permitted to question the validity of the agreement at this time. A municipal corporation may be estopped by its official acquiescence in, and approval of,

acts originally unauthorized. May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448. The record sustains the finding of the board that the agreement approved May 12, 1965, was a valid, existing agreement. A service area, however, is subject to modification.

A service area is subject to modification at any time by the procedure prescribed in section 70-1010, R. R. S. 1943. Modification may be accomplished by agreement, with the approval of the board, or upon the application of a supplier after notice and hearing.

The application filed in this case was a request for the modification of a service area. The applicant alleged a change of circumstances in that its corporate limits had been extended and its zoning area enlarged. The question presented is whether a municipality is entitled to enlarge its service area to include extensions of its zoning area.

The purpose of the statute was to eliminate conflict and competition between public corporations furnishing electrical energy to retail customers. § 70-1001, R. R. S. 1943; City of Auburn v. Eastern Nebraska Public Power Dist., *supra*. The fixing of retail service areas is the method by which the purpose of the statute is accomplished.

At the time this legislation was under consideration, the Legislature was concerned with the problems that arise where there are multiple suppliers within a municipal area. The act evidences an intention to avoid similar situations in the future.

The act provides that a municipality which operates a retail system shall have a preference within its corporate limits and zoning area. Section 70-1008, R. R. S. 1943, provides: "In the absence of an agreement between the suppliers affected and notwithstanding the provisions of subdivisions (1) to (5) of section 70-1007:

"(1) In the zoning area surrounding any municipality and outside the corporate limits thereof, if such municipality operates a retail system, it shall have the right to serve such zoning area at retail except as to

such customers as are presently served by other suppliers. Such a municipality may acquire the facilities of other suppliers in such zoning area by negotiation.

"(2) In determining the service area of a municipally-owned electric system, there shall be included, as a maximum, the corporate area of the municipality, the zoning area outside the corporate limits of such municipality, and the area beyond the zoning area which is presently being served by such municipality, including not more than the area one half mile on each side of the line presently used by such municipality to serve its existing customers, except for customers presently served by other suppliers. When any new customer outside the corporate limits of any municipality and outside the zoning limits surrounding such municipality locates closer to electric lines owned by other suppliers in the municipal service area as provided for in this section, in case of disagreement, the question of which supplier shall serve such new customer shall be submitted to the Nebraska Power Review Board for determination under the standards set forth in section 70-1007."

The logical area into which a municipality expands is its zoning area. If the retail service area of a municipality includes the zoning area, the problem of multiple suppliers within the municipal area will be lessened.

The board took the position that a municipality has the right to serve retail customers in its zoning area only in the absence of an agreement between the suppliers affected. This interpretation fails to give effect to the spirit of the act and the purpose of the legislation. If the boundaries of the retail service areas are to be rigid and remain fixed without regard to the expansion of municipalities, the result will be multiple suppliers within the municipal areas. We think the more reasonable interpretation of the act is that which permits modification of service areas to include extensions of zoning areas within municipal retail service areas.

In this case there are no customers presently being served in the disputed area and the applicant seeks only to serve new customers. The applicant has at least equal, if not superior, capabilities to serve the area. As we view the record, the evidence does not sustain the denial of the application. The order of the Nebraska Power Review Board is, therefore, reversed.

REVERSED.

BEVERLY A. FRANKS, APPELLEE, V. HARRY A. FRANKS, APPELLANT.

150 N. W. 2d 252

Filed May 5, 1967. No. 36495.

1. **Divorce.** A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact, without reference to incompetent, irrelevant, and immaterial evidence admitted in the original trial over proper objection by the adverse party, and without reference to findings made by the trial court.
2. ———. The fruits of an independent investigation by the trial court of the issues between the parties, when there is no provision of law providing for such an investigation, may not be considered upon trial de novo on appeal.
3. ———. Generally, a property settlement agreement in a divorce proceeding will be respected by the courts as presumably fair and valid.
4. **Judges.** A proper administration of the law demands not only that judges refrain from actual bias, but also that they avoid all appearances of unfairness or impropriety.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert E. Paulick and Gerald B. Buechler, for appellant.

Kelly & Kelly, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

Plaintiff, Beverly A. Franks, brought suit for divorce against defendant, Harry A. Franks, on the grounds of extreme cruelty and nonsupport of plaintiff and four minor children born to the parties. Defendant filed an answer admitting plaintiff's allegations concerning the fact of marriage and the birth of the four children, but denying plaintiff's other allegations. The trial court granted a divorce to the plaintiff, awarded her custody of the minor children, and made allowances for alimony and child support. The defendant perfected this appeal.

Neither the granting of the divorce nor the awarding of custody of the minor children to the plaintiff are assigned as error, and a review of the evidence shows that action by the trial court to have been fully warranted.

The assignments of error, in summary, are: That the judgment is contrary to the law and the evidence and is not sustained by sufficient evidence, but is based on evidence not properly before the court; that the trial judge erred in not disqualifying himself; and that the trial judge erred in subpoenaing and interrogating witnesses and receiving evidence, all upon his own motion.

The petition was filed May 24, 1966. The allegations of cruelty related to physical violence and defendant's association with women other than plaintiff. On June 24, 1966, the parties, after consultation with their respective attorneys, entered into a property settlement agreement expressly subject to the approval of the court and the granting of a divorce by the court. The agreement provided that plaintiff should have custody of their four children; that defendant should pay $150 per month child support and should be entitled to claim two of the children as dependents for federal income tax purposes; that plaintiff should receive certain household furnishings and an automobile, subject to encumbrances; that defendant should pay two medical bills; and that defendant should receive, subject to encumbrances, all per-

sonal property then in his possession, and a 1964 Chevrolet pickup, a 1965 Pontiac sedan, a 1958 Kenworth truck-tractor, a 1961 Mack truck-tractor, and two 1962 Hobbs trailers, which vehicles were subject to various mortgages, the balance due on which totaled approximately $29,000.

On September 8, 1966, the cause came on for trial, at which time defendant was not present, although his counsel was present and made no objection. Plaintiff testified that the parties had been separated for 2 years, during which time the defendant had acquired the vehicles enumerated in the property settlement agreement. She asked that the agreement be approved. She stated she was employed at a weekly take-home pay of $78.95, and her husband was a self-employed trucker. In response to inquiry by the trial court she indicated that she did not know the actual value of those vehicles, but was of the opinion that their value was less than the mortgage indebtedness against them.

While the trial judge was examining plaintiff he commented once: "We are talking here about a man who hasn't supported his family for two years, yet, he's got a '65 Pontiac sedan. I want to know why? If he hasn't supported his family in two years and bought all this equipment, there is something I don't know about." He also commented: "Well, you understand, Mrs. Franks, that the court has a duty to see the children's interest is protected in this thing, too, and if your husband isn't supporting and he has all these assets or has acquired them in the last two years, I feel it is my duty to see there is proper protection for the children. Whether or not he sold you a bill of goods in this settlement is yet to be seen. I have no question as to grounds. You may step down."

At the conclusion of that hearing, the trial court continued the matter over, stating, among other things, that it would make an independent investigation of the values because he felt there was some equity in the

property. The court also directed that the defendant appear at the later hearing.

On September 15, 1966, a brief hearing was held, at which time the court made some comments reflecting that it had, in fact, conducted an independent investigation. The court stated that defendant was living with another woman, naming her; and stated further that defendant had filed an assessment schedule setting her out as his wife. The court then set forth in detail how various vehicles, apparently those described in the property settlement agreement, were titled, either in defendant, or the other woman, or both.

On September 23, 1966, a further hearing was held, at which time, on its own motion, without any foundation having been laid, and over appropriate objections by counsel for the defendant, the trial court received in evidence two exhibits. One of these exhibits was a photocopy of a 1966 personal property tax return bearing the name of "Harry Franks." The other was a photocopy of the assessor's copy of two Nebraska motor vehicle registration certificates, with a dollar figure endorsed by pen on each. These certificates appear to relate to vehicles owned by defendant and described in the property settlement agreement. The trial court stated that the dollar figures were valuations obtained by it from assessor's office which the assessor's office called market value. Also on its own motion the trial court, having previously caused a subpoena to be issued for each, called as witnesses the defendant and the person whose name appeared on the registration certificates and also, as defendant's wife, on the tax return. Counsel were granted an opportunity to interrogate them, but did not do so. The court did interrogate them, but did not require that they answer any questions when they declined to do so under the Fifth Amendment. At that same hearing the trial court overruled a motion that he disqualify himself on account of prejudice against the defendant.

At the conclusion of this hearing the trial court granted plaintiff an absolute divorce and approved the property settlement with two exceptions. The plaintiff was awarded alimony in the sum of $3,000 and the amount of child support was fixed at $50 per month for each child.

A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court. Benton v. Benton, 180 Neb. 759, 145 N. W. 2d 576. Upon such a trial de novo, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded. Young v. Young, 166 Neb. 532, 89 N. W. 2d 763; 5 C. J. S., Appeal and Error, § 1531, p. 1022.

"It is not the prerogative of a trial court to make an independent investigation of the issues between the parties when there is no provision of law providing for such an investigation." Caldwell v. Wells, 174 Neb. 288, 117 N. W. 2d 486. We think that the investigation made by the trial court in this instance did not comply, either in form or in substance, with that authorized by statute (§ 42-307, R. R. S. 1943), and that the fruits of that investigation must be totally disregarded here. Further, no compliance was had with the procedural requirements indicated by us in the case of Koser v. Koser, 148 Neb. 277, 27 N. W. 2d 162.

"A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable ad-

vantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence." Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790. Such contracts are not binding upon, but are advisory to, the court. Coker v. Coker, 173 Neb. 361, 113 N. W. 2d 329.

Guided by the above principles we find that the property settlement agreement of the parties is fair and valid; was not obtained through fraud, intimidation, overreaching, or other improper or unlawful means; and should be approved in full.

We are aware that generally a ruling of the trial court on a motion to disqualify the trial judge is immaterial on appeal to the Supreme Court where the case is an action in equity triable de novo. Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721. However, in this instance the cause must be remanded for further proceedings, and the trial court will have continuing jurisdiction concerning the custody and support of the minor children. It becomes, therefore, appropriate to consider that ruling in this case.

The Canons of Judicial Ethics provide, in essence, that a judge should be impartial, that his official conduct should be free from even the appearance of impropriety, and that his undue interference in a trial may tend to prevent the proper presentation of the cause and the ascertainment of the truth in respect thereto.

The determination by a trial judge upon a motion seeking to disqualify him on account of prejudice rests generally within his sound discretion, but such discretion is not absolute. If it appears that a fair and impartial trial cannot be had before him, it is his duty to transfer the case. Back v. State, 75 Neb. 603, 106 N. W. 787.

"A proper administration of the law demands not only that judges refrain from actual bias but also that they avoid all appearance of unfairness. All doubt or suspicion of bias should be jealously guarded against and, if possible, completely eliminated; and, when the circumstances and conditions surrounding a litigation are of

such nature that they might cast doubt on the impartiality of any judgment the judge may pronounce, the judge should certify his disqualification. Thus disqualification of a particular judge for bias or prejudice, although not technically required by the circumstances, is sometimes proper in order to dispel any thought or suspicion that the litigants may not be receiving impartial justice; * * *." 48 C. J. S., Judges, § 82 a, p. 1058.

Whether or not there was here an abuse of discretion need not now be determined. We have, however, come to the conclusion that upon remand of the cause, the motion of defendant that the trial judge disqualify himself should be granted. Because of the independent investigation conducted by him, it would seem inappropriate for him to continue to act in this cause.

For the reasons given, the decree of the district court is modified to provide for an allowance for child support in conformity with the property settlement agreement of the parties and to delete therefrom the provision for alimony in the sum of $3,000; such modification to relate back to the original date of the decree and to be in lieu of the provision therein made for plaintiff's support pending this appeal. The decree in all other respects is affirmed. The costs of the appeal are taxed to the defendant.

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

STATE OF NEBRASKA, APPELLEE, V. MANUEL SOLANO, APPELLANT.

150 N. W. 2d 585

Filed May 12, 1967. No. 36386.

1. **Burglary.** While the mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case, may

be considered by the jury in determining the question of the guilt or innocence of a defendant so charged.

2. ———. In order for a defendant's possession of stolen property to be sufficient to support a conviction of burglary, such possession must be recent, that is, not too remote in point of time from the crime, personal, exclusive, distinct, conscious, and such possession must be coupled with a lack of a satisfactory explanation, or a false explanation or other incriminating circumstances or conduct.

3. ———. Possession of stolen property, coupled with false statements as to the manner in which the property came into defendant's possession, may be sufficient evidence to sustain a conviction of burglary.

4. **Criminal Law.** A charge that one accused of a crime is a habitual criminal is not the charge of a distinct offense or crime but is rather a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.

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

Kelly & Kelly, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and LYNCH, District Judge.

WHITE, C. J.

Defendant was convicted of burglary under section 28-532, R. R. S. 1943. He was found to be a habitual criminal under Count II of the information and sentenced to the Nebraska Penal and Correctional Complex for a period of 5 years on Count I and 10 years on Count II. The sentences were to run concurrently. The defendant appeals and the assignments of error present the sole question of whether there was sufficient evidence to sustain the conviction.

On the night of December 20, 1965, the Wheeler Farm Supply store in Kearney, Nebraska, was broken into and numerous items of merchandise were taken. There was

no evidence identifying the defendant as being at or near the scene of the crime. Defendant was arrested on the evening of December 25, 1965, while driving an automobile near York, Nebraska. He had as a passenger one Robert Pruitt, who owned the vehicle. Various items of merchandise identified as being taken in the burglary were found in this automobile. The evidence shows that the defendant, at the time of his apprehension, was wearing a ladies necklace-type watch around his neck. This was identified as one of the items stolen from the store. Defendant told the officers that the watch was a family heirloom. At the trial, the defendant testified that he had purchased the watch from Robert Pruitt, the owner of the vehicle, for $7. This was corroborated at the trial by Pruitt and the defendant's sister. A soldering iron, taken in the burglary, was found on the top of a refrigerator in the home of the sister of the defendant, one Helen Mumm. The defendant had been residing with his sister in Kearney, Nebraska, and was present there on the evening of December 20, 1965. The defendant, corroborated by Pruitt and his sister Helen Mumm, testified that the soldering iron had been brought to his sister's home by Pruitt and, after testing it to see whether it worked or not, Pruitt had placed it on top of the refrigerator. Defendant, corroborated by Pruitt, testified he had bought the watch that was found around his neck, on December 25, 1965, from Pruitt for the sum of $7.

Defendant contends the evidence is insufficient to support a conviction for burglary. Defendant cites Bassinger v. State, 140 Neb. 63, 299 N. W. 293, and Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762, which state the rule to be that the mere possession of stolen property lately taken burglariously is insufficient evidence upon which to base a verdict of guilty against the person found in possession of the property. Although the State asks us to depart from the rule and hold that mere possession alone is sufficient to justify a convic-

tion of burglary, we adhere to the rule that 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. The question then presented is whether there are sufficient corroborating circumstances or evidence, pointing toward the guilt of the defendant, to justify a submission of that issue to the jury in this case as the trial court did.

We believe the correct rule to be that while the mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged. See, 12 C. J. S., Burglary, § 59, p. 735; People v. Barber, 112 Cal. App. 2d 333, 246 P. 2d 99; Lefthand v. State (Okl. Cr.), 398 P. 2d 98. In the application of this rule where both possession and other suspicious circumstances are shown, a conviction may be supported irrespective of whether either would have been sufficient of itself to sustain a verdict of guilty. 12 C. J. S., Burglary, § 59e, p. 739; Gibson v. State, 25 Ariz. 236, 215 P. 2d 729; People v. Morris, 124 Cal. App. 402, 12 P. 2d 679; Oglesby v. State, 121 Tex. Cr. 52, 51 S. W. 2d 587; State v. Johnson, 11 Wis. 2d 130, 104 N. W. 2d 379; State v. Bricker, 178 Iowa 297, 159 N. W. 873; Hart v. State, 61 Okl. Cr. 224, 67 P. 2d 66; Myers v. Commonwealth, 132 Va. 746, 111 S. E. 463. An unreasonable or contradictory explanation of the possession of recently stolen property by a defendant is a circumstance pointing to guilt and is sufficient to submit the case to the jury. Such an explanation may not be believed by the jury and will not, as a matter of law, be insufficient to sustain a conviction. People v. Russell, 120 Cal. App. 622, 8 P. 2d 209; Holliday v. State, 23 Ga. App. 400, 98 S. E. 386; People v. Hein, 315 Ill. 76, 145 N. E. 654; Stallard v. Common-

wealth, 130 Va. 769, 107 S. E. 722. We believe the proper rule to be that possession of stolen property, coupled with false statements as to the manner in which the property came into defendant's possession, may be sufficient evidence to sustain a conviction of burglary. People v. Mercer, 103 Cal. App. 2d 782, 230 P. 2d 4; People v. Buratti, 96 Cal. App. 2d 417, 215 P. 2d 500; People v. Brown, 136 Cal. App. 2d 244, 288 P. 2d 984. In accordance with the above authorities we hold that in order for a defendant's possession of recently stolen propery to be sufficient to support a conviction of burglary, such possession must be recent, that is, not too remote in point of time from the crime, personal, exclusive, distinct, conscious, and such possession must be coupled with a lack of a satisfactory explanation, or a false explanation or other incriminating circumstances or conduct. If these conditions are met a case sufficient to sustain a conviction is made out. See, State v. Thomas, 121 Utah 639, 244 P. 2d 653; State v. Nichols, 106 Utah 104, 145 P. 2d 802; State v. Ebel, 92 Mont. 413, 15 P. 2d 233; 12 C. J. S., Burglary, § 59, p. 736.

The defendant was found in possession of a ladies necklace-type watch, sufficiently identified as being stolen in the burglary, within 5 days after the occurrence of the crime. His explanation of how he came into possession of this watch (that it was a family heirloom) is directly contradicted by his own testimony at the trial that he purchased it from Pruitt. Many other items of merchandise stolen in the burglary were found in the automobile that the defendant was driving. Another item, the soldering iron, was found on the top of a refrigerator in the home of his sister where he had been staying. It is true that the defendant, corroborated by Pruitt and his sister, gave an explanation of his possession of these articles. But it is not for the court to pass on the credibility of this testimony nor to determine if the explanation was sufficient. Under the authorities that we have cited and under the proper rules with reference

to the province of a jury in the trial of a criminal case, all of these matters were for the jury's determination. The jury was fully and properly instructed as to the rules regarding circumstantial evidence. We conclude that, under the circumstances of this case, there were sufficient corroborating circumstances and evidence beyond the mere naked possession of recently stolen property to warrant the submission of the case to a jury and the verdict of guilty in this case.

In this case, the court found the defendant guilty of being a habitual criminal and separately sentenced him upon this count. This was error. A charge that one accused of a crime is a habitual criminal is not the charge of a distinct offense or crime but is rather a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. Consequently, the sentence in this case for being a habitual criminal is void, but the principal sentence upon the charge of breaking and entering is valid. Jones v. State, 147 Neb. 219, 22 N. W. 2d 710; Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. Consequently, we hold that the sentence of the court for 10 years upon the habitual criminal charge is void but that the sentence for a period of 5 years for burglary is a valid sentence and should be affirmed. The judgment and sentence of the district court are affirmed as modified.

AFFIRMED AS MODIFIED.

BOSLAUGH, SMITH. and MCCOWN, JJ., dissenting.

We dissent because the evidence is insufficient to sustain the conviction. See, Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762; Bassinger v. State, 140 Neb. 63, 299 N. W. 293.

DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, AS RECEIVER AND LIQUIDATING AGENT OF THE BARTLETT STATE BANK, INSOLVENT, APPELLANT, V. FRANK LAWHEAD, APPELLEE.

150 N. W. 2d 734

Filed May 12, 1967. No. 36467.

1. **Payment.** The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it.
2. **Trial.** To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, and Robert A. Nelson, for appellant.

Vogeltanz & Kubitschek, for appellee.

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

NEWTON, J.

This is an action by the Department of Banking of the State of Nebraska, as receiver and liquidating agent of the Bartlett State Bank, insolvent, against Frank Lawhead, appellee. Two causes of action were set out in appellant's petition, the first being upon a promissory note and the second on a check. Appellee's answer generally denies all allegations in the petition, and alleges payment of the promissory note and check. The reply consisted of a general denial.

On trial to a jury a verdict was rendered for appellee on both counts and judgment entered thereon.

The evidence discloses that appellee had been doing business with the Bartlett State Bank over a period of several years prior to the time it went into receivership on May 13, 1959, and had frequently borrowed substantial sums from the bank, giving his notes therefor.

The bank records reveal that in May 1956, appellee was indebted to the bank in the sum of $7,475 and borrowed an additional $12,000 for which he gave two notes, each for $6,000, to C. L. Bishop, president of the bank. The bank's maximum loan limit was $10,400, whereas total loans to appellee then amounted to $19,475, and explains why the two $6,000 notes were not made payable to the bank. These notes were immediately discounted, one with the Omaha National Bank and one with the First National Bank of Omaha. The note sent to the Omaha National Bank was renewed from time to time, and together with all other indebtedness of appellee, excepting only the note sent to the First National Bank of Omaha, was concededly subsequently paid by appellee.

The note sent to the First National Bank of Omaha was not accepted, was returned to the Bartlett State Bank, and so far as the bank records are concerned then disappeared and remains unaccounted for; its withdrawal being covered by manipulations of other accounts. A renewal of this note, the one in suit here, was subsequently found in the bank's office, and endorsed over by C. L. Bishop to the receiver. It is dated March 2, 1957.

The check in suit, dated March 2, 1957, in the sum of $363.45 was given to cover interest due on the two $6,000 notes and was never charged to appellee's account.

On June 26, 1959, appellee paid to the receiver the sum of $5,358.72, which represented all indebtedness owing by him to the bank as reflected by the bank records. The note and check sued upon, as previously noted, did not then appear in the bank records and were not discovered until a later date. On discovery they were traced back and the foregoing facts came to light.

Appellee called attention to other credits due him from the bank. Without exception these are revealed by the records to have been applied toward the payment of his other indebtedness to the bank. He testified that a check in the sum of $6,771.60, dated February 23,

1957, was given by him to the bank in payment of the $6,000 note in question, but the records reveal this too was in payment of other indebtedness due the bank, and he does not explain why, having paid the note on February 23, 1957, he executed a renewal of it on March 2, 1957.

No attempt is made to show payment of the $363.45 check and the only evidence in the record to establish payment of either the note or the check is appellee's unsupported statement that he paid the bank in full.

At the conclusion of the evidence appellant moved for a directed verdict, which was denied. The question presented is whether or not such motion should have been sustained. On the basis of the record we conclude that it should have been.

The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Van Buskirk v. Chandler, 18 Neb. 584, 26 N. W. 356; Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 454, 289 N. W. 866; Bosle v. Luebs, 169 Neb. 186, 98 N. W. 2d 795.

The burden of proving payment being upon appellee can the verdict he received be sustained under the circumstances presented by this record? "To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." Corbitt v. Hafer, 153 Neb. 824, 46 N. W. 2d 176. See, also, Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568. The record in this case discloses that every fact, without exception, relied upon by appellee as a basis for his statement that he had made payment of the note and check in question fail to support that contention. The evidence is insufficient to sustain the verdict. The judgment of the district court is reversed, and the cause remanded with direction that judgment be entered for appellant on both causes of action.

REVERSED AND REMANDED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.

S. K. "BOB" HANNA, A RURAL LANDOWNER IN THOMAS COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

RALPH P. VINTON, A RURAL LANDOWNER IN HOOKER COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF ARTHUR, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF CHERRY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF MCPHERSON, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF GRANT ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF BLAINE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

COUNTY OF CHASE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 878

Filed May 19, 1967. Nos. 36441, 36442, 36443, 36445, 36446, 36449, 36455, 36462.

1. **Taxation.** For the purpose of determining sales-assessment ratios, sales occurring in recent years adjusted to allow for any fluctuations in actual values occurring subsequent to such sales may be considered.
2. ———. It is the duty of the State Board of Equalization and Assessment to give effect to the requirement that taxes be levied uniformly and proportionately upon all tangible property and to properly equalize between counties to that end.

3. ———. The record must sustain the action taken by the State Board of Equalization and Assessment and in the absence of a uniform approach to equalization, or a rationalizing of the relationship existing between the various factors on which the State Board has acted, it is impossible for this court to ascertain that a constitutionally required uniformity between counties has been attained.

4. ———. Sales-assessment ratios revealed by the record indicate varying discrepancies in the assessed values adopted for the various counties and in the absence of a reasonable explanation of such discrepancies, the actions of the State Board of Equalization and Assessment cannot be sustained.

Appeals from the State Board of Equalization and Assessment. Reversed.

H. Alan Curtiss, Guy Curtis, Joseph J. Divis, Firmin Q. Feltz, Richard L. Spittler, and McGrath, North, Carroll & Nelson, for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WHITE, District Judge.

NEWTON, J.

The above entitled cases are appeals from the State Board of Equalization and Assessment which, for convenience, will hereinafter be referred to as the State Board. They were consolidated for the purpose of briefing and argument, and deal primarily with the 1966 equalization of rural lands in the several counties involved herein. There were changes made, in some instances, in the assessment of other categories of property within these counties, but reference to the record, the briefs, and the presentation by oral argument discloses that appellants were primarily interested in, and limited their protest to, the proposition of assessment and equalization of rural or agricultural lands. In no instance does the record disclose sufficient evidence to justify a finding that any of the counties concerned were

valued for assessment purposes in excess of actual value. The sole question presented is whether or not appellant counties were properly equalized in relation to each other and to other counties within the state.

Of the eight counties, all except Cherry County had had recently completed, state approved, county reappraisals as provided in section 77-1301, R. R. S. 1943. Such reappraisals in these seven counties, and in nine other counties, were accepted by the State Board as the sole criterion for the determination of actual value. Where the values found in such reappraisals had been reduced, for assessment purposes, by county boards of equalization, such values were restored to reappraisal levels. No other factors indicative of actual value were considered by the State Board in counties where appraisals were available; in connection therewith, the State Board found: "That a professional and scientific appraisal conducted in accordance with law by an approved appraisal company is the best evidence of actual value."

In Cherry County, and in 37 other counties within the state, the action taken by the State Board was based on a sales-assessment ratio. In this connection, the State Board found that such sales-assessment ratios must necessarily be used in the absence of more conclusive evidence, and that: "* * * such sales-assessment ratios adopted for 1966 equalization purposes have been duly adjusted on the basis of all the evidence available."

Regarding perimeter studies, the State Board found: "That the evidence regarding perimeter values was conflicting in many instances and was not of such a nature so as to provide a reasonably reliable basis for equalization between counties."

In fixing sales-assessment ratios, only sales occurring within the past 1-year period were considered. As a result, in a number of counties there were not enough sales available to provide a reliable base for equalization on a sales-assessment ratio basis. It appears that following the decision in Laflin v. State Board of Equalization

& Assessment, 156 Neb. 427, 56 N. W. 2d 469, wherein this court ruled that sales occurring 20 years in the past were too remote to be entitled to consideration, there has been a swing to the opposite extreme. The State Board does not hesitate to use scientific appraisals which are 2, 3, or even 5 years old and can reasonably do so if values so found are adjusted to allow for any fluctuations in actual value since the completion of the appraisals. There would not appear to be any sound reason for not, in like manner, using sales occurring in the past few years where necessary to get a reasonable sales-assessment ratio, provided they also are adjusted to allow for any fluctuation in actual values in the interim.

In making up its sales-assessment ratios, the State Board screened out all sales which were not deemed to have been made on an "actual value" basis. Yet, notwithstanding the care used in determining sales-assessment ratios, a wide divergence in such ratios as between counties resulted. The sales-assessment ratios varied over the state from 116.89 in Thomas County to 23.78 in Rock County. In most instances these discrepancies remain unexplained, but they do exist despite the finding of the State Board that all sales considered "have been duly adjusted."

For purposes of equalization, there is perhaps no single method of determining actual value which can be relied upon. In the 16 counties which had had professional appraisals, a number of such appraisals had occurred several years in the past; yet, the old appraisal figures are still used for assessment purposes without any adjustment to correct for fluctuations in values occurring since completion of the appraisals, and such appraisals were accepted for equalization purposes. Perimeter studies took into account only lands lying within 1 mile of county lines. In some instances, values of such lands may be representative of the average of rural lands within the counties, but an assumption that such is the

case cannot be justified without substantiating facts or evidence and the State Board found such studies to be unreliable.

Despite these uncertainties, a representative of the Tax Commissioner's office testified that proposed changes in valuations to arrive at an equalization of the various counties were determined in 16 counties on the basis of professional appraisals, in 38 on the basis of the sales-assessment ratios, and in the remainder on the basis of perimeter studies.

The seven counties involved in this action which had had professional appraisals were all appraised by the same firm, and reference to the report of such appraisals reveals that in considering sales in connection with the arrival at actual values in these counties, the prices paid were considered on a 100 percent basis whereas the State Board, in figuring sales-assessment ratios for equalization purposes, used only 90 percent of the purchase prices. Deviations resulting therefrom would, however, be slight. The evidence generally discloses and the appraisers' report verifies that income on investment in rural lands in the counties concerned runs from 1 percent to 2½ percent. Such a rate of return is far below that received from normal investments and although it may be true that values for sale purposes approach the actual values found in the appraisals and by the State Board, it would appear that little if any weight has been given to the factor of "earning capacity" and that considering the low earning capacity, unusual conditions of some type may have influenced sales in the area.

It is recognized that the State Board has a very difficult task in equalizing between counties and with that in mind, this court has ruled that: "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." Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272. But it is the duty of the State Board to give effect to the requirement that taxes be levied uniformly and proportionately upon all tangible property. Art. VIII, § 1, Constitution of Nebraska. It is the primary duty of the State Board to establish uniformity between the various counties. § 77-506, R. R. S. 1943; Carpenter v. State Board of Equalization & Assessment, *supra*. On the basis of the record applicable to the eight interested counties and to equalization on a state-wide basis, it appears that the action of the State Board cannot be sustained. No uniform approach was adopted for the purpose of equalization among the various counties of the state. Such a uniform approach was probably impossible under the circumstances and the State Board is, of course, bound to consider all factors affecting actual values. Nevertheless, the record must sustain the action of the State Board and, in the absence of a clarification regarding the factors upon which the State Board relied and a rationalization of the relationship existing between the various factors on which the State Board acted, it is impossible for this court to ascertain that a constitutionally required uniformity between counties has been attained. The available evidence points to the contrary. The sales-assessment ratios adopted by the State Board, notwithstanding that such ratios have certain inherent deficiencies, reveal varying discrepancies in the assessed values adopted for the various counties, which discrepancies in most instances are not explained in the record. Certain counties have very low sales-assessment ratios. Examination of the record pertaining to those counties does not satisfactorily reveal or explain the low sales-assessment ratios attributable to them. Under such circumstances, it must be concluded that the constitutional requirement of uniformity has not been attained and that the action of the State Board is illegal, contrary to law, arbitrary, and capricious, neces-

sitating a reversal of the action of the State Board in regard to the assessment of rural lands in all eight counties.

REVERSED.

SMITH and MCCOWN, JJ., concur in result.

SPENCER, J., concurring.

I am in accord with the majority opinion herein, but believe some reference should be made to the Brandt reappraisal which was used by the State Board to raise the valuations.

I question how scientific an appraisal may be when it is subsequently raised to meet an objection, particularly where it is necessary to juggle figures to do so. The Brandt Appraisal Company submitted an appraisal report to the Tax Commissioner for approval. It was not approved. Brandt then reconstructed his appraisal by revising it upward. In this respect, Senator Paxton's testimony on a conversation with Brandt is illuminating. Portions of that testimony are as follows: " 'Of course, I appraised the property at $25 an acre. I took it to the Tax Commissioner's office and he turned it down. He said, "I'll never approve it," and he said, "You'll never get your other 10 percent of the money for the appraisal." ' GOVERNOR MORRISON: Who is 'he'? MR. PAXTON: The Tax Commissioner, Mr. Dworak, * * * GOVERNOR MORRISON: Mr. Brandt said that? MR. PAXTON: Yes, sir, Mr. Brandt said, 'I have to earn a living, I expect to get more jobs from the Department, Tax Commissioner's office, so what could I do but go home and do as he directed, so I did.' Now that was the gist of the conversation."

Brandt was asked why he changed his valuations after he had made a scientific appraisal. His answer was: "My opinion changed." Brandt testified: "The first year I set values giving less weight to sale price or market value." Brandt also testified that rule 24 was enacted by the Tax Commissioner after Brandt had appraised three counties. This rule provided in

effect that actual value was within 10 percent of selling price, or that a 10 percent variation would be allowed from sales-assessment ratio, and that if it was more than a 10 percent variation, the appraisal would not be approved. This caused Brandt to change his opinion. Rule 24 was revoked by the Tax Commissioner shortly after the reappraisal, and is no longer effective. It would seem obvious that the counties involved herein should not be penalized by a rule which will not be applied to future appraisals.

Brandt's testimony would indicate that considerable weight was given to an analysis of sales in the 6-county area, yet only 10 sales throughout the 6-county area, covering a 5-year period, were used. These were later supplemented by three others. The 13 sales were distributed as follows: None in McPherson County; one in Arthur County; one in Grant County; one in both Grant and Hooker counties; three others in Hooker County; two in Thomas County; and five in Blaine County. Obviously, unless the sales could be shown to be truly representative of the entire area, there are too few sales on which to place much reliance.

There was no investigation of the actual income of the land sold, nor any computation of the rate of return. Brandt assumed a hypothetical ranch, not too far and not too close to market, computed a hypothetical profit from that ranch, and worked from that formula. His first report was based on a 4 percent return. This he lowered to 2½ percent, to justify the revised figures. It is of interest to note that in one of the sales analyzed by Brandt, he suggests that if the land involved were rented it should net a return of 4.43 percent. Brandt concedes that it is not possible to carry a ranch on borrowed money with a 2½ percent return. For appraisal purposes for the six-county area, it should be apparent that a 2½ percent return is too low.

Brandt concedes that none of the sales used by him were as well balanced as his hypothetical ranch, for

which he assumed 8,240 acres. Only one of the sales exceeded that figure. Only two others even approached it. They were 7,034 acres and 6,245 acres. Two of the others were for 4,100 and 4,516 acres. Five of the sales were between 2,000 and 3,010 acres, and the three others were 1,250, 1,280, and 1,300 acres respectively.

The record is undisputed that McPherson County, which had no sales, is approximately 98 percent pasture land. A sale which included cultivated land, which many of the sales considered did, would not be representative for McPherson County. It would serve no useful purpose to analyze the sales used. Suffice it to say that some of them contained factors which would need further explanation before being used, and that they are too few and not sufficiently representative on which to base a sales-assessment ratio study.

The county boards of equalization for the six-county area conducted hearings and reached conclusions that the rate of return used by Brandt in revising his figures was not realistic, and rolled back the valuations to approximate the first appraisal. The State Board raised the valuations to restore the roll-back, so that the action of the State Board approved the final Brandt figures. I believe this to be erroneous, and would have decided these cases on that issue rather than leaving the issue undecided, as the majority opinion does.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
CITY OF OMAHA, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
COUNTY OF DOUGLAS, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 888

Filed May 19, 1967. Nos. 36444, 36451.

1. **Taxation: Notice.** Notice of hearing issued by the State Board of Equalization and Assessment should specify the proposed adjustment in percentage amounts.
2. ———: ———. A county is entitled to reasonable notice and hearing when a proposed decrease in valuation suddenly becomes a substantial increase, and the entire thrust of the hearing reverses direction after the original hearing has apparently been concluded.
3. **Constitutional Law: Taxation.** Under the particular circumstances, an overnight notice, and a hearing based on new evidence which the county has no reasonable opportunity to challenge or even to examine, does not meet the requirements of due process.
4. **Taxation.** The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property. That judgment and discretion is not unlimited, but if its exercise is to be properly presented for judicial review, at a minimum, the evidence upon which the State Board relied and the method by which it reached the determinations made must be shown.
5. ———. Substantial compliance with the requirements of equality and uniformity is all that is required.

Appeals from the State Board of Equalization and Assessment. Reversed.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Walter J. Matejka, James E. Fellows, Allen L. Morrow, P. D. Spenceri, and Theodore L. Carlson, for appellant City of Omaha.

Donald L. Knowles, Arthur D. O'Leary, James M.

Murphy, and Paul F. Peters, for appellant County of Douglas.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

MCCOWN, J.

This is an appeal by Douglas County and the City of Omaha from an order of the State Board of Equalization and Assessment increasing the valuation of suburban residential lands and improvements and all urban lands and improvements 24 percent as shown by the 1966 abstract of assessment for Douglas County.

The State Board of Equalization and Assessment commenced its public hearings on assessed valuations among the 93 counties of the state on July 26, 1966. Douglas County was notified on July 20 to appear on July 30 for hearing on its assessed valuations. This notice proposed a decrease of 14 percent in the valuation of "urban-suburban property." At the hearing on July 30, an assessment-sales ratio study of Douglas County prepared by the Tax Commissioner's office was the foundation for the proposed 14 percent decrease. This study included 763 sales selected from a group of 3,977 confidential sales reports. Douglas County objected to the inclusion of 153 of these 763 sales and subsequently the State Board sustained objections to 117 of them. This first hearing was continued at the Tax Commissioner's request until August 4. On August 4, Douglas County and representatives of the City of Omaha and the University of Omaha also appeared. At this hearing, the Tax Commissioner's office had made additional computations, eliminating some or all of the sales previously objected to. These additional computations indicated that the proposed reduction should be between 8.72 percent and 7.07 percent, and the Tax Commis-

sioner recommended action accordingly. The hearing on August 4 was concluded with the statement that "this will close the hearing then on Douglas County." Douglas County in both the first two hearings objected to any reduction in its assessments.

Thereafter, apparently on August 10, the Tax Commissioner obtained 1,346 additional confidential sales report forms from Douglas County. Sales involved were for September through December 1965. The Douglas County assessor's office was still working on these forms and the work had not been completed. These 1,346 reports were all processed in one day on August 11 by the Tax Commissioner's office, and 1,107 of them were selected and used in computing a new assessment-sales ratio for Douglas County which was found to be 28.14 percent. This assessment-sales ratio was computed on the aggregate basis by a composite of all classes of property, and was interpreted to indicate that a 24.378 percent increase in urban and suburban property should be ordered rather than any reduction.

On Friday afternoon, August 12, Douglas County was notified to appear for a hearing at 8 a.m. the next morning, August 13, on a proposed 24 percent increase for urban-suburban property. Douglas County appeared at the hearing, objected strenuously on the ground of lack of due process; objected to the introduction of the new study; and also requested an opportunity and time to examine and check the study and the sales and information on which it was built. Apparently on the ground that the statutory time limit for State Board action would expire in 2 more days, and that such time was insufficient to permit the county to check and analyze the study, the objections were overruled, the study was admitted into evidence, and the hearing concluded. Two days thereafter, on August 15, the order was entered imposing a 24 percent increase on urban and suburban property in Douglas County.

Notice of hearing issued by the State Board should

specify the proposed adjustment in percentage amounts. County of Lancaster v. State Board of Equalization & Assessment, 180 Neb. 497, 143 N. W. 2d 885.

The statutory 5-day notice of hearing specifying a proposed 14 percent decrease had been given for the July 30th hearing, and was not required to be repeated for a continuation of that hearing. Nevertheless, a county is entitled to reasonable notice and hearing when a proposed decrease in valuation suddenly becomes a substantial increase, and the entire thrust of the hearing reverses direction after the original hearing has apparently been concluded. The imminence of a statutory deadline for board action does not make the requirements of due process disappear. Under the circumstances here, an overnight notice, and a hearing based on new evidence which the county has no reasonable opportunity to challenge or even to examine, does not meet the requirements of due process.

The record here shows that the foundation for the State Board's equalization order was an assessment-sales ratio in more than a third of the counties; scientific appraisals in some counties; and was indefinite in other counties. The record does not reveal the basis of correlation, or the basis of application, of the methods used for measuring and testing uniformity. There is also no showing in the record of correlation of an assessment-sales ratio study in Douglas County based on 1965 assessments to the 1966 abstract of assessment. The evidence does show that Douglas County made substantial increases in assessed values between 1965 and 1966 in certain classes of property, but the 1965 assessment-sales ratio was applied to the 1966 abstract of assessment apparently without examining the abstract. Even a thoroughly reliable assessment-sales ratio study based on a prior assessment period needs to be correlated to a subsequent abstract of assessment where there are substantial changes in assessment valuation in the abstract to which the study is being applied.

The State Board has a wide latitude of judgment and discretion in equalizing assessment of property. That judgment and discretion is not unlimited, but if its exercise is to be properly presented for judicial review, at a minimum, the evidence upon which the State Board relied and the method by which it reached the determinations made must be shown. Compare, County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880; County of Box Butte v. State Board of Equalization & Assessment, 180 Neb. 492, 143 N. W. 2d 900; County of Lancaster v. State Board of Equalization & Assessment, *post*, p. 738, 150 N. W. 2d 886.

Neither mathematical exactness nor precise uniformity is possible in the complex task of equalization. Substantial compliance with the requirements of equality and uniformity is all that is required.

Upon consideration of the entire record here, however, we cannot escape the conclusion that the order of the State Board of Equalization and Assessment as applied to Douglas County was arbitrary and capricious and must be reversed.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
COUNTY OF LANCASTER, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 886

Filed May 19, 1967. No. 36447.

1. **Administrative Law.** Basic findings are more detailed than an ultimate finding but less detailed than a summary of evidence.
2. ———. Administrative findings, express and implied, that fail to disclose a clear basis for an order are inadequate.
3. **Administrative Law: Taxation.** If findings by the State Board

of Equalization and Assessment are inadequate, the resulting order is arbitrary.

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

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

SMITH, J.

In this equalization proceeding Lancaster County was ordered to increase valuations of certain real estate set out in its 1966 abstract of assessment. The county contends on appeal that the order should be reversed because the findings are inadequate.

The abstract shows valuations of property according to the following subclasses:

R. Rural Class	U. Urban Class
1. Agricultural land	1. Residential land
2. Agricultural improvements	2. Residential improvements
3. Suburban residential land	3. Commercial land
4. Suburban residential improvements	4. Commercial improvements
5. Suburban commercial land	5. Industrial land
6. Suburban commercial improvements	6. Industrial improvements
7. Suburban industrial land	
8. Suburban industrial improvements	

The State Board of Equalization and Assessment im-

posed an increase of 42 percent on subclasses R3, R4, U1, and U2, and an increase of 44 percent on subclass R1. Other valuations were not changed. The State Board found that the assessment-sales ratio (without any statement of numerical proportion) for urban and suburban properties did not reflect the level of assessment on commercial or industrial property. Valuations of subclasses that were commercial or industrial were therefore not subject to adjustment. In the abstract of assessment they compose more than 25 percent of the urban class and approximately 10 percent of the rural class. Computing means of county ratios, the State Board made the following comparisons:

	Rural Ratio	Urban Ratio
Mean (State)	33.58	34.87
Lancaster County:		
Without ordered increases	22.76	24.53
With ordered increases	32.77	34.83

Rural and urban ratios, which were found unreliable statewide for valuation of commercial and industrial property, produced increased valuations of other subclasses. No finding of a mathematical relation among subclasses or of other explanatory facts was made. The ratios and the increases were not correlated. The effect of the ambiguities hinges on the function of findings in administrative process.

"The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearing and judicial review, and keeping agencies within

their jurisdiction." 2 Davis, Administrative Law Treatise, § 16.05, p. 444.

"The basic findings are those on which the ultimate finding rests; the basic findings are more detailed than the ultimate finding but less detailed than a summary of the evidence. * * * The wanted basic findings may be either too general or too detailed. When they are too general, the task of the reviewing court is rendered more difficult, for it has to fill the gap between the evidence and the general findings in order to perform its task of reviewing. * * * A reviewing court may be just as dissatisfied with findings that are so detailed as to amount to no more than a statement of evidence. * * * The principal motivating force, as revealed by the opinions, is the need of the reviewing court for a clear view of the basis for the agency's action, * * *." 2 Davis, Administrative Law Treatise, § 16.06, pp. 451-454. See, also, Ostler v. City of Omaha, 179 Neb. 515, 138 N. W. 2d 826; Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211.

The more intricate the adjustments, the greater the need is for basic findings. Unless we know the facts found by the State Board, we cannot reasonably pass on the sufficiency of evidence. Because the findings are inadequate, the order for increase of valuations in Lancaster County is reversed.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.

JULIUS NOVAK, A RESIDENT AND TAXPAYER OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 898

Filed May 19, 1967. No. 36448.

Taxation. The decision of the State Board of Equalization and

Assessment ordering Douglas County to increase its assessed valuation of urban and suburban property 24 percent was arbitrary and unreasonable.

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

Beber, Richards & Polack, Steven J. Riekes, and Michael G. Brady, for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

SPENCER, J.

This is an appeal by Julius Novak, a resident and taxpayer of Douglas County, and Ben Realty Company, from an order of the State Board of Equalization and Assessment increasing the valuation of industrial and commercial property within incorporated municipalities in Douglas County 24 percent.

This appeal involves the same issue decided today in Brandeis Investment Co. v. State Board of Equalization & Assessment, *post* p. 750, 150 N. W. 2d 893, and is controlled by that opinion. For the reasons enunciated therein, the order of the State Board of Equalization and Assessment is reversed as to these appellants.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
COUNTY OF BOX BUTTE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
150 N. W. 2d 892

Filed May 19, 1967. No. 36453.

1. **Administrative Law.** Administrative findings, express and im-

plied, that fail to disclose a clear basis for an order are inadequate.

2. **Administrative Law: Taxation. If findings by the State Board of Equalization and Assessment are inadequate, the resulting order is arbitrary.**

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

Laurice M. Margheim and John B. Hilpert, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

SMITH, J.

Box Butte County has appealed from the equalization order entered in 1966 by the State Board of Equalization and Assessment. We examine the State Board findings.

The county abstract of assessment shows the following actual valuations of rural property: Agricultural land, $27,161,910; agricultural improvements, $5,630,425; suburban residential land and improvements, $454,290; and suburban commercial land and improvements, $630,-560. The State Board ordered the county to decrease the valuation of the agricultural improvements 10 percent and to increase the valuation of the agricultural land 50 percent.

The State Board made the following findings: Rural assessment-sales ratios in percents for the county before and after the ordered adjustments were 23.36 and 35.04. For all counties with rural ratios the mean was 33.58. An assessment-sales ratio (without any statement of numerical proportion) for urban and suburban property did not reflect the level of assessment on commercial or industrial property. Valuations of commercial and industrial property were therefore not subject to adjustment. The preceding year rural increases had

caused inequitable assessments on suburban property, which had been labeled rural in spite of its urban character.

In order to equalize assessments statewide the State Board employed the very ratios that were found unfit. The ratio for urban and suburban property was partly unreliable. Rural ratios caused percentage adjustments in valuations of some but not all rural property in many counties. Those ratios were then increased or decreased by percents, and a mean was computed. The order at best was fashioned from vague comparisons.

Administrative findings, express and implied, that fail to disclose a clear basis for an order are inadequate. If findings of the State Board are inadequate, the resulting order is arbitrary. County of Lancaster v. State Board of Equalization & Assessment, *ante* p. 738, 886 N. W. 2d 150. The order for adjustments in Box Butte County is reversed.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
COUNTY OF LINCOLN, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
150 N. W. 2d 884

Filed May 19, 1967. No. 36454.

Taxation. An order of the State Board of Equalization and Assessment which is not sustained by the record of the proceedings before the board is arbitrary and will be reversed.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded.

Walter R. Mullikin, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WHITE, District Judge.

BOSLAUGH, J.

This is an appeal by Lincoln County, Nebraska, from the order of the State Board of Equalization and Assessment increasing the valuation of agricultural land (rural) as shown by the 1966 abstract of assessment. The county does not complain of the increase which was made in the valuation of urban lands and improvements and suburban residential lands and improvements.

The county was notified that the State Board proposed to increase the valuation of agricultural property within the county 43 percent and that representatives of the county might appear on August 1, 1966, and show cause why the proposed change should not be made. According to Dwaine Radke, real property chief in the office of the Tax Commissioner, the proposal was based upon a sales-assessment study, using twenty sales; a perimeter study; and recently completed reappraisals in Perkins County and McPherson County.

On August 1, 1966, representatives of the county appeared before the State Board and testified that Lincoln County had been reappraised by the E. T. Wilkins Company in 1955; that the State Board, in 1965, had increased the valuation of rural property in Lincoln County 40 percent; and that this increase was reflected in the 1966 abstract of assessment.

The county representatives found it difficult to identify the sales which the Tax Commissioner had used in the sales-assessment study because the information which was submitted to them referred to transactions by sale numbers which had been assigned in the office of the Tax Commissioner. As a result, on the motion of the attorney for the Tax Commissioner, concurred in by the county attorney, the hearing was continued. It was agreed that the county would be permitted to examine the records of the Tax Commissioner and be given an

opportunity to present its evidence at a later time. The record shows no further proceedings concerning Lincoln County until the order of August 15, 1966, which directed a 33 percent increase in the valuation of agricultural land.

The record shows that the county was not afforded the hearing to which it was entitled. There is some reference in the brief to a letter, which does not appear in the record, and a "private hearing." The record does not show an affirmative waiver of the further public hearing which was to be held after the county had been given the opportunity to examine the records of the Tax Commissioner.

The record also fails to disclose a basis upon which the action of the State Board can be supported. Of the bases originally considered, only the sales-assessment study remains as a basis to support the action of the State Board. The State Board found that "the evidence regarding perimeter values was conflicting in many instances and was not of such a nature so as to provide a reasonably reliable basis for equalization between counties." That part of the order of the State Board which directed increases in valuations in Perkins County and McPherson County has been reversed by opinions filed this day. See, County of Perkins v. State Board of Equalization & Assessment, *post* p. 747, 150 N. W. 2d 883; County of McPherson v. State Board of Equalization & Assessment, *ante* p. 725, 150 N. W. 2d 878.

In its order of August 15, 1966, the State Board found that six of the sales originally considered should be disregarded, that two additional sales should be included in the computation, and that objections to the other sales should be overruled. The record does not show what objections were considered, why some were sustained, or why others were overruled. For example, the county objected to a sale of 475 acres which had an assessed value equal to 9.68 percent of the selling price. The record does not show why the objections to this sale

were overruled and the sale was considered to be a representative sale. The county contends that if the State Board had been consistent in its rulings, the sales-assessment ratio would have been 30.33 instead of 26.22 as found by the State Board.

The importance of including only representative sales in the computation of a sales-assessment ratio is emphasized in this case by the fact that the State Board directed a 33 percent increase in the valuation of more than one and one-half million acres of land upon the basis of transactions involving about ½ of 1 percent of the land. Although the county concedes that some increase in the valuation of the agricultural property was justified, the record does not show a basis for the order which was made. The order, therefore, is arbitrary and capricious. County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880.

For the reasons stated, the order of the State Board of Equalization and Assessment increasing the valuation of agricultural land (rural) in Lincoln County is reversed and the cause remanded to the State Board of Equalization and Assessment for further proceedings according to law.

REVERSED AND REMANDED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
COUNTY OF PERKINS, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 883

Filed May 19, 1967. No. 36456.

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

Frederick E. Wanek, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WHITE, District Judge.

NEWTON, J.

This is an appeal from the State Board of Equalization and Assessment. It is the contention of appellant that both rural and urban lands in Perkins County were not properly equalized with such property in other Nebraska counties. Sales-assessment ratios for Perkins County were: Rural 45.77 and urban 50.27.

It is not necessary to delve further into this case. The opinion rendered in the consolidated cases of S. K. "Bob" Hanna v. State Board of Equalization & Assessment, *ante* p. 725, 150 N. W. 2d 878, is determinative here and the action of appellee regarding the assessment of rural, urban, and suburban lands and improvements is reversed.

REVERSED.

SMITH and McCOWN, JJ., concur in result.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
FAIRMONT FOODS COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
150 N. W. 2d 899

Filed May 19, 1967. Nos. 36458, 36466.

Taxation. The decision of the State Board of Equalization and Assessment ordering Douglas County to increase its assessed valuation of urban and suburban property 24 percent was arbitrary and unreasonable.

Appeals from the State Board of Equalization and Assessment. Reversed.

Edward Sklenicka, William K. Schaphorst, and Ronald L. Sluyter, for appellant Northwestern Bell Tel. Co.

Abrahams, Kaslow & Cassman and Thomas Conis, for appellant Fairmont Foods Co.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

SPENCER, J.

This is an appeal by Northwestern Bell Telephone Company, a corporation, and Fairmont Foods Company, a corporation, from an order of the State Board of Equalization and Assessment increasing the valuation in industrial and commercial property within incorporated municipalities in Douglas County 24 percent.

This appeal involves the same issue decided today in Brandeis Investment Co. v. State Board of Equalization & Assessment, *post* p. 750, 150 N. W. 2d 893, and is controlled by that opinion. For the reasons enunciated therein, the order of the State Board of Equalization and Assessment is reversed as to these appellants.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
BRANDEIS INVESTMENT COMPANY, A CORPORATION, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
ERNEST F. LIED, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
ALAN BAER AND J. D. DIESING, TRUSTEES OF THE E. JOHN BRANDEIS TRUST, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

150 N. W. 2d 893

Filed May 19, 1967. Nos. 36459, 36460, 36461.

1. **Taxation.** Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.
2. **Administrative Law: Taxation.** An administrative record must show some basis on which a finding may be premised.
3. **Taxation.** The decision of the State Board of Equalization and Assessment ordering Douglas County to increase its assessed valuation of urban and suburban property 24 percent was arbitrary and unreasonable.

Appeals from the State Board of Equalization and Assessment. Reversed.

Monsky, Grodinsky, Good & Cohen, for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

SPENCER, J.

This is an appeal by Brandeis Investment Company, a corporation; Ernest F. Lied; and Alan Baer and J. D. Diesing, Trustees of the E. John Brandeis Trust, from an order of the State Board of Equalization and Assess-

ment, hereinafter referred to as State Board, increasing the valuation of industrial and commercial property within incorporated municipalities in Douglas County 24 percent. City of Omaha v. State Board of Equalization & Assessment, *ante* p. 734, 150 N. W. 2d 888, decided today, requires the reversal of this case, and the statements and conclusions therein are included herein by reference. We deem it pertinent, however, to elaborate on other features of the proceedings which further demonstrate the arbitrary and capricious nature of the State Board's order as to Douglas County.

Douglas County reported 14,078 sales to the Tax Commissioner, but the Tax Commissioner in his sales-assessment ratio study did not consider any sale previous to July 21, 1965, when L. B. 918, Laws 1965, chapter 457, section 1, page 1451, amending section 76-214, R. R. S. 1943, became effective. Sales for the entire year of 1965 were considered in all other counties where the sales-assessment ratio study was used. Previous to August 11, 1966, the only sales which had been processed by the Tax Commissioner for Douglas County were 3,977 on which confidential statements had been submitted. Of these, the Tax Commissioner determined that only 763 were bona fide sales, and so advised the county. Douglas County, because of the time factor, was only able to check approximately 200 of them. Douglas County objected to 153 of those which it had been able to check, and 117 of these objections were sustained, with the result that of the 3,977 sales for which confidential statements had been submitted, only 646 were determined to be bona fide sales for the sales-assessment ratio study.

This was the situation on August 10, 1966, when the Tax Commissioner secured 1,346 additional confidential report forms for the last part of 1965 which Douglas County had not been able to process and had not sent to the Tax Commissioner. These were processed by the Tax Commissioner's office in less than 12 hours, and 1,107 were used with the 646 referred to above to deter-

mine the sales-assessment ratio for Douglas County. It is conceded that Douglas County, previous to the hearing, was not told which 1,107 sales were being used, and had no opportunity to review them. Based on the high percentage of rejections on 200 of the previous 763 sales checked by the county, it is patent that some portion of the 1,107 sales would have been discarded if Douglas County had been given the opportunity to process them.

Ignoring the question of due process and the other points which are discussed in City of Omaha v. State Board of Equalization & Assessment, *supra,* it is apparent that at most only sales for the last 5 months of 1965 were reviewed for the sales-assessment ratio study for Douglas County, whereas sales for the entire 12 months were reviewed in all other counties in which the sales-assessment ratio study was used.

In Lancaster County, which like Douglas County would have a large volume of sales, the screening process covered every sale for the 12-month period. There is no satisfactory explanation or correlation in the record for this difference nor is there any showing to indicate that the sales used were representative samples for the entire year. We realize that this is an unusual situation which is not likely to happen again. On this record, however, it is not possible to determine whether or not the procedure followed in Douglas County and in Lancaster County may not have produced an improperly weighted study for intercounty equalization purposes.

The record herein contains no proof of any nature to justify an increase for Douglas County. County of Lancaster v. State Board of Equalization & Assessment, *ante* p. 738, 150 N. W. 2d 886, decided today, is particularly pertinent herein. The State Board is bound by its record, and where the record of the proceedings before the State Board contains no evidence to justify an order, the action must be held unreasonable and arbitrary. The State Board did not see fit to make the 1,107 addi-

tional sales it used to raise its previous sales-assessment ratio study 24 percent a part of this record. The information used by the Tax Commissioner from these sales changes a previous State Board conclusion of a 14 percent decrease to a 24 percent increase. The State Board's case, therefore, depends entirely upon this evidence. Unless we require the record to reflect the pertinent information on which the State Board acted, an appeal herein would be a futile gesture. Without this evidence in the record, a 24 percent increase is no more than an arbitrary conclusion, which cannot be accepted by this tribunal. An administrative record must show some basis on which a finding may be premised.

The Douglas County abstract, unlike those of most other counties, and contrary to the instruction of the Tax Commissioner, listed all urban, residential, commercial, and industrial lands together, and all urban, residential, commercial, and industrial improvements together. The suburban residential lands and improvements, and the suburban industrial lands and improvements, however, were listed separately. This fact was apparent from the abstract, and was brought to the attention of the State Board on several occasions, but no division was considered or ordered. At the conclusion of the hearing, the State Board made a specific finding: "That the sales-assessment ratio for urban and suburban property does not reflect the level of assessment for industrial and commercial property and that the increase or decrease applicable to urban and suburban property should not be applied to industrial and commercial property."

This finding was entirely disregarded by the State Board in Douglas County. The sales-assessment ratio for urban residential was used for urban industrial and commercial property. This resulted in a 24 percent increase on all commercial and industrial lands and improvements within the boundaries of all municipalities in Douglas County. Therefore, commercial and indus-

trial properties within the boundaries of municipalities in Douglas County were assessed 24 percent higher than similar property in Douglas County outside the boundaries of the municipalities as well as similar property throughout the rest of the state. It is obvious that the action of the State Board in this respect produced inequality rather than equality, and must be held to be arbitrary, unreasonable, and capricious.

Appellants' contention that the order of the State Board increasing urban commercial and industrial real property in Douglas County 24 percent was arbitrary, unreasonable, and capricious is sustained, and the order of the State Board of Equalization and Assessment must be reversed as to these appellants.

REVERSED.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1966.
COUNTY OF KEITH ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
150 N. W. 2d 896

Filed May 19, 1967. No. 36464.

1. **Administrative Law.** Administrative findings that fail to disclose a clear basis for an order are inadequate, and if findings are inadequate, the resulting order is arbitrary.
2. **Taxation.** It is the duty of the State Board of Equalization and Assessment to give effect to the requirement that taxes be levied uniformly and proportionately upon all tangible property and to properly equalize between counties to that end.
3. **Taxation: Appeal and Error.** The record must sustain the action taken by the State Board of Equalization and Assessment and in the absence of a uniform approach to equalization, or a rationalizing of the relationship existing between the various factors on which the State Board has acted, it is impossible for this court to ascertain that a constitutionally required uniformity between counties has been attained.

4. **Taxation.** Sales-assessment ratios revealed by the record indicate varying discrepancies in the assessed values adopted for the various counties and in the absence of a reasonable explanation of such discrepancies, the actions of the State Board of Equalization and Assessment cannot be sustained.

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

Frank B. Svoboda, for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

WHITE, C. J.

Keith County and rural property owners of Keith County appeal from the order of the State Board of Equalization and Assessment increasing the assessed value of rural lands 71 percent and of urban property 7 percent. The increase on rural property is the only issue argued and considered here.

We consider this case in context with the other cases decided today. In 1965 the board ordered a 43 percent increase on rural property in Keith County based on an invalid sales-assessment ratio of 18.97, whereas it should have been 24.239. We reversed, because the deviation produced from the mean for rural ratios over the state was too great. County of Keith v. State Board of Equalization & Assessment, 180 Neb. 494, 143 N. W. 2d 902. In 1966, in this case, based on a sales-assessment ratio (exhibits 2 and 5) the State Board ordered a rural increase of 71 percent. No action of the State Board on the previous order of reversal appears. Exhibits 2 and 5 show 16 sales and one (No. 50) was excluded by the State Board. The State Board allowed a tolerance of 10 percent on the sales and reduced the total sales by that percentage. The ratio resulting between the sales on exhibits 2 and 5 and the assessed valuations listed

therein is about 27 percent. Excluding sale No. 50, it would be even higher. Instead of using this ratio the board used a ratio of 19.22 on which it based an increase of 71 percent to bring the adjusted ratio to 32.86, a deviation of 2.14 percent from 35 percent. Applying the 71 percent increase to a ratio of 27 we arrive at an adjusted ratio of approximately 46, obviously a deviation from 35 percent from actual value that is arbitrary. The State Board explains this action in its brief by stating that the assessed valuations on exhibits 2 and 5 include the increase of 43 percent ordered by the State Board (and later reversed) in 1965, and that since the county rolled back this increase in its 1966 valuations as shown on its assessment abstract, that the true ratio of 19.22 is reached by comparing the 1965 sales with the 1966 reduced assessed valuations. But there is no direct evidence in the record or any finding of fact by the State Board supporting this action. The State Board's order must be supported by an appropriate finding so that this court may know why the State Board took the action it did. Administrative findings that fail to disclose a clear basis for an order are inadequate, and if findings are inadequate, the resulting order is arbitrary. County of Lancaster v. State Board of Equalization & Assessment, *ante* p. 738, 150 N. W. 2d 886. And, as we pointed out in the above case, "The more intricate the adjustments, the greater the need is for basic findings."

But the State Board's order in this case must be reversed on more basic grounds. The primary duty of the State Board is to equalize. It is not restricted to one single method of determining actual value. Sixteen counties were equalized on the basis of appraisals, 38 on sales-assessment ratios, and the balance on perimeter studies. But the board found perimeter studies to be unreliable, old appraisal figures were used without adjustments for increases or fluctuation of values occurring since completion of the appraisals, and there was a wide divergence in adjusted sales-assessment

ratios (116.89 in Thomas County to 23.78 in Rock County) without any satisfactory explanation appearing in the record as to the reason for the discrepancies. Absolute uniformity of approach is impossible, but the record must sustain the action of the State Board, and in the absence of an explanation of the divergences and discrepancies in the application of the different methods used and relied upon, and of a satisfactory explanation of the correlation between the different methods, this court cannot determine if the constitutionally required equalization or uniformity has been attained between counties. See Hanna v. State Board of Equalization & Assessment, *ante* p. 725, 150 N. W. 2d 878.

The order directing a 71 percent increase on rural property in Keith County is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. DAROLD FORNEY, APPELLEE.

150 N. W. 2d 915

Filed May 19, 1967. No. 36630.

1. **Constitutional Law: Searches and Seizures.** Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, is not applicable to searches and seizures under the Fourth Amendment to the Constitution of the United States.
2. **Criminal Law: Searches and Seizures.** When we put a burden on the State to affirmatively prove the voluntariness of consent, we adequately protect the rights of the defendant.
3. **Searches and Seizures.** There is no illegal search and seizure of objects found in defendant's automobile, even if defendant was not under arrest, and even if the officers did not have a search warrant, if the defendant freely and intelligently gave his consent to the officers making the search.
4. ———. A consent is not voluntary if it is the result of duress or coercion, either actual or implied.
5. ———. Affirmative consent may be established by acts entirely aside from the use of words.

Statutory proceeding for review by a Judge of the Supreme Court under section 29-824, Reissue Revised Statutes, 1943. Interlocutory order entered.

Lawrence E. Mitchell and Michael V. Smith, for appellant.

Fisher & Fisher, for appellee.

Heard before SPENCER, J.

SPENCER, J.

This is an appeal by the State from the sustaining of a motion to suppress evidence, pursuant to section 29-824, R. R. S. 1943. Briefs were filed, and arguments were heard in camera May 8, 1967.

About 3 a.m. on November 25, 1966, the deputy sheriff of Cherry County, hereinafter referred to as deputy sheriff, who lived at Merriman, Nebraska, was notified by a telephone call of a burglary in Merriman. Immediately thereafter he heard a car pass his house and noted that it was traveling at high speed west on U. S. Highway No. 20, hereinafter referred to as highway 20, in the direction of Gordon, Nebraska, which is west of Merriman in Sheridan County. He alerted the Gordon police department, and then left for Gordon with the marshal from Merriman.

In response to the alert, a Gordon police officer stationed himself in a police car at the east edge of Gordon. Approximately 20 minutes thereafter he observed an automobile coming from the east on highway 20. He followed this automobile to a cafe located on highway 20, just west of Gordon. When defendant stopped at the cafe, the officer asked the defendant, who was known to him, where he came in from, and defendant said "Rushville." Defendant asked if there was anything wrong, and the officer told him "'* * * they just had a little deal down to Merriman.'" Rushville is west of Gordon, and defendant's car came from the east. The officer then contacted the deputy sheriff by radio, and

drove back into Gordon to await his arrival. When the deputy sheriff arrived, they each drove their cars to the cafe. The officer then went to the police station to call the chief of police and the sheriff.

When the defendant and his companion came out of the cafe the deputy sheriff identified himself and told the defendant they wanted to ask him some questions if he would go down to the police station in Gordon, and defendant said " 'All right.' " The defendant drove to the police station, followed by the deputy sheriff and the Merriman marshal. At the police station they found officer Case and officer Lennox, Gordon police officers, who were known to defendant. After they arrived at the police station the deputy sheriff asked the defendant where he was at approximately 3 a.m., and defendant replied "Rushville."

Officer Case then asked defendant if they could look in his car, and defendant said " 'Yes.' " They went out to the car, which was sitting in front of the police station. Officer Lennox asked defendant if he would open the trunk of the car, and defendant said " 'yes' " and did so. Officer Lennox then asked defendant if they could look in the front seat, and defendant replied " 'Yes.' " One of the officers looked in the front seat and observed a bag on the floor, which he picked up. They also observed a holstered, loaded revolver, with its barrel protruding out from under the front seat. Officer Case then told the defendant that he was going to have to hold him, and said, " 'I want to advise you of your rights.' " The officer advised defendant that anything he said could be used against him; that he did not have to answer any questions; and that he was entitled to a lawyer. The defendant asked the officer if he could make a call, and he was allowed to do so. Subsequently, complaints were filed against the defendant, charging him with carrying a concealed weapon and with grand larceny. Defendant filed a poverty affidavit, and counsel was appointed to represent him. A preliminary hearing was held, and

defendant was bound over to the district court. The motion to suppress followed.

The defendant, who testified on the motion, was asked by counsel as to the conversation in regard to searching his automobile. His answer is as follows: "A Well, they asked me if I was—they could search my car, and I said, 'Yeah, go ahead.' I couldn't stop them. Q And did they then? A Yeah, we went out, and they looked through it. And they wanted me to open the trunk, so I opened the trunk. And they wanted to look in the front, and so I let them. Q They went ahead and looked? A Yeah. * * * Q What did you tell them about the search of the car, so there is no misunderstanding? A Well, when they first asked me, I said, 'Yeah, go ahead.' That I couldn't stop them. And after that I just said, 'Go ahead.' "

All of the officers testified for the State. They were all positive defendant said nothing but " 'Yes, go ahead.' " Defendant was asked his consent again on two later occasions. He said "Yes" when he was asked if he would open the trunk, and he did so. After the trunk was open, officer Case again asked defendant if it would be all right if they looked in the front seat, and defendant said " 'Yes.' "

The trial court sustained the motion to suppress on the theory that in order for a consent to be voluntary it was necessary that the defendant be first advised that he need not submit to a search, and that if he does consent, the fruits of the search may be used as evidence against him. To reach this result the trial court held that Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, which involved the Fifth and Sixth Amendments to the Constitution of the United States, by analogy was applicable to search and seizure under the Fourth Amendment to the Constitution of the United States. While I concede that protection from unreasonable searches and seizures is fully as important and imperative as the guarantees provided by the Fifth Amend-

ment to the Constitution of the United States and is basic to a free society, I do not agree with the trial court's premise. So far as I have been able to determine, the United States Supreme Court has not applied the Miranda test to searches and seizures. Until it does so, if it ever does, we should not further shackle law enforcement. When we put the burden on the State to affirmatively prove the voluntariness of the consent, we adequately protect the rights of the defendant. Miranda v. Arizona, *supra,* in this jurisdiction will be applied only to the issue tried therein, and will not be extended by analogy to cover the Fourth Amendment to the Constitution of the United States.

Ignoring, therefore, the premise on which the trial court predicated its decision, the question remains, did the defendant voluntarily consent to the search herein? There is no illegal search and seizure of objects found in defendant's automobile, even if defendant was not under arrest, and even if the officers did not have a search warrant, if defendant freely and intelligently gave his consent to the officers making the search. See Burge v. United States, 332 F. 2d 171, a decision of the United States Court of Appeals for the Eighth Circuit involving a Nebraska case.

If the defendant consented to the search herein, he waived the protection afforded him by the Fourth Amendment to the Constitution of the United States. However, the State has the burden to prove voluntary consent by clear and positive evidence. A consent is not voluntary if it is the result of duress or coercion, either actual or implied. Is there any indication in this record which would tend to show that defendant's consent was the result of coercion, either actual or implied? There certainly is no evidence of actual coercion, so if coercion is present herein it must be implied from the fact that the defendant was at the police station when he gave consent. This, however, does not ipso facto make the consent involuntary. This is clearly a fact, among

others, to be considered in the determination of the issue of voluntariness. Being in a police station or in custody was not a unique experience for the defendant. He admits he has two previous felony convictions.

Defendant does not deny he gave consent to the search. He merely implies he did so because he felt it would do no good to object. Even if this is not a mere afterthought, it is not of itself sufficient to indicate coercion under the circumstances in the light of defendant's background and experience. Defendant does not even suggest that he was threatened or intimidated in any manner, and, as previously noted, contact with police officers was not a new experience for him. However, there is much more than mere acquiescence in defendant's conduct herein. Affirmative consent may be established by acts entirely aside from the use of words. People v. Guyette, 41 Cal. Rptr. 875, 231 Cal. App. 2d 460. On three different occasions defendant gave his consent and additionally he opened his automobile trunk for inspection.

In Robinson v. United States, 325 F. 2d 880, the United States Court of Appeals for the Fifth Circuit held that when defendant gave his automobile keys to a federal officer without objection upon request, he voluntarily consented to the search of his automobile. Here the defendant actually opened the trunk for the officers.

In Wren v. United States, 352 F. 2d 617, the United States Circuit Court of Appeals for the Tenth Circuit held that a defendant, by opening his automobile trunk with a key to permit a search of that part of the car, consented to the search of the automobile and could not suppress the questioned firearm found underneath one of the seats. In the present case, the defendant gave specific consent to the search of the front seat where the questioned articles were found.

I find that there was no coercion herein, either actual or implied. Under the totality of all the circumstances, I hold defendant's consent to be voluntary and find that

the motion to suppress the questioned articles should be overruled.

INTERLOCUTORY ORDER ENTERED.

ROY BARTON, APPELLEE, V. ERNEST HOBBS ET AL., APPELLANTS, IMPLEADED WITH EARTHWORMS, INC., A CORPORATION, APPELLEE.

151 N. W. 2d 331

Filed May 26, 1967. No. 36474.

1. **Master and Servant.** The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
2. ———. The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.
3. ———. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person.
4. **Master and Servant: Trial.** In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court.
5. **Master and Servant: Negligence.** An employee 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 chargeable with negligence or contributory negligence.
6. **Master and Servant.** An employee assumes risks not ordinarily incident to his employment, provided he knows them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger.
7. **Master and Servant: Negligence.** Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, ques-

tions of contributory negligence and assumption of risk are for the determination of a jury.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Crossman, Barton & Norris, for appellants.

Mathews, Kelley & Cannon, for appellee Barton.

Cassem, Tierney, Adams & Henatsch, for appellee Earthworms, Inc.

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

CARTER, J.

Plaintiff brought this action against Ernest Hobbs and Charles R. Hobbs, a partnership doing business as E. E. Hobbs & Son, for damages resulting from injuries sustained in a cave-in of a sewer ditch. At the close of the evidence, the trial court directed a verdict for the defendants. After argument on the motion for a new trial, the trial court sustained the motion and granted a new trial. The defendants Hobbs have appealed. Earthworms, Inc., was made a party defendant for subrogation purposes as the employer of the plaintiff to whom it has paid compensation under the workmen's compensation law. The issue presented by the present appeal is the correctness of the trial court's ruling in granting the plaintiff a new trial.

The evidence shows that Earthworms, Inc., was engaged in the construction of a sewer line in La Vista in Sarpy County immediately south of the city of Omaha. This entailed the digging of a ditch, the laying of sewer pipe, and the covering of the pipe and back-filling of the ditch. Earthworms, Inc., engaged the defendants Hobbs to furnish a manned dragline to dig the ditch through an area requiring the use of heavy equipment. The dragline, with operator and oiler, was provided by Hobbs at the agreed price of $16 per hour. Ernest Hobbs,

one of the defendants, was the operator of the dragline and will be referred to hereafter as Hobbs.

At the time and place of the accident, the ditch was about 32 inches wide at the bottom, approximately 22 feet wide at the top, and 20 feet deep, according to the plaintiff's testimony. The evidence establishes that minimum safety requirements require the sides of the ditch be veed out on a plane of 1½ feet to 1 foot. If this formula was followed, the width of the ditch at the top would have been a little more than 30 feet. Hobbs testified that the ditch was 17 feet deep and 20 to 25 feet wide at the top. If the 1½ to 1 formula was applied to this testimony, the width of the ditch at the top would have been approximately 25 feet. It is the contention of the plaintiff that the 1½ to 1 plane was not maintained on the sides of the ditch and that the sides bulged in a convex position which negligently caused the cave-in.

At the time of the accident, the dragline was idle with the bucket on the bank. No movement of the dragline precipitated the cave-in. Plaintiff was in the bottom of the ditch preparing to lay a section of sewer tile. The cave-in occurred, striking the plaintiff and causing him serious injury. It is contended that Hobbs was negligent in the manner of digging the ditch in that the convex contour of the bank was not in accord with recognized safety regulations.

Defendants Hobbs contend that the work was that of Earthworms, Inc., and that they were an employee or special employee of that company. In this point, the evidence is that defendants Hobbs were hired by the hour to dig a sewer ditch, that they had no knowledge of the work to be done until the dragline arrived on the job, and that they proceeded to do the work under the direction and supervision of Paul Abel, Earthworm's foreman. It is further shown that engineers had set stakes which contained information as to the depth and grade of the ditch, the width of the top of the ditch, and by their location indicated the direction to be followed

in its digging. Hobbs testified that Paul Abel instructed him what he was to do each morning and the times he was there during the day. Ernest Hobbs testified that he had no authority to move the engineers' stakes and that he followed the stakes set by the engineers and the instructions of the foreman. He said that the stakes had been moved out at the foreman's direction and that he had widened the ditch previously in accordance therewith. He testified further that the foreman had directed the widening of the ditch on the morning of October 14, 1964, the day of the accident, and he had complied therewith. Plaintiff testified that he informed Hobbs that the ditch ought to be widened on at least two occasions and that Hobbs told him that he had been digging ditches for 40 years and that he knew what he was doing. These conversations were denied by Hobbs. Plaintiff testified that he was fearful of the danger until his fears were allayed by Hobbs' assurances.

The manner of doing the work was testified to by Hobbs. He testified substantially as follows: When he arrived on the job, the existing ditch which had been dug was 24 inches wide and 10 or 11 feet deep. Stakes were set in the ground from which the grade of the ditch and the depth of the ditch could be obtained. The stakes did not necessarily have anything to do with the width of the ditch. On arrival on the job, he reported to Paul Abel, Earthworm's foreman, who instructed him where to place the machine. Abel then told him to dig the trench from the stakes and vee it out. The stakes were set 10 feet from the ditch. He would dig out to the stakes and then the same distance on the other side and vee it down. He was instructed by Abel three or four times to widen the ditch which he did each time. Nothing was said to Hobbs by Abel about the construction of the ditch other than he was to go to the required depth and vee it out. It is quite evident that Abel assumed that Hobbs knew how to vee out the ditch because of his experience.

The issue here is well presented in The Standard Oil Co. v. Anderson, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480, wherein it is said: "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. * * * To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

In Kessler v. Bates & Rogers Constr. Co., 155 Neb. 40, 50 N. W. 2d 553, we announced the following rule: "The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person."

In the last-cited case, the evidence revealed the following factual situation: The Pope company and Bates & Rogers each had a construction contract with the Central Nebraska Public Power & Irrigation District for the construction of a power plant, the contractors and contracts being wholly independent of each other. The Pope company had a car of heavy pipe on track without

the means of unloading it. Bates & Rogers had a crane suitable for the job. Pope engaged the manned crane of the latter to do the unloading. The foreman of the Pope company, Holt, directed the placing of the crane and the unloading of the pipe, even to the extent of signaling the crane's movements. The crane was not operated in any manner other than at Holt's direction. We held under those circumstances that the crane and its operator were under the control of the Pope company and in its service, at the time of the accident, in the status of an employee. See, also, Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749.

No such control was exercised in the instant case and the cited cases do not control the result here. Hobbs was instructed to dig the ditch and vee it out. His experience as a ditch digger was relied on for the proper digging of the ditch for the purpose of laying the sewer tile. He admits that he was familiar with the minimum safety requirements in such work. He was not restricted from a proper performance of the work by the instructions of the foreman or the stakes set by the engineers, according to his own testimony. Whether or not he was under such control by Earthworms, Inc., and its foreman as to give him the status of an employee is a question of fact for the jury under the evidence in this case.

Plaintiff's testimony that the ditch was negligently dug is corroborated to some extent by two fellow employees. Hobbs explained the method of digging the ditch and, in effect, denied that the ditch was improperly excavated. The issue of negligence is for the jury if the jury finds that Hobbs was not in the status of an employee of Earthworms, Inc.

The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523. The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the par-

ticular servant of another, who may become liable for his acts. Mansfield v. Andrew Murphy & Son, *supra*. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person. Kessler v. Bates & Rogers Constr. Co., *supra*. In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. Mansfield v. Andrew Murphy & Son, *supra*.

Defendants Hobbs contend that plaintiff was guilty of contributory negligence sufficient to defeat a recovery as a matter of law. It is also contended that the plaintiff had knowledge of the danger and assumed the risk when he entered the ditch to lay the sewer tile. As we have heretofore stated, plaintiff testified that he thought the ditch was unsafe until Hobbs assured him that it was free from danger. Hobbs testified that neither the plaintiff nor his two fellow employees said anything to him about the convex plane of the ditch bank or any danger arising therefrom. The evidence is in conflict and is a question for the jury.

An employee 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 chargeable with negligence or contributory negligence. An employee assumes risks not ordinarily incident to his employment, provided he knows them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his em-

ployment, questions of contributory negligence and assumption of risk are for the determination of a jury. Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Gamble v. Gamble, 171 Neb. 826, 108 N. W. 2d 92; Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

We think the trial court erred in directing a verdict at the close of the evidence and that it was correct in granting a new trial.

AFFIRMED.

WANDA KUFFEL, APPELLANT, V. NICHOLAS KUNCL ET AL., APPELLEES.

150 N. W. 2d 908

Filed May 26, 1967. No. 36485.

1. **Automobiles: Negligence.** The presence of ice and snow on a street which is reasonably known or anticipated is a condition and not an independent intervening causal factor that relieves a motor vehicle operator from responsibility for the result of his negligence.
2. **Trial: Appeal and Error.** An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue and tends to mislead or confuse the jury is erroneous and prejudicial.
3. **Automobiles: Negligence.** Pedestrians have the right-of-way on a sidewalk and it is incumbent upon one who is driving an automobile across a sidewalk to take particular care to avoid endangering or injuring them.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

Young, Denenberg & Mullery, for appellant.

Boland, Mullin, Walsh & Cooney, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WHITE, District Judge.

MCCOWN, J.

This is an action for personal injuries to a pedestrian

on a sidewalk as a result of being struck by defendants' automobile. The jury verdict was for the defendants and plaintiff has appealed.

The essential facts are not in dispute. The accident occurred at Twenty-third and Castelar Streets in Omaha, Nebraska, January 24, 1962. It was approximately 7 a.m., but still dark. The streets in the entire area were very slick and covered with packed snow and ice and the defendant driver was fully aware of the condition. Castelar Street runs east and west and Twenty-third Street runs north and south. The plaintiff was walking on the sidewalk on the south side of Castelar Street approaching the intersection from the east. The defendant driver, Nicholas Kuncl, hereinafter called defendant, was delivering newspapers in an automobile accompanied by a helper. Castelar Street between Twenty-fourth and Twenty-third Streets is a hill sloping down rather sharply to the east. The defendant approached the intersection proceeding downhill in an easterly direction with his clutch depressed and the brake partially on, at a speed of 10 to 15 miles per hour. Castelar Street, at the intersection in question, was protected by stop signs on the north and south at Twenty-third Street. As the defendant approached the intersection, an unidentified automobile was also approaching from the south on Twenty-third Street. This unidentified automobile did not stop at the stop sign, but proceeded across the intersection directly in front of the defendant. The defendant turned his wheels to the right and applied his brakes in an effort to avoid the unidentified automobile and went into a skid with the rear of his automobile sliding gradually around to the north and the front to the south. The rear ends of the two vehicles just missed; the defendant's car slid sideways on across the intersection, over the curbing which was almost level with ice, and struck the plaintiff on the sidewalk, throwing her into a snowbank, and causing her injuries, the nature and extent of which were in dispute. Both Caste-

lar Street and Twenty-third Street were 25 feet in width. The defendant was 5 or 10 feet west of the intersection when the car commenced skidding. He was going approximately 4 miles an hour at the time his automobile struck the plaintiff and came to rest approximately 3 feet up on the sidewalk on the southeast corner of the intersection.

The defendant specifically pleaded the doctrine of sudden emergency and the negligence of the driver of the unidentified vehicle; and denied any negligence on the part of the defendant.

Instruction No. 11, after first instructing the jurors that if they found the sole proximate cause of the accident was negligence on the part of the driver of the unidentified vehicle, they should return a verdict for the defendants, also instructed: "You are further instructed that if you find from the evidence that the sole proximate cause of the accident was the icy condition of the streets, and that the accident would have occurred because of such ice, even in the absence of negligence by defendant driver, you should then return a verdict in favor of defendants."

In instruction No. 16, the court instructed the jury that the presence of ice and snow upon the streets was a condition which imposed a duty to exercise a degree of care commensurate with the circumstances, and concluded with the paragraph: "The presence of ice upon a street is not an independent, intervening cause that relieves a motorist from responsibility for the result of his negligence unless such result would in some manner have occurred because of the ice, even if the motorist had not been negligent."

In the case of Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825, involving smoke on a highway, this court discussed extensively the distinction between conditions and proximate causes. At least where the presence of frost, ice, snow, mist, fog, or smoke were known, or should have been reasonably anticipated, they have consistently

been held to be conditions rather than intervening or proximate causes in the legal sense. See Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571.

It is obvious that the language used in the instructions referred to comes from the cases of Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, and Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696. While the particular statements in those cases were loosely paraphrased from the broad concept of negligent conduct as a necessary antecedent of harm in section 432, page 1161, Restatement, Torts, both of the Adcock cases reaffirmed the holding that ice upon a highway was a condition and not an independent intervening causal factor; and specifically found that the record did not make it evident that the accident would, in some manner, have happened because of the ice "even if all the participants had been free from negligence."

The instructions as given permitted the jury to find that the sole proximate cause of the accident was the ice and that the plaintiff would have sustained harm, the same in character and extent as she did receive, only because of the ice and without negligence on the part of anyone.

An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue and tends to mislead or confuse the jury is erroneous and prejudicial. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661.

The plaintiff also pleaded the violation of an Omaha city ordinance which provided that it shall be unlawful for the driver of a motor vehicle to drive the same along, upon, or across any sidewalk, except at a duly authorized or established crosswalk.

Admission of the ordinance into evidence was objected to on the grounds that it was incompetent, irrelevant, and immaterial, not tending to prove or disprove any issue in the case. Neither was any instruction on

right-of-way given. The defendant argues that the ordinance was properly excluded upon the ground that the evidence showed the defendant driver was only a passive occupant of the car rather than an active participant because it was skidding and out of his control. If this argument be accepted, it would be improper to instruct the jury on the violation of traffic rules or regulations whenever the evidence showed that the driver's vehicle was skidding and out of control, and therefore involuntarily violated them.

The crucial question, however, is not whether the defendant violated the ordinance while his vehicle was skidding and out of control, but whether he was guilty of negligence which contributed to the loss of control. The court had already thoroughly instructed the jury that if the defendant lost control of the motor vehicle through skidding, the driver was not responsible for what happens thereafter unless he was guilty of negligence which contributed to the loss of control. It had also instructed the jury that the driver of a motor vehicle cannot shield himself against a charge of negligence merely by showing that the motor vehicle operated by him was temporarily beyond control due to its skidding, if the skidding was the result of his negligence.

The exclusion of the ordinance necessarily required the court to predetermine that the defendant was not guilty of negligence which contributed to the skidding and loss of control. This was clearly a jury question here. For collection and analysis of innumerable cases involving skidding, see, Annotations, 58 A. L. R. 264, 113 A. L. R. 1002, and 72 A. L. R. 2d 6. On issues of burden of proof, violation of traffic regulations, and some elements of res ipsa loquitur, compare Bergstrom v. Ove, 39 Wash. 2d 78, 234 P. 2d 548; Zanetti Bus Lines, Inc. v. Hurd, 320 F. 2d 123; Evans v. S. J. Groves & Sons Co. (1963), 315 F. 2d 335; Scott v. Checker Cab Co., 12 La. App. 598, 126 So. 241.

While the plaintiff did not in terms plead right-of-way,

she did specifically plead the violation of the ordinance as well as the failure to operate the automobile in the righthand lane of traffic in the street at the location of the collision. Pedestrians have the right-of-way on a sidewalk and it is incumbent upon one who is driving an automobile across a sidewalk to take particular care to avoid endangering or injuring them. Chew v. Coffin, 144 Neb. 170, 12 N. W. 2d 839; 60 C. J. S., Motor Vehicles, § 346, p. 806.

The court properly instructed the jury that the violation of traffic laws, ordinances, or regulations is not in itself negligence as a matter of law, but is to be considered as evidence of negligence together with all other facts and circumstances in evidence. The exclusion of the city ordinance, coupled with the omission of any instruction on right-of-way, was prejudicially erroneous. The plaintiff's remaining assignments of error are without merit.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion because I feel there was no prejudicial error in the instructions, and the judgment should be affirmed.

We have said many times that in reviewing instructions to a jury this court must read and consider the instructions as a whole. Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354. If that is done in this case, it is obvious that the jury could not have been misled.

The instruction questioned is essentially the language of Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696. The last two syllabus points in that case are as follows: "The presence of ice upon a highway is not generally an independent, intervening causal factor that relieves an automobile operator from responsibility for the result of his negligence.

"In order for an accident to be solely attributable to

an icy condition of the highway, it must be made evident that the accident would in some manner have occurred because of the ice, even if the motorist had not been negligent."

I do not consider the instructions conflicting, but even if they could be so construed, they are not prejudicial as it is apparent from the record that the jury was not misled thereby. Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

As to the requiring of an instruction on the ordinance in question, it seems to me that such instruction is superfluous at best under the issues of the case.

In my judgment, the trial judge fully, adequately, and carefully instructed the jury on the issues involved.

G. LEONARD RICHARDSON ET AL., APPELLEES, V. BIG INDIAN CREEK WATERSHED CONSERVANCY DISTRICT OF GAGE AND JEFFERSON COUNTIES, STATE OF NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLANT.

151 N. W. 2d 283

Filed May 26, 1967. No. 36488.

1. **Eminent Domain: Damages.** Benefits resulting from public improvements where property is taken by condemnation are of two kinds, special and general. Special benefits are those which are peculiar to the tract taken, whereas general benefits are those which arise from the fulfillment of the public object which justified the taking.
2. **Eminent Domain: Trial.** The burden of proving special benefits is on the condemner.
3. **Eminent Domain: Damages.** Where land is taken for public use, the owner is entitled to the fair market value of the land taken, and special benefits cannot be set off against such value but may be against incidental damages to the rest of the tract.
4. ———: ———. Special benefits, to have any standing in court, must be genuine and capable of estimation in money value. They must add to the present fair market value of the remaining land with reference to all the uses to which it is reasonably adapted, and for which it is available.

5. ———: ———. In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained.
6. ———: ———. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking.
7. ———: ———. When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Everson, Wullschleger & Sutter, for appellant.

Vasey & Rist, for appellees.

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

SPENCER, J.

This action involves a condemnation of an easement, but the only issue tried was that of damages.

G. Leonard Richardson, who will hereinafter be referred to as plaintiff, and Florence Richardson are husband and wife. Plaintiff is the owner of the southeast quarter of Section 19, Township 2 North, Range 5 East of the 6th P. M., in Gage County, Nebraska, the highest and best use of which is as an agricultural production unit. Big Indian Creek Watershed Conservancy District of Gage and Jefferson Counties, which will hereinafter be referred to as defendant, is a body politic and corporate, organized for the development of programs defined in section 2-1550, R. S. Supp., 1965. This statute provides as follows: "A watershed area may be formed as a subdistrict of a soil conservation district, as provided in sections 2-1550 to 2-1565, to be known as a watershed conservancy district, for the purpose of developing and executing plans and programs relating to any phase for

the conservation of water, water usage, drainage, flood prevention, flood control, erosion prevention and control of erosion, floodwater and sediment damages, * * *."

The defendant is constructing a flood retardation structure on 24 acres approximately one-half mile below plaintiff's property. This structure will cause rainwater to be impounded in natural drainage ditches in the area, including the area along two drainage ditches, one on the east and one on the west side of plaintiff's farm. The easement is for the permanent and temporary detention of waters upon the land to a maximum of 9.87 acres on the east side of plaintiff's property, and 9.23 acres on the west side of plaintiff's property, or a maximum easement of 19.1 acres. The permanent conservation pool area, however, embraces only 0.2 acre, and will be within the present drainage ditches. The remainder of the area may be temporarily flooded, but otherwise may be used by plaintiff for pasture or for cultivated crops. The extent of the flooding will depend on the frequency and amount of rainfall in the area. Plaintiff's farm drains 1,600 acres. The maximum easement is expected to handle 7.87 inches of rain, while it is estimated a 4-inch rain will flood 6.54 acres for 4 days and 7 hours.

Defendant is given the right to use the easement area for its purposes, and may do reasonable grading and earth moving for the purpose of establishing normal drainage. The easement also includes the right of ingress and egress at any time over and upon plaintiff's property. A jury fixed plaintiff's damages at $1,925, to which the court added $50 abstract expense, $235 for plaintiff's expert witnesses, and $450 as attorneys' fees. Defendant perfected this appeal.

Defendant raises two questions: First, the failure of the trial court to instruct on special benefits; and second, the giving of the trial court's instructions Nos. 9 and 10. The only testimony on special benefits is the following by two of defendant's experts.

Robert A. Mook: "Q Would the easement have any

beneficial effects to the Richardson property? A In my opinion, yes. Q In what area? A In the areas of the existing pool areas; in the existing drainage channels. Q What would those effects be, Mr. Mook? A It would have an effect of stabilizing the present channels plus slowing the runoff which is generally considered to be detrimental to any farmstead."

William A. Eyth: "A My opinion is based on personal observation of similar easements such as is involved in this case here. In the area on the east side there is quite a deep ditch, there is water, as you heard time and again, standing here now, not very much water but a little water in the bottom of this ditch (indicating). The ditch itself continues to back up this way (indicating). In my opinion I can't find any element of damage in this particular area over here to the Richardson property; I would rather tend to think that this ditch will be stabilized or at least it won't certainly become any deeper if and when there is a structure built somewhere down below here (indicating). In this area here (indicating) the same situation exists, this is quite a deep ditch, and I can stand down at the bottom of it right here (indicating) and if you stood back here aways (indicating) you couldn't see the top of my head."

Benefits resulting from public improvements where property is taken by condemnation are of two kinds, special and general. Special benefits are those which are peculiar to the tract taken, whereas general benefits are those which arise from the fulfillment of the public object which justified the taking. The burden of proving special benefits is on the condemner. The following from Backer v. City of Sidney, 166 Neb. 492, 89 N. W. 2d 592, draws the distinction: "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the pub-

lic improvement. In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways."

It is not necessary herein to decide whether the plaintiff received special benefits, because the evidence was insufficient to justify the submission of that issue to the jury. Slowing the runoff would be common to the area and is the purpose of the project. Otherwise, both of defendant's experts confine the special benefits to the existing drainage channels. This is the area embracing the permanent conservation pool, or the 0.2 acre which will be permanently out of production, and while only an easement is involved, this 0.2 acre is permanently appropriated to a public use and should not be charged with special benefits. The law is well settled, where land is taken for public use the owner is entitled to the fair market value of the land taken, and special benefits cannot be set off against such value but may be against incidental damages to the rest of the tract. City of Omaha v. Howell Lumber Co., 30 Neb. 633, 46 N. W. 919.

In any event, neither of defendant's experts attempted to evaluate the value the alleged special benefit would contribute to plaintiff's land. To do this it must be expressed in some manner in terms of money. See Phillips v. State, 167 Neb. 541, 93 N. W. 2d 635.

On what basis, other than pure conjecture or speculation, could the jury have valued special benefits if it found them to exist? The general rule is stated thus in 27 Am. Jur. 2d, Eminent Domain, § 358, p. 207: "* * * any alleged benefit, to have any standing in court at all, must be genuine and capable of estimation in money value. It must add to the present fair market value

of the remaining land with reference to all the uses to which it is reasonably adapted, and for which it is available. The courts are agreed that remote, uncertain, contingent, imaginary, speculative, conjectural, chimerical, mythical, or hypothetical benefits cannot, under any circumstances, be taken into consideration."

If a special benefit exists, it must be material and capable of measurement by computation, and should be reflected in the value of the remaining land immediately after the taking.

In instruction No. 7 the trial court delineated the measure of plaintiff's damages as the difference in the reasonable market value of plaintiff's farm before and after the taking. Defendant agrees with this instruction, but complains that the trial court changed the measure of damages by giving instructions Nos. 9 and 10, which defendant insists instructed the jury to value the easement separately. Instruction No. 9 is as follows: "It is the law of the State of Nebraska that in determining compensation for the taking of real estate from a land owner, together with damages that may result therefrom, you should base the compensation to the owner to be determined by the actual legal rights acquired by the condemnor, and not by the use the condemnor may make of the right. The fact that the condemnor in this case, Big Indian Creek Watershed Conservancy District of Gage and Jefferson Counties, State of Nebraska, a body politic and corporate, may have no present intention of exercising all the rights acquired or the probability that its use may be a limited one, are not proper matters for consideration in fixing of compensation, since damages are required to be paid for the right appropriated, even though the full use may not be immediately contemplated or never had. The presumption is, that the condemnor will exercise its rights, and use and enjoy the property taken to the full extent."

The objection to instruction No. 10 is directed to similar language in that instruction. The portion set out in

defendant's brief is as follows: "Therefore, in determining the damages to which plaintiffs are entitled, you should assume that the defendant * * * will make maximum reasonable use to which the easement can be made, and you should not reduce the damages awarded to plaintiffs by reason of statements or evidence by the defendant or by witnesses on its behalf relating to the improbability or unlikelihood of maximum reasonable use."

It is evident that these instructions were given to cover the issue presented by evidence adduced by the defendant as to the frequency of the use of the easement taken. It instructed the jury that the evidence was taken for the limited purpose of showing the extent of the easement and the nature of the damages, and not to mitigate those damages.

The law is well settled in this jurisdiction that in a condemnation proceeding an owner receives full compensation for all damages sustained, and the measure of those damages is the actual legal rights acquired by the condemner, and not the use actually made of the land by the condemner. See Gable v. State, 176 Neb. 789, 127 N. W. 2d 475, in which we held as follows: "In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained.

"A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking.

"When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them."

The trial court properly instructed the jury in instruction No. 16, as follows: "The court has not attempted to embody all the law in any one instruction. Therefore,

in construing any single instruction, you must consider it in connection with all of the other instructions given you and you should consider them in harmony with each other."

Instructions Nos. 9 and 10 must be read in conjunction with instruction No. 7, the damage instruction. When so read, the jury could not have been misled.

For the reasons given, we find no merit to defendant's assignments of error. The judgment herein is affirmed.

AFFIRMED.

JOHN G. NORCROSS, APPELLANT, V. MILDRED S. GINGERY, APPELLEE.

150 N. W. 2d 919

Filed May 26, 1967. No. 36493.

1. **Partnership.** Property may be shown to be partnership property by proof of an intent to devote it to partnership purposes.
2. **Evidence: Trial.** Circumstantial evidence is not sufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom.
3. ———: ———. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover.

Appeal from the district court for Gage County: WILLIAM F. COLWELL, Judge. Affirmed.

Frederick J. Patz and Ralph H. Gillan, for appellant.

Dean R. Sackett, for appellee.

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

BOSLAUGH, J.

This is an action brought by John G. Norcross against

Mildred S. Gingery to establish the plaintiff's interest in two parcels of real estate in Gage County, Nebraska; to partition the property; and for an accounting of the income from the property since the death of the defendant's husband. The trial court found that there was a failure of proof and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The record shows that in 1939 the plaintiff owned a quarter section of land in Gage County, Nebraska, subject to a mortgage. The mortgage was in default and foreclosure proceedings had been commenced. The plaintiff wanted to refinance the property by obtaining a Federal Land Bank loan but was unable to do so because he did not live on the land.

At about this time the plaintiff was introduced to Fred W. Gingery, the defendant's late husband, by Charles Wells, a mutual acquaintance. Gingery then lived on a 30-acre tract near Filley, Nebraska. The plaintiff alleged that he and Gingery entered into a written partnership contract to operate a farming and livestock-feeding business in Gage County, Nebraska. The plaintiff's copy of the contract had been lost or destroyed, and he was unable to produce a copy of the contract.

Charles Wells testified that he had recommended Gingery to the plaintiff and was present in March of 1939 when they discussed a partnership arrangement. According to Wells, the plaintiff made a proposal to Gingery about the quarter section and the 30-acre tract near Filley and "they was to go in fifty-fifty on the deal"; that Gingery "was to make a farm loan * * * to pay off the mortgage" that the plaintiff had on the quarter section; and that "they was to go in fifty-fifty at Filley and this place out here." The evidence shows that Gingery obtained a $6,000 Federal Land Bank loan on the quarter section in March 1939 and that most of the net proceeds were used to pay off a mortgage and other indebtedness of the plaintiff.

The record further shows that on March 29, 1939, the

plaintiff and his wife conveyed the quarter section to Fred W. Gingery and the defendant as joint tenants. The deed recites "Six Thousand Dollars and exchange of properties" as the consideration. On the same date, Fred W. Gingery and the defendant conveyed the 30-acre tract to Lucile B. Norcross who was then the plaintiff's wife. This deed recited the consideration to be "One Dollar and exchange of property."

The deed to Mrs. Norcross was never recorded. On October 11, 1945, Fred W. Gingery and the defendant conveyed the 30-acre tract to Casey Gray and Ferne Gray. On March 25, 1946, Paul M. Logan and Grace E. Logan conveyed a 40-acre tract to Fred W Gingery and the defendant as joint tenants. Gingery died in February 1962.

The plaintiff claims that the quarter section and the 30-acre tract were assets of the partnership; that the 40-acre tract was purchased with the proceeds from the sale of the 30-acre tract; that the title to the property was placed in the name of Fred W. Gingery and his wife solely for convenience; and that the plaintiff has an interest in the quarter section and the 40-acre tract. The plaintiff alleged that there never had been a partnership accounting and did not allege the exact interest that he claimed in the property.

After 1939, the plaintiff entered defense work and lived at Davenport, Iowa, and Baltimore, Maryland, until about 1948. During this time Gingery lived on the quarter section and farmed it and the other Gage County land. He also looked after other property in Kansas for the plaintiff. The plaintiff produced a series of letters written by Gingery between March 2, 1941, and September 24, 1947, which were received in evidence. The letters indicate that Gingery was conducting a farming and livestock-feeding business in which the plaintiff had some form of an interest but the nature of that interest is not disclosed.

Of significance here is the absence from the letters

of any accounting of the business during the years involved. It is difficult to imagine a partnership of 23 years' duration that was conducted without written records or any accounting between the partners. The failure of the plaintiff to produce evidence of this nature is not explained in the record.

In this action it was necessary for the plaintiff to prove not only the existence of a partnership but an intent to contribute the property to the partnership. The plaintiff assumes the existence of the partnership and then argues that the use of the property for partnership purposes proves an intent to devote the property to purposes of the partnership. Use of the property alone is not sufficient because an owner may intend to contribute only the use, as distinguished from the ownership, to the partnership. See, Warren v. Raben, 33 Neb. 380, 50 N. W. 257; Murphy v. Warren, 55 Neb. 215, 75 N. W. 573.

The plaintiff's evidence in this case was largely circumstantial. Circumstantial evidence is not sufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom. Bowers v. Maire, 179 Neb. 239, 137 N. W. 2d 796. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover.

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

AFFIRMED.

L. M. BRYAN, APPELLANT, V. ALEX REIFSCHNEIDER ET AL., APPELLEES.

150 N. W. 2d 900

Filed May 26, 1967. No. 36494.

1. **Deeds.** A deed of conveyance does not of itself create privity between the grantor and grantee as to land not within the calls of the deed, but which have been occupied by the grantor in connection therewith.
2. **Adverse Possession: Deeds.** The rule that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument, but if land be actually occupied beyond the calls of the deed, hostile to the true owner, the deed does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character.
3. ———: ———. If, in connection with the conveyance of lands, there are circumstances showing an intent to transfer the possession of other adjacent land to the grantee which was occupied by the grantor, even though not covered by the calls of the deed, there is created such a privity of possession as to permit a tacking of possession for the purpose of establishing title by adverse possession.
4. ———: ———. The taking of possession of contiguous lands, some of which are not within the calls of the deed, which have been used by the grantor as a unit as is apparent by reason of the location of fences, buildings, trees, roads, and the like, and the transfer of possession pursuant to a deed has evidentiary value as to the existence of privity of possession.
5. **Adverse Possession.** A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, adverse, and continuous possession for the full statutory period of 10 years.
6. ———. A claim of ownership by adverse possession is sufficient if the land is used continuously for the purpose to which it may in its nature be adapted.
7. ———. Where the evidence of ownership of land by adverse possession is that its adverse use was solely for the establishment of a needed farm road, the title by prescription will be limited to the extent and purpose of the adverse taking.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Wright, Simmons & Hancock, for appellant.

Jack E. Lyman and Walter E. Gallawa, for appellees.

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

CARTER, J.

Plaintiff commenced this suit to quiet title against the defendants to a strip of land along the west side of a 40-acre tract to which plaintiff holds the legal title by a deed of conveyance. Defendants allege that they are the owners of a 20-foot strip of land along the west side of the 40 acres by adverse possession. The trial court found for the defendants and quieted title in them to the 20-foot strip. Plaintiff has appealed.

Plaintiff purchased the southeast quarter of the southeast quarter of Section 25, Township 22 North, Range 54 West of the 6th P.M., in Scotts Bluff County, Nebraska, in 1948. Defendants purchased the southwest quarter of the southeast quarter of Section 25, Township 22 North, Range 54 West of the 6th P.M., in Scotts Bluff County, in 1964. The common boundary of these two 40-acre tracts affords the situs of the dispute in the instant case. Plaintiff's west line and defendants' east line are a common boundary line between the two 40-acre tracts.

Defendants' immediate predecessors in title were as follows: Drexel J. Sibbernsen acquired title in 1928. In 1931, he conveyed the property to Marion T. Sibbernsen, who, in 1938, reconveyed it to him. Drexel J. Sibbernsen retained the title until his death in 1962. The executrix of his estate conveyed the land to Drexel J. Sibbernsen, Jr., and Everts S. Sibbernsen in 1964. Subsequently in 1964, the land was conveyed to the defendants. Prior to this conveyance, the 40-acre tract has been farmed by tenants, the Sibbernsens having been nonresident landlords at all times. The plaintiff's 40-acre tract ap-

pears to have been farmed by tenants although the plaintiff was a local resident.

There is no disagreement as to the location of the government survey line between the two 40-acre tracts according to the original government survey. Admittedly it is correctly shown on exhibit No. 1 contained in the record. Approximately 235 feet north of the south line of the two tracts, a feedlot on the west tract extends over the line into the east tract. The feedlot is about 135 feet in width and extends 9 feet across the line on the south and 7.2 feet on the north. The two points are connected by a straight fence or feedrack. This encroachment on the east tract has existed for many years.

For many years, the tenants on the west tract have used a road from their farmyard south of the feedlot to get to the north part of their farm. This road goes east around the feedlot protruding into the east tract, and turns to the northwest. The east edge of the road, as found by the trial court, is 20 feet east of the government survey line where it passes the feedlot. The evidence shows that two small buildings were located on this line extended south which were maintained by the defendants and their predecessors. The record shows and the plaintiff appears to concede that this 20-foot strip of ground south of the north edge of the feedlot has been acquired by the defendants by adverse possession. The issue here is the width of the strip of land north of the feedlot, if any, which has been acquired by the defendants. There is evidence that an old cedar post is located 62 feet north of the north fence of the feedlot and 20 feet east of the government survey line between the two tracts. There is evidence in the record that a fence once existed beginning at a point 20 feet east of the division line between the tracts on the south line of the east tract which extended straight north to the old cedar post, and continued straight north to the north line of the east 40-acre tract. There is also evidence that this fence was destroyed or removed many years ago. There is also

evidence of a stub fence, which enclosed nothing, which came from the north line for a distance of 500 or 600 feet. This fence was removed by plaintiff's tenant in 1951 and has not been in existence since that time. There is no evidence that defendants' predecessors in title ever claimed ownership of the land to this through fence to which the old cedar post is alleged to have been a part. The most that has ever been claimed by defendants and their predecessors in title was to the east edge of the farm road going north from the north fence of the feedlot. It is the location of the road and not the old through fence that is important here. The evidence also shows that the plaintiff and his tenants have farmed their lands to the toe of the slope of the road and have used the road to turn their machinery in cultivating row crops.

In late 1964, the defendants did some leveling of their land. In doing so, they made a fill in a low area that extended over into the east 40-acre tract. It is the contention of the plaintiff that the defendants filled over the existing road and into the plaintiff's cornfield. It was the alleged encroachment of this fill upon the land of the plaintiff that brought about the present litigation. The defendants contend that the fill extended only to the east edge of the existing road to which they claim ownership.

The defendants became the owners of the west 40 acres in 1964. It is necessary for the defendants, to sustain their claim of ownership by adverse possession for the statutory period of 10 years, to tack on the adverse possession of the land by their predecessors in title. Plaintiff contends the right to tack the adverse possession by the predecessors in title has not been established by the evidence in this case.

The deed from the Sibbernsens to the defendants described only the southwest quarter of the southeast quarter of Section 25. Plaintiff asserts that there was no privity between the defendants and their predecessors

in title sufficient to permit tacking in establishing adverse possession.

A deed does not of itself create privity between the grantor and the grantee as to land not within the calls of the deed, but which may have been occupied by the grantor in connection therewith. Kramper v. St. John's Church, 131 Neb. 840, 270 N. W. 478. Possession cannot be tacked to make a title by prescription where the adverse occupant did not come in under another, and the deed under which the last occupant claims title does not include the land in dispute or show any privity between him and his grantor in regard thereto. Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N. W. 201. The rule that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument, but if land be actually occupied beyond the calls of the deed, hostile to the true owner, the deed does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. Rice v. Kelly, 81 Neb. 92, 115 N. W. 625.

In order to tack the possession of predecessors in title to support a claim of adverse possession, each predecessor occupant must show derivative title from his predecessor in order to link his possession with that taken under a previous or original entry. Successive occupancies alone do not establish privity but only show a succession of independent trespasses. In the case before us, defendants cannot successfully claim that privity exists with their grantors as to land beyond the calls of the deed because of the deed alone since they have derived no rights thereto from the deed. Maas v. Platte Valley Public Power & Irr. Dist., 167 Neb. 124, 91 N. W. 2d 409. But if, in connection with the conveyance of the lands, there are circumstances showing an intent to transfer the possession of other adjacent land to the grantee which was occupied by the grantor, even though

not covered by the calls of the deed, there is created such a privity as to permit a tacking of possession for the purpose of establishing title by adverse possession.

It is the generally accepted rule, as well as the rule in this jurisdiction, that the taking of possession of contiguous lands, some of which are not within the calls of the deed, which have been used by the grantor as a unit and is apparent by reason of the location of fences, buildings, roads, or other evidence, and the transfer of possession pursuant to a deed or contract has evidentiary value as to the existence of privity. In order to permit the tacking of successive adverse possessions of grantor and grantee of an area not within the calls of a deed or contract, but contiguous thereto, the ultimate fact to be established is the intended and actual transfer and delivery of the possession of such area to the grantee as successor in ownership, possession, and claim. Privity means privity of possession. It is the transfer of possession, not title, which is the essential element. The privity required is that there must be a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene. Ringstad v. Grannis, 171 F. 2d 170. Here the possession and use of lands beyond the calls of the deed were by the tenants of defendants' predecessors in title. The fact that the actual possession was in the grantor's tenants is merely a circumstance to be considered in determining whether or not the possession of the disputed strip was in fact delivered to the grantee. Illinois Central R.R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751. The foregoing rules for tacking adverse possession of land for the purpose of establishing ownership by prescription are supported by the authorities in this jurisdiction. Rice v. Kelly, *supra;* Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458. See, also, Annotation, 17 A. L. R. 2d 1128.

The evidence here shows a conveyance of the west 40 acres to the defendants and the surrender of possession

to them. It was apparent that defendants' grantors intended to convey the strip of land outside the calls of the deed within the feedlot, the area on which the outhouse and tool shed sat, and the farm road used in farming the land. The circumstances surrounding the grant of title, surrender of possession, and the location of fences, buildings, roads, and other observable conditions, indicate an intent to convey title and possession to property beyond the calls of the deed. Such evidence will sustain a finding that defendants succeed to the entire possession of the grantors and that privity of possession existed between them.

We have examined the evidence in this case de novo as we are required to do. We find from the evidence that the defendants and their predecessors in title have never claimed title to lands in the southeast quarter of the southeast quarter to any fence or landmark north of the feedlot. The evidence does not support a finding that any of this land was ever used by the defendants for the purpose for which it is generally adapted. There is no evidence that the defendants and their predecessors in title ever farmed the lands in the east 40 acres to any fence or line in the manner required to give title by adverse possession. The evidence does sustain a finding that the defendants and the tenants of their predecessors in title did acquire title to a farm road by exercising exclusive control over it for a period of more than 10 years. But its open, notorious, exclusive, continuous, and adverse use was that of a farm road and nothing more. The testimony of witnesses and a photograph in evidence show that, after passing the feedlot, the road turned to the west close to the true boundary line. We hold, therefore, that defendants have gained title to the road by adverse possession, any use of the road by plaintiff and his tenants being shown to have been permissive only during the statutory period.

Exhibit No. 1 shows what we shall designate as stations on the government survey line between the two 40-

acre tracts. These stations are 100 feet apart, beginning at the southwest corner of the southeast quarter of the southeast quarter of Section 25 and are numbered consecutively on the government survey line going north from that point. As to the land north of the north line of the feedlot, we find that defendants have acquired title to the land lying west of the following line: Beginning at a point 20 feet east of the government survey line on the north line of the feedlot extended, then north to a point 18 feet east of the government survey line at station No. 5, then north in accordance with the dashed line and the widths designated at the stations shown thereon, such line showing the toe of the slope on the east edge of the road.

We affirm that part of the judgment quieting title in the defendants to the 20-foot strip of ground extending from the north line of the feedlot to the south boundary line of the southeast quarter of the southeast quarter. We reverse that part of the judgment awarding a 20-foot strip of ground to the defendants from the north line of the feedlot to the north boundary of the southeast quarter of the southeast quarter. We direct that a judgment be entered finding defendants to be the owners of the land by adverse possession west of the line set out in this opinion. We further direct that the judgment set forth such conditions and requirements as to fix the rights of the parties under the issues raised by the pleadings which are supported by the evidence.

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

LEROY H. CORDES, APPELLANT, V. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLEE.

150 N. W. 2d 905

Filed May 26, 1967. No. 36496.

1. **Insurance.** Contracts of insurance, like other contracts, are to

be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense.

2. ———. In construing an insurance contract, the court must give effect to the instrument as a whole, and, if possible, to every part thereof.
3. **Contracts.** Where the language is plain and unambiguous, the court will not read an ambiguity into plain language in order to construe it against the one who prepared the contract.
4. **Contracts: Trial.** The construction of a written contract is ordinarily a question of law for the court.

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

Homer E. Hurt, Jr., for appellant.

Young, Holm, McEachen & Hamann and Vard R. Johnson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MURPHY, District Judge.

MCCOWN, J.

This was an action at law to recover medical expense benefits under a policy of insurance. A motion for summary judgment for the defendant insurance company was sustained and the plaintiff has appealed.

On August 15, 1964, the defendant Prudential Insurance Company of America issued to the plaintiff LeRoy H. Cordes, a policy of insurance providing life insurance benefits for the plaintiff, accidental death and dismemberment benefits for the plaintiff, nonoccupational vehicle accidental death benefits for the plaintiff, and extended medical benefits for plaintiff and plaintiff's covered dependents as defined in the policy.

Roger Cordes was the son of plaintiff, 20 years old and unmarried, and dependent upon his father for support and maintenance. On June 6, 1964, Roger Cordes became ill and from June 9 to 12, and from June 15 to 21, 1964, was hospitalized for diagnostic purposes. The

diagnosis made was seminoma of testes with metastic lesions to the neck (a more particularized expression for carcinoma of the testes, metastic, which is a form of cancer). On various dates from June 8 through June 21, charges were incurred for examinations and biopsies upon Roger Cordes. From June 22, 1964, to August 12, 1964, excepting weekends, Roger Cordes was treated with telecobalt therapy treatments and charges were incurred for these services. On or about September 15, 1964, Roger Cordes was admitted as a patient in Dodge County Community Hospital with his condition diagnosed as carcinoma of testes, metastic, and later hospitalized at Nebraska Methodist Hospital in Omaha for the same condition. Roger Cordes died January 4, 1965. Medical expenses were also incurred during the period September 15, 1964, to the date of his death and these medical expenses incurred were all for the same illness.

The plaintiff's claim was for a portion of the medical expenses he had incurred for the illness of Roger Cordes. The defendant asserted three defenses, but moved for summary judgment only on the second defense. The second defense was based on what might be termed a 90-day preexisting condition limitation or exclusion.

The particular portions of the contract directly involved are those under Part EM, Extended Medical Expense Benefits. The first paragraph of Part EM provides: "The benefits of this Part EM are payable with respect to service and supply charges incurred for medical care and treatment of the Insured or a covered dependent deemed necessary by a licensed physician, in accordance with the following provisions of this Part EM and the applicable provisions of this Policy pertaining to claims."

Section F of Part EM is headed "Eligible Charges." The first 11 numbered paragraphs of section F describe various kinds of medical services and supply charges.

Paragraph (12) of section F provides: "*Charge limitations for certain illnesses*: The extent to which charges

are included above is limited as follows—

"(a) Charges incurred in connection with mental illnesses or functional nervous disorders of any type or cause of a person will be included only to the following extent—* * *.

"(b) Charges incurred in connection with pregnancy including resulting childbirth, abortion or miscarriage will be included only to the following extent— * * *.

"(c) Charges incurred in connection with an illness of a person with respect to which medical expenses (including hospital, nursing and supplies of any kind) were incurred during the ninety days immediately prior to the date the person becomes covered for benefits under this Part EM will be included only to the following extent—

"Charges included are those incurred after the first to occur of (i) the first continuous period of ninety days ending on or after the date the person becomes covered for benefits under this Part EM during which period no such medical expenses were incurred in connection with that illness, and (ii) the end of the one year period commencing on the date the person becomes covered for the benefits under this Part EM."

Paragraph (13) of section F provides: "*Non-eligible charges*: In any event, the eligible charges will not include any charges incurred— * * *."

It is the plaintiff's position that the contract contains ambiguities and should be construed against the insurance company which drew it. Boiled down to its essence, the plaintiff claims that the particular language involved in paragraph (12) of section F should have been set out or emphasized as an exclusion or limitation rather than carrying a paragraph number under section F, and that its position in the policy requires the policy to be read as a reasonable person in the position of the insured would have read and understood it.

Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the

terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. U. P. Terminal F.C.U. v. Employers Mutual Liability Ins. Co., 172 Neb. 190, 109 N. W. 2d 115.

In construing an insurance contract, the court must give effect to the instrument as a whole and, if possible, to every part thereof. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721.

The language here is plain and unambiguous and the court will not read an ambiguity into plain language in order to construe it against the one who prepared the contract. Pickens v. Maryland Casualty Co., 141 Neb. 105, 2 N. W. 2d 593.

For purposes of defendant's second defense, which was the only one at issue here, it is conceded that Roger Cordes was a covered dependent as of the effective date of the policy, and that there was no deferment of the dependent's coverage because of disability. These issues were raised in the defendant's other defenses. As to the defendant's second defense, there was no genuine issue as to any material fact pertaining to that defense.

The construction of a written contract is ordinarily a question of law for the court. Omaha Public Power Dist. v. Traveler's Indemnity Co., 178 Neb. 709, 135 N. W. 2d 1; Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581.

The district court properly found that defendant was entitled to summary judgment on its second defense as a matter of law.

AFFIRMED.

IN RE APPLICATION OF NORTHWESTERN BELL TELEPHONE COMPANY, OMAHA, NEBRASKA.
NORTHWESTERN BELL TELEPHONE COMPANY, APPELLANT, V. PLEASANT VALLEY TELEPHONE COMPANY ET AL., APPELLEES, ALFRED B. KOPF ET AL., INTERVENERS-APPELLANTS.
150 N. W. 2d 922

Filed May 26, 1967. No. 36501.

1. **Telecommunications.** A telephone company must obtain a certificate of convenience and necessity before it may invade the service area of another telephone company.
2. **Public Service Commissions: Telecommunications.** To obtain a certificate of convenience and necessity to invade the service area of another common carrier telephone company, the applicant must establish and the Nebraska State Railway Commission must find compliance with section 75-604, R. S. Supp., 1965.
3. ———: ———. When the evidence sustains a compliance with section 75-604, R. S. Supp., 1965, and a valid basis for denial of the application is not disclosed, it is the duty of the Nebraska State Railway Commission to grant the application and its denial is arbitrary and unreasonable.
4. ———: ———. While the authority to issue or deny a certificate of convenience and necessity under section 75-604, R. S. Supp., 1965, rests with the Nebraska State Railway Commission, it may not whimsically grant or deny the application, and it is its duty to act in accordance with the best interests of all parties concerned if in accordance with the public interest.

Appeal from the Nebraska State Railway Commission. Reversed.

Edward Sklenicka, Walter D. James, Jr., and William K. Schaphorst, for appellant.

Smith & Smith, for interveners-appellants.

Beatty & Morgan, Leonard P. Vyhnalek, and William S. Padley, for appellees.

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

CARTER, J.

The Northwestern Bell Telephone Company filed its application with the Nebraska State Railway Commission

pursuant to section 75-604, R. S. Supp., 1965, for a certificate of convenience and necessity to construct and extend telephone lines and cables into a portion of the Oconto exchange area of the Northeastern Telephone Company and a portion of the Cozad exchange area of the Cozad Telephone Company. The Northeastern Telephone Company and Cozad Telephone Company filed their relinquishments with the commission to the areas contained in the application. These areas are shown on a map in evidence, exhibit No. 11, and are not in dispute. Nineteen of twenty-one possible subscribers in the area sought to be served by Northwestern Bell intervened in support of the application. Albert A. German, a resident of the Cozad exchange area who resides approximately 2 miles west of the area described in the application, protested the grant of the application. The Pleasant Valley Telephone Company, a farmer-switcher telephone company within the area of Northeastern's Oconto exchange, opposed the granting of the application. After a hearing, the commission found that the grant of the application was not in the public interest and denied it. Northwestern Bell and the intervening potential users of the proposed service have appealed.

This litigation appears to be a continuance of differences of long standing as to the adequacy of telephone service in the area. Some phases of the problem were before this court in Kopf v. Public Telephone Co., 173 Neb. 96, 112 N. W. 2d 521. The Public Telephone Company in that case is the former name of what is now the Northeastern Telephone Company. The evidence generally is to the effect that the area included in the application has not been afforded adequate telephone service over the years for various reasons which are of importance here.

It is provided by section 75-604, R. S. Supp., 1965, that no person or corporation shall construct or extend a new telephone line into the territory of another telephone company without applying for and receiving a

certificate of convenience and necessity from the commission. Before granting such a certificate, the commission must find that the territory to be served is not receiving reasonably adequate telephone service, that the territory will not within a reasonable time receive reasonably adequate telephone service from the telephone company serving the territory, or that the application is agreeable to the subscribers and both telephone companies involved, will not create a duplication of facilities, and is in the interest of the public and the parties requiring telephone service.

The evidence shows that Northwestern Bell has a telephone exchange and an exchange area in and around Lexington, Nebraska. Immediately north and adjoining the Lexington exchange area lies the territory described in the application which was relinquished by the Cozad Telephone Company. North of this area lies the territory relinquished by Northeastern from its Oconto exchange area.

The Pleasant Valley Telephone Company is a farmer-owned switcher telephone line having no telephone exchange. It obtains switching service for its member-subscribers from the Oconto exchange of the Northeastern Telephone Company. Pleasant Valley was organized about 1907. The adequacy of the telephone service provided by Pleasant Valley was a questionable quality, at least until 1961. In 1961, the members paid in $650 each for rehabilitating its facilities. It put in new poles, constructed a new overhead two-wire line, and installed dial telephones. The evidence is conflicting as to the adequacy of the service provided even though it was much better than before. In any event, the residents in the involved area refused to pay for memberships in Pleasant Valley or to use the service into the Oconto exchange. For years no resident in the controversial area used the telephone service of Pleasant Valley. At the time of the hearing before the commission, Pleasant Valley had but 14 users from whom it ob-

tained but $1 per month for operation, maintenance, and depreciation. It was dependent upon members for making repairs, although a company repairman at Callaway made repairs when he had the time to do it.

The residents of the area relinquished by Northeastern are practically unanimous in their desire for telephone service into Lexington. They testify that their business, church, school, social, and professional needs are transacted in Lexington and that they do not want and will not accept the service of Pleasant Valley into the Oconto exchange. The evidence makes it clear that Pleasant Valley renders no service in the area applied for and that it has no potential users in the territory. We point out here, that when the commission required the filing of maps showing telephone company service areas, Northeastern showed the territory which it relinquished in the present proceeding to be a part of its service area, but it has never rendered any telephone service in such area, at least not in recent years. The 10 potential users of telephone service in the area relinquished by Northeastern signed an affidavit in which they state that they are agreeable to becoming a part of Northwestern Bell's Lexington exchange area. Pleasant Valley is not a common carrier and is not subject to the rules and regulations of the commission. It is clear that it renders no service in the area and that it has no potential users there. We fail to see where the granting of a certificate of convenience and necessity should in any manner be in derogation of the rights of Pleasant Valley. The cost of a share of stock in Pleasant Valley, even at its depreciated value, its poor maintenance and operation which is beyond the control of the commission, and its connection with the Oconto exchange of Northeastern which is not a desired service by potential users, lends force to its inadequacy for the residents of the questioned area. The grant of the certificate appears to be in the public interest and in the interest of the parties re-

quiring telephone service, and will provide no duplication of service.

The area relinquished by the Cozad Telephone Company has been served, at least in part, by the Buffalo Mutual Telephone Company. Since 1909, it has operated as a mutual unincorporated telephone company. It operates a switcher line, obtaining switcher service from the Cozad exchange of the Cozad Telephone Company. On September 14, 1965, the member-shareholders of Buffalo Mutual voted to dissolve the company and cease operations when and if Northwestern Bell's application for a certificate was granted and telephone service was made available by it in the area relinquished by the Cozad Telephone Company. The telephone service provided by Buffalo Mutual was shown to be unreliable and inadequate. There are 11 potential users in the Buffalo Mutual area. Nine of these users signed an affidavit that they were agreeable to Northwestern Bell's taking a part of Buffalo Mutual's service area into its Lexington station exchange area. Two potential users, H. H. Neben and School District No. 44, did not sign the affidavit. The evidence does show that H. H. Neben has paid the advance construction charges to Northwestern Bell in order to obtain its service when available, a clear indication of his desire for such service. School District No. 44 is in the same situation as H. H. Neben and must be considered as desiring the service of Northwestern Bell when it is made available.

Albert A. German protested the grant of the application and filed a brief in support of his protest on this appeal. German is a rancher who resides approximately 2 miles west of the area proposed to be served by Northwestern Bell. He is presently served by Buffalo Mutual which contracts for its switcher service from the Cozad Telephone Company. It is the contention of German that if the application of Northwestern Bell is granted and upon the dissolution of Buffalo Mutual when service is provided by Northwestern Bell, he will have no

means of obtaining telephone service from any telephone service supplier. There is evidence in the record, however, that he can obtain service at additional cost, which German deems excessive. There is evidence in the record that Cozad Telephone Company has refused to take over the Buffalo Mutual switcher lines and render telephone service to its subscribers because it is not economically feasible to do so.

It is the contention of German that the grant of the application would be against the public interest in that it would result in his being deprived of telephone service. It must be pointed out that German resides 2 miles west of the area covered by Northwestern Bell's application. The difficulty in which German finds himself results from the dissolution of Buffalo Mutual, a farmer-switcher line over which the commission has no regulatory control. We cannot say that the probable loss of telephone service by German involves a matter of such public interest as to defeat the application and thereby prevent the residents of the area covered by the application from receiving adequate telephone service.

A telephone company must obtain a certificate of convenience and necessity as provided by section 75-604, R. S. Supp., 1965, before invading the territory of another company. Sherdon v. American Communication Co., 178 Neb. 454, 134 N. W. 2d 42. The exchange area of a telephone company includes all subscribers whether over company-owned lines or switcher lines. In order to obtain a certificate of convenience and necessity to invade the service area of another telephone company, the applicant must establish and the commission must find compliance with section 75-604, R. S. Supp., 1965.

The evidence shows that the area covered by the application is not receiving or about to receive reasonably adequate telephone service. The service areas invaded by the application have been relinquished by the telephone companies previously claiming the area. The record shows that a great majority of the subscribers, if

not all, are agreeable to the changes in service areas which will be brought about by the grant of the application. A public need for the service is clearly shown. A duplication of telephone facilities will not result. We think the evidence establishes compliance with section 75-604, R. S. Supp., 1965.

While it is true that the granting of a certificate of convenience and necessity under section 75-604, R. S. Supp., 1965, is lodged with the commission, a refusal to grant such a certificate when supported by the evidence and no basis exists for its denial will be regarded as unreasonable and arbitrary. Transit Homes, Inc. v. National Trailer Convoy, Inc., 173 Neb. 391, 113 N. W. 2d 638. When a public utility files an application for a certificate of convenience and necessity, the commission may not make a whimsical disposition of the matter, but must dispose of it on the evidence. And where the evidence clearly supports the interests of the people involved and the public interest as well, and no legal basis for its denial is pointed out, the denial of the application is arbitrary and capricious.

In Kopf v. Public Telephone Co., *supra,* the potential users of telephone service in this same area applied to the commission for the obtaining of adequate telephone service, which application the commission granted. On appeal to this court, we determined that potential users of telephone service were not proper applicants and the commission had no authority to require a common carrier to extend its service beyond its established service area into an area not previously served. In the case before us, the same situation as was then before the commission exists, except that defects in the previous litigation have been removed by providing a proper applicant and the obtaining of relinquishments from those companies to whose service areas the territory was formerly attached. The rights of the parties, and the public interest as well, is no different now than it was in the case of Kopf v. Public Telephone Co., *supra.* On the merits of the two

cases, an identical result is called for and an opposite result is not readily explainable.

There is some contention made in the record and briefs that the relinquishments of territory from the service areas of the Northeastern Telephone and Cozad Telephone companies was the result of coercion and fraud. In this respect there is some evidence that the relinquishments were obtained under a threat of legislation if adequate telephone service could not be provided the residents of the area under existing laws and the regulations of the commission. Suffice it to say that coercion and fraud are not asserted by the grantors of the relinquishments. In fact, they assert their validity and willingness to comply with them on the hearing before the commission. Under such circumstances Pleasant Valley and German are in no position to complain of coercion and fraud upon the parties who do not assert it and who in fact desire the results flowing from the relinquishments.

We think the evidence shows all the essential facts to support the grant of the certificate. It was the duty of the commission under the evidence to grant the certificate, and its action in denying the application was arbitrary and unreasonable. The order of the commission is therefore reversed.

REVERSED.

LUCIAL G. STEINBERG, APPELLANT, V. EVERETTE LESTER PAPE, APPELLEE.

150 N. W. 2d 912

Filed May 26, 1967. No. 36532.

Automobiles: Negligence. Where the motorist on an arterial highway is not in violation of any statutory regulation, and has no opportunity to anticipate or avoid the accident due to the existence of a blind intersection or a sudden and unexpected entry into the highway by a vehicle from an intersecting street or

highway, the motorist on the arterial highway cannot be held to be guilty of negligence or contributory negligence in failing to avoid an accident which from her standpoint was then unavoidable.

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

Eisenstatt, Morrison, Higgins, Miller, Kinnimon & Morrison, for appellant.

Sodoro & Meares, for appellee.

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

NEWTON, J.

This is an action brought by Lucial G. Steinberg, hereinafter referred to as plaintiff, against Everette Lester Pape, hereinafter referred to as defendant, as a result of an automobile accident occurring at the intersection of Fifty-second and Cuming Streets in Omaha, Nebraska. In regard to the circumstances pertaining to the accident, there is very little, if any, conflict in the evidence and it may be summarized as follows: Plaintiff was proceeding south on Fifty-second Street at a speed of from 20 to 25 miles per hour. Defendant was proceeding west on Cuming Street at a speed of about 25 miles per hour. Fifty-second Street is an arterial highway protected by stop signs. As defendant approached Fifty-second Street, there was a panel truck parked adjacent to the stop sign which prevented his observing it and he entered Fifty-second Street without stopping. There were trees and shrubbery at the northeast corner of the intersection which obscured defendant's vision to the north and plaintiff's vision to the east. Plaintiff testified that as she entered the intersection, she looked for other traffic, but did not see defendant's automobile prior to the collision nor did defendant see plaintiff's automobile prior to the collision. Plaintiff's automobile, after the accident, came to rest on a lawn at the southwest corner of the inter-

section and defendant's automobile came to rest adjacent to the curb at the southwest corner of the intersection. The front and right front corner of defendant's automobile were damaged and the left side of plaintiff's automobile in the area of the doors was damaged. Defendant was not familiar with this particular intersection. Evidence regarding the nature and extent of injuries sustained by the plaintiff in the accident was very conflicting. On trial to a jury, verdict was rendered for plaintiff in the sum of $1,800.

Plaintiff has appealed and assigns as error the inadequacy of the verdict and the submission to the jury of the question of plaintiff's contributory negligence.

Regarding the contention that the verdict is inadequate, it is sufficient to state that we find no merit in it. The evidence regarding damages was very conflicting and there was evidence upon which the jury might well have based its finding as to the amount complained of.

Regarding the second assignment of error pertaining to the submission by the trial court of the question of contributory negligence on the part of plaintiff, we find that under the facts existing here, the evidence was not sufficient to sustain the action of the trial court in submitting this question to the jury. This court has repeatedly ruled that one operating a motor vehicle on an arterial highway who enters an intersection must use reasonable care to look for other traffic approaching or in the intersection, and if such motorist looks but fails to see another vehicle which is not favored over him entering the intersection, the question of his negligence or contributory negligence ordinarily presents a jury question. This rule has been frequently cited in cases involving open intersections or under other somewhat similar circumstances where had the motorist on the arterial highway used due care, he could have seen the approach of the other automobile or avoided the accident. One on an arterial highway does not have an absolute right-of-way, but must still conform to the rules

constituting due care under the existing circumstances.

It is also a familiar rule that one traveling upon an arterial highway need not anticipate negligence on the part of a motorist entering the highway from an intersecting street, and need not anticipate that such motorist will fail to stop in obedience to the stop sign or to yield the right-of-way. He has a right to assume that the driver approaching on the intersecting road will observe the law unless and until he has notice to the contrary. In this case, the parties agree that there was what is generally denominated a "blind" intersection. Neither driver saw the approach of the other. Neither car was being driven at an excessive speed and plaintiff was not in violation of any of the statutory rules. She had no reason to anticipate danger until the defendant's automobile entered the intersection and it was too late to avoid an accident. Under such circumstances, plaintiff cannot be held to have been guilty of contributory negligence.

Where the motorist on an arterial highway is not in violation of any statutory regulation, and has no opportunity to anticipate or avoid the accident due to the existence of a blind intersection or a sudden and unexpected entry into the highway by a vehicle from an intersecting street or highway, the motorist on the arterial highway cannot be held to be guilty of negligence or contributory negligence in failing to avoid an accident which from her standpoint was then unavoidable. This case is analogous to several other cases heretofore determined. In the case of Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652, the plaintiff maintained an adequate lookout, saw the approach of the other automobile, but had no reason to anticipate that it would run the stop sign and when it did so, it was then too late for the plaintiff to avoid the accident. In Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848, plaintiff's decedent saw defendant's car approach on an intersecting highway, slow down as though it were about to sop, and then

suddenly accelerate and enter the highway a short distance in front of the automobile driven by plaintiff's decedent. In Giebelman v. Vap, 176 Neb. 452, 126 N. W. 2d 673, there was a blind intersection which made it impossible for the plaintiff to ascertain the approach of the defendant's automobile on an intersecting highway. In all of these cases it was ruled that the motorist on the arterial highway, under the existing circumstances, had no reason to anticipate the entrance into the arterial highway of an automobile from an intersecting road, had no reasonable opportunity to avoid the ensuing accident, and was not guilty of negligence or contributory negligence.

In view of the foregoing, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, V. DANIEL C. LYNCH ET AL., APPELLEES.

151 N. W. 2d 278

Filed May 26, 1967. No. 36542.

1. **Taxation.** The county board of equalization can exercise only such powers as are expressly granted to it by statute, and statutes conferring power and authority upon the county board of equalization as to a tax levy are strictly construed.
2. **Constitutional Law: Municipal Corporations.** The purpose of the constitutional provision as to a home rule charter is to render a city independent of state legislation as to all subjects which are of strictly municipal concern.
3. **Taxation.** The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate percent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power.
4. ———. The Legislature did not intend to grant to a county board of equalization any legislative power with respect to a city tax levy, nor to divide such power, or permit a dual exercise of it.

5. ———. The duties of the county board in making a tax levy for a home rule charter city under section 77-1601, R. R. S. 1943, are intended to be ministerial. The Legislature did not intend that the county board act as a quasi judicial body to review and determine questions of legality or procedural budgetary requirements of a home rule city.
6. **Mandamus.** Mandamus is not a writ of right and in determining whether or not the writ should issue, the court should consider the facts of the particular case, the nature of the exigency which calls for the exercise of the court's discretion, the consequences of the granting of the writ, and the nature and extent of the wrong which would result from its refusal. Such a writ will be issued ordinarily only to prevent injustice and not to promote it.
7. **Taxation.** In determining the rate of a tax levy, complete accuracy cannot be attained. The true test is that there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions.
8. ———. The levying body has considerable discretion in fixing the tax amount, and the exercise of this discretion will not be disturbed in the absence of an abuse thereof.
9. ———. Where the decision of the legislative body as to the amount of a tax levy is made at a time when the valuation of a substantial portion of the property upon which the levy is to be based is indefinite and uncertain and judicial proceedings to challenge valuations are pending or probable, illegality or arbitrary and unreasonable action in setting the levy must be clearly demonstrated to warrant judicial interference with legislative power.
10. ———. The county board of equalization ordinarily has no standing to question those matters properly lying within the discretionary legislative powers of the city, nor to determine, as a quasi judicial body, the legality or illegality of a tax levy made by a political subdivision to whom the Legislature has entrusted the legislative power.

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

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Walter J. Matejka, James E. Fellows, Allen L. Morrow, P. D. Spenceri, and Theodore L. Carlson, for appellant.

Donald L. Knowles, Arthur D. O'Leary, James M. Murphy, and Paul F. Peters, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, McCOWN, and NEWTON, JJ.

McCOWN, J.

This is an action filed by the State of Nebraska on the relation of the City of Omaha, against the members of the County Board of Equalization of Douglas County, and the County Clerk and County Assessor. It seeks a writ of mandamus requiring the respondent County Board of Equalization to levy the number of mills for 1967 taxes certified and directed by the city. The district court entered a judgment of dismissal and the City of Omaha has appealed.

The City of Omaha is governed by a home rule charter. On August 2, 1966, the city council held a public hearing on the 1967 budget for the city. On August 16, after deliberations thereon, the council adopted the budget which provided for tax revenue and expenditures in the amount of $14,179,636, and certified a levy of 22 mills. On the preceding day, August 15, 1966, the State Board of Equalization and Assessment had ordered a 24 percent increase in valuation of real property subject to tax levy for the City of Omaha. As stipulated by the parties, the 22 mill levy, based on the ordered increase, would have produced tax revenue for the City of Omaha in the sum of $17,025,725. Contemporaneously with the certification of the levy, the council also resolved that the City of Omaha appeal the decision of the State Board of Equalization and Assessment with respect to valuation of property in Douglas County, Nebraska, and recited that "at the present time it is necessary to levy the full amount allowed because the City does not know what the final valuation of property will be at the time of levy; * * *."

On August 27, 1966, a special meeting of the council

was held, and motions were carried to reconsider prior resolutions and action taken. The council then passed a resolution to change estimated tangible property tax valuations for 1967, increased the tangible tax revenue resulting from the increased valuations, increased the general fund property tax levy to 16 mills and appropriated proportions of the additional revenue to various budgetary accounts, one of which was $1,719,368 for "Such items as outlined in the supplemental budget as the Council may designate." It also adopted the budget with the revisions and passed a resolution in which it again certified the tax levy for the City of Omaha for the year 1967 to the county clerk of Douglas County in the amount of 22 mills. On August 29, 1966, the board of equalization of Douglas County levied a tax of 18.71 mills for the City of Omaha for the year 1967 rather than the 22 mills certified to it by the city. This is the action by the county board of equalization which is here attacked.

The district court found for the respondents, denied relief, and dismissed the action.

Section 77-1601, R. R. S. 1943, dealing with the county tax levy provides in part: "After making the levy for such purpose, the county board of equalization shall make the levy of taxes for county purposes. The levy shall include all county taxes necessary to cover the amounts required to be raised by taxation, as provided in the annual budget of said county for the current year, and shall include all township, city, school district, precinct, village, road district, and other taxes required by law to be certified to the county clerk and levied by the county board of equalization; * * *."

Section 14-514, R. R. S. 1943, applicable to metropolitan cities provides in part: "The city council shall annually certify to the county clerk of the county in which the city is located, by resolution, the number of mills on the dollar upon the assessed value of all the taxable property in such city * * *, which the city desires to be

levied as taxation for all municipal purposes for the ensuing year; * * *."

The chapter in which that section appears was adopted in 1922 in toto as the Omaha Home Rule Charter. Section 5.07 of the home rule charter for the City of Omaha for 1956 is headed Tax Levy and provides in part: "The Council, on the basis of the budget as finally adopted, shall certify by adopting an appropriate resolution a single City of Omaha tax levy for the ensuing fiscal year, which single tax levy shall be sufficient so that total anticipated revenues plus receipts from authorized borrowing will at least equal total proposed expenditures."

The county board of equalization can exercise only such powers as are expressly granted to it by statute and statutes conferring power and authority upon the county board of equalization in these circumstances are strictly construed. Speer v. Kratzenstein, 143 Neb. 300, 9 N. W. 2d 306; Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

The purpose of the constitutional provision as to a home rule charter is to render a city independent of state legislation as to all subjects which are of strictly municipal concern. Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N. W. 196.

"The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate per cent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power." 84 C. J. S., Taxation, § 349, p. 679.

In our opinion, the Legislature did not intend to grant to a county board of equalization any legislative power with respect to a city tax levy nor to divide such power, or permit a dual exercise of it. The duties of the county board, under section 77-1601, R. R. S. 1943, are intended to be ministerial. The statutes do not require that the city submit its budget, but require only the certified

mill levy. Neither do we believe the Legislature intended that the county board act as a quasi judicial body to review and determine questions of legality or procedural budgetary requirements of a home rule city.

The problem here is complicated by the fact that the remedy of mandamus is not a writ of right and in determining whether or not the writ should issue, the court should consider the facts of the particular case, the nature of the exigency which calls for the exercise of the court's discretion, the consequences of the granting of the writ, and the nature and extent of the wrong which would result from its refusal. Such a writ will be issued ordinarily only to prevent injustice and not to promote it. In State ex rel. School Dist. v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421, this court denied issuance of a writ of mandamus to compel a county board of equalization to restore a mill levy for a school district, where the effect of its issuance would be to compel the board of equalization to do an unlawful act. In effect, that case and similar cases have treated the action in the same context as though by a taxpayer challenging the legality or validity of the proceedings. They have only indirectly considered the original authority of the county board to alter a tax levy or amount determined by another political subdivision.

In considering the determination of the amount of a levy, this court said in C.R.T. Corporation v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194: "In the very nature of things and as the pertinent statutes declare, there may only be estimates, which of course negative any thought that accuracy must be attained. The true test is that there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions."

"The levying body has considerable discretion in fixing the tax amount, and the exercise of this discretion

will not be disturbed in the absence of an abuse thereof." 16 McQuillin, Municipal Corporations, Taxation (3d Rev. Ed.), § 44.97, p. 311.

Here the city council on August 15, 1966, was faced with a totally unexpected 24 percent increase in the valuation of real property which the city believed to be unjustified, contrasted with an originally proposed decrease of 14 percent as of the date of the city's budget hearings. The dilemma faced by the council was somewhat staggering. If the city's appeal from the valuation order was successful, but its levy was based on the valuations ordered by the State Board, the city would find itself over two million dollars short of its financial requirements, and faced with at least some possibilities of being unable to finance the deficit out of the following year's taxes in view of the closeness of its operation to maximum mill limits. On the other horn, if it based the levy on the original valuations, and if its appeal was unsuccessful, it might well anticipate being faced with taxpayers' suits for attempting to levy taxes amounting to approximately 5 percent of its total budget, for items which were not specifically allocated.

Originally the property tax statutes in Nebraska obviously were based on the assumption that valuations upon which levies were to be made were reasonably fixed and final at the time of the levy; or at least that very substantial changes would not occur through later appeals. That assumption is no longer valid.

Where the decision of the legislative body as to the amount of a tax levy is made at a time when the valuation of a substantial portion of the property upon which the levy is to be based is indefinite and uncertain, and judicial proceedings to challenge valuations are pending or probable, illegality or arbitrary and unreasonable action in setting the levy must be clearly demonstrated to warrant judicial interference with legislative power.

We think the action of the city council under the dilemma it faced, in the light of the known and reason-

ably ascertainable facts and circumstances and the possible consequences to the fiscal operations of the city, cannot be said to be unreasonable. We cannot believe the Legislature intended to promote dissention or dispute between separate taxing subdivisions of the state nor to divide or distort the legislative power of a home rule charter city as to its own taxes. The county board of equalization ordinarily has no standing to question those matters properly lying within the discretionary legislative powers of the city nor to determine as a quasi judicial body the legality or illegality of a tax levy made by a political subdivision to whom the Legislature has entrusted the legislative power. This conclusion is emphasized by the fact that any taxpayer may raise the issue in a direct action. See C.R.T. Corporation v. Board of Equalization, *supra.*

For the reasons stated, the judgment is reversed and the cause remanded with directions to enter an order commanding the respondents and each of them to amend and correct the levy made by the county board of equalization on August 29, 1966, to the number of mills certified by the resolution of the City of Omaha dated August 27, 1966.

REVERSED AND REMANDED WITH DIRECTIONS.

WILMA NISTOR, APPELLANT, V. JAMES V. THERKILDSEN, APPELLEE.

151 N. W. 2d 443

Filed June 2, 1967. No. 36317.

1. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.

2. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
3. ———: ———. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
4. **Automobiles: Negligence.** If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
5. **Highways.** A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Schrempp, Rosenthal, McLane & Bruckner, for appellant.

Sodoro & Meares, for appellee.

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

WHITE, C. J.

The basic question presented is whether the plaintiff is entitled to a directed verdict on the issue of liability arising out of an automobile accident occurring on March 11, 1963, at about 8 a.m. at Thirty-ninth and Laurel Streets, a stop-sign intersection, in the city of Omaha, Nebraska. The trial court submitted the case on the plaintiff's petition and the defendant's cross-petition, and the jury returned a verdict against each party. We reverse the judgment and remand the cause.

Plaintiff was driving east on Laurel Street, an arterial. The left front of plaintiff's automobile collided with the right front of defendant's automobile in the southwest quadrant of the intersection. Defendant, enroute to school with three companions, was driving south

and was familiar with the intersection. Defendant testified that the stop sign was 5 feet north of the curb line; that the view to the west was obscured by bushes 5 to 6 feet in height; that he stopped 5 feet north of the stop sign; and that he saw plaintiff's automobile stopped one-half to three-fourths of a block to the west to permit the passage of children on the street. He then proceeded south straight across the intersection and at no time did he look or see the plaintiff's car moving or approaching in the half block to the right or west. The evidence is conclusive that during the period of time that plaintiff's car was traveling this half block the defendant did not see her or take any precautions whatsoever to avoid the accident. Although the view at the stop sign was obstructed, defendant did not stop at the right-of-way line required by the statute, section 39-724, R. R. S. 1943, Dale v. City of Omaha, 154 Neb. 434, 48 N. W. 2d 380; or at the curb line, Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701, Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854; or at a point where he could see the approaching car in the range of danger, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333.

The driver of an automobile entering an intersection is obligated to look for approaching automobiles and see any vehicle within the radius which denotes the limit of danger, and if he fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848; Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36. A motorist approaching a highway protected by stop signs must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for a motorist to proceed into the intersection. Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652; Nichols v. McArdle, *supra;* Paddack v. Patrick, *supra;* Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. The duty of the driver of a vehicle to look over

vehicles approaching on the highway implies the duty to see what is in plain sight. Nichols v. McArdle, *supra;* Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

There is no allegation or proof of excessive speed of plaintiff's vehicle. Her vehicle was approaching or entering the intersection for at least half a block and in plain sight of the defendant as he approached and entered the intersection. Preventive action was easy. He took no action whatsoever because, by his own admission, he never saw the plaintiff at all during this critical period of time. Undisputedly, her vehicle was traveling in the range of danger, the defendant failed to see her, and the collision resulted. The defendant was not only legally compelled to stop and look before he went on the arterial highway, but the duty imposed on him was mandatory that before he went thereon that he see what was in plain sight in the range of danger and could have and should have been seen by any normal person reasonably and effectively complying with this obligation. See Nichols v. McArdle, *supra.*

This is not a case where the evidence supports an inference of a reasonably formed judgment that the vehicle approaching on the arterial was outside the range of danger and therefore it would be prudent to proceed. It is rather a case of an entire failure to see and avoid a collision with a vehicle, undisputedly within the range of danger. The rules above noted may not be avoided by the simple expedient of evidence that the approaching vehicle was observed at some point in the distance on the arterial highway. We come to the conclusion that the defendant was guilty of negligence as a matter of law.

We turn to the question of contributory negligence. The burden of proof to establish evidence of contributory negligence is, of course, on the defendant. Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107; Colton v. Benes, *supra.* Defendant did not see plaintiff's vehicle approach-

ing, so this burden must be met almost entirely on plaintiff's testimony. Plaintiff first saw the defendant when she was about 30 to 35 feet west of the curb line. At that time plaintiff was traveling 20 to 25 miles per hour. She kept the defendant's vehicle under observation. The defendant did not stop at the stop sign. This was corroborated by defendant's companion, Bruce Sheffield, who was riding with him. When plaintiff was about 10 feet from the west curb line, she realized that the defendant was not going to stop, and she applied her brakes, but it was too late to avoid the collision. Defendant did not apply his brakes.

There was neither allegation nor proof of an excessive or unlawful speed, nor does the defendant so contend. There is no evidence that plaintiff kept an improper lookout; in fact, she had the defendant's car under observation continually from a point about 30 to 35 feet north of the curb line of Laurel Street. Is there any evidence of lack of proper control? We think not. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, *he may govern his acts in accordance with such assumption.* Nichols v. McArdle, *supra;* Paddack v. Patrick, *supra;* Colton v. Benes, *supra.* The evidence is that it was too late to avoid the accident after plaintiff became aware of the defendant's sudden and unexpected entry into the intersection.

In Steinberg v. Pape, *ante* p. 806, 150 N. W. 2d 912, in holding a plaintiff driver on an arterial free from contributory negligence, even though she did not see the vehicle on the intersecting road, we recently said: "Where the motorist on an arterial highway is not in violation of any statutory regulation, and has no opportunity to anticipate or avoid the accident due to the existence of a blind intersection or a sudden and unexpected entry into the highway by a vehicle from an

intersecting street or highway, the motorist on the arterial highway cannot be held to be guilty of negligence or contributory negligence in failing to avoid an accident which from her standpoint was then unavoidable. This case is analogous to several other cases heretofore determined. In the case of Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652, the plaintiff maintained an adequate lookout, saw the approach of the other automobile, but had no reason to anticipate that it would run the stop sign and when it did so, it was then too late for the plaintiff to avoid the accident. * * * In all of these cases it was ruled that the motorist on the arterial highway, under the existing circumstances, had no reason to anticipate the entrance into the arterial highway of an automobile from an intersecting road, had no reasonable opportunity to avoid the ensuing accident, and was not guilty of negligence or contributory negligence."

In Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235, a somewhat analogous stop-sign intersection case, we said: "There was no evidence from which a reasonable inference could flow that the defendants had notice of danger in entering the intersection at the rate of speed and the manner in which their automobile was being operated as it approached the intersection *until Herman E. Fairchild drove his automobile into it.*" (Emphasis supplied.)

The evidence in this case is clear that the proximate cause of this collision was the negligence of the defendant and that the defense of contributory negligence is not sustained by any evidence. The plaintiff was entitled to a directed verdict on the issue of liability. The judgment is reversed and the cause remanded for a new trial on the issue of damages alone.

REVERSED AND REMANDED.

ROBERT C. GOLDSBERRY ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

151 N. W. 2d 329

Filed June 2, 1967. No. 36470.

1. **Municipal Corporations: Nuisances.** A city of the metropolitan class has the power to remove or order the removal of a dangerous building which has become a nuisance because of its condition.
2. **Municipal Corporations: Courts.** If the exercise of a power by the governing authority of a municipal corporation is based upon evidence sufficient to sustain it, the conclusion thus reached is final and the courts are without authority to interfere.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Ralph R. Bremers, for appellants.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Walter J. Matejka, James E. Fellows, Allen L. Morrow, P. D. Spenceri, and Theodore L. Carlson, for appellees.

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

BOSLAUGH, J.

This is a proceeding brought by Robert C. Goldsberry and Alice Goldsberry to review a resolution of the city council of the City of Omaha, Nebraska, declaring a structure owned by the plaintiffs to be a public nuisance and ordering its demolition. The trial court found that the evidence sustained the finding of the city council and dismissed the action. The plaintiffs' motion for new trial was overruled and they have appealed.

The structure consists of three frame buildings used for storage which are located at the rear of a residential lot. One building is 8 feet by 10 feet, another 6 feet by 4 feet, and a third 4 feet by 4 feet. Although the buildings are separate, they are adjacent to each other and were considered as a unit.

The Omaha building code provides that the building inspector shall inspect buildings within the city limits annually to determine whether they are "dangerous buildings." A "dangerous building" is defined to include any building or structure whose interior walls or other vertical structural members list, lean, or buckle to such an extent that a plumb line passing through the center of gravity falls outside of the middle third of its base. It is the duty of the building inspector to notify the owner of a dangerous building to repair or demolish the building.

A dangerous building which can reasonably be repaired so that it will no longer exist in violation of the code is to be repaired. A dangerous building which cannot be repaired so that it will no longer exist in violation of the code, or which is 50 percent damaged, decayed, or deteriorated from its original value is to be demolished.

Noncompliance with the notice from the building inspector is reported to the chief of the permits and inspections division who then notifies the owner to appear before him and show cause why the dangerous building should not be repaired or demolished as set forth in the building inspector's notice. A hearing is held, evidence taken, and findings of fact made. Any building found to be a dangerous building is to be ordered repaired or demolished.

The code further provides that a dangerous building is declared a nuisance. The chief of the permits and inspections division is required to report in writing to the council any building which is a nuisance. Notice is then given to the owner that he may appear at a hearing before the city council and show cause why the building should not be condemned. The council is authorized to order the demolition of any building found to be a nuisance.

The record in this case shows that Robert C. Goldsberry received a notice from the building inspector

dated October 28, 1965, directing him to demolish two sheds. On November 11, 1965, a notice was mailed to Robert C. Goldsberry directing him to appear before the permits and inspections division on November 19, 1965, and show cause why the two sheds should not be declared a nuisance. Although the structure was described as "two sheds," the plaintiffs were not prejudiced by any inaccuracy in the description in the notices. The record indicates that the plaintiffs appeared at the hearing on November 19, 1965, and were represented by counsel.

The report of the chief of the permits and inspections division to the council was filed on December 21, 1965, and the plaintiffs were notified to appear before the council on January 11, 1966. At the conclusion of that hearing, the city council adopted a resolution declaring the structure a nuisance and ordering its demolition.

The plaintiffs contend that the council had no jurisdiction because there had been no prior review by the city building review board. The plaintiffs rely upon section 37.99.020 of the code which provides where there is a right of appeal to the city building review board in a matter involving the exercise of discretion, such an appeal shall be a condition precedent to any action of the city council.

The function of the city building review board is to decide controversies concerning methods of building, use of processes and devices, strength and character of construction, and other technical matters concerning building construction. The code provides that any person aggrieved by a decision of the chief of the permits and inspections division may appeal to the building review board and from that board to the district court.

An appeal to the building review board is a remedy designed to provide relief from a decision of the chief of the permits and inspections division. The code does not require the chief of the permits and inspections division to submit his decisions to the building review board for approval. The plaintiffs did not attempt to appeal to

the building review board and have waived any right of review by that board which they may have had. They cannot now complain that the matter was not submitted to the building review board.

The plaintiffs' witnesses testified that the structure had a list of 1½ or 2 inches. The city's witnesses testified that the structure had a list of from 3 to 6 inches. The evidence shows that the structure in question was built with 2 by 4 lumber and that a list of a little less than ⅝ of an inch measured at the center of gravity would put the structure in violation of the code. The evidence was sufficient to sustain a finding that the structure was a dangerous building as defined by the code.

The plaintiffs contend that they should have been given an opportunity to repair the structure, and produced testimony to the effect that the structure could be repaired for approximately $50 or $55. The city's witnesses testified that the structure was in a dilapidated condition and should be demolished. The chief field inspector for the city testified that in his opinion the structure could not be repaired by the methods suggested by the plaintiffs' witnesses. The city's evidence was sufficient to sustain a finding that the structure could not be repaired so that it would no longer be in violation of the code and should, therefore, be demolished.

The power of the city to order the removal of a dangerous building which constitutes a nuisance was recognized in Horbach v. Butler, 135 Neb. 394, 281 N. W. 804. The evidence in this case was sufficient to sustain the finding of the district court, and its judgment is affirmed.

AFFIRMED.

ALLEN HEIKES, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A NEBRASKA CORPORATION, APPELLANT.

151 N. W. 2d 336

Filed June 2, 1967. No. 36482.

1. **Insurance.** In prescribing the standard form of fire insurance policy, the Legislature did not abrogate the right to reformation in respect to permissible subjects of insurable interest.
2. ———. A soliciting agent of an insurance company is deemed to all intents and purposes an agent of the company. §§ 44-103 (8), 44-328, and 44-329, R. R. S. 1943.
3. **Insurance: Reformation of Instruments.** Coverage provisions of an insurance policy may be reformed to express the actual agreement between the insured and the soliciting agent in accordance with controlling equities.
4. ———: ———. An insurance policy is not reformable unless a ground for reformation is proved convincingly.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Affirmed.

Jewell & Otte, for appellant.

Smith, Smith & Boyd, for appellee.

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

SMITH, J.

The district court reformed a multiple-line policy of insurance to provide fire coverage on potatoes in storage. Plaintiff, whose potatoes in storage had been destroyed by fire, was also awarded the amount of the loss under his reformed policy. The issue on appeal is the responsibility of defendant insurer for misrepresentations by its soliciting agent.

The policy, known as the Country Squire, has twelve pages. The boxed section shows a premium charge of $75 for "Blanket Farm Personal Property Coverage D" with a $25,000 limit of liability. On page 3 the heading "Description of Property * * * Covered * * * Coverage D—Blanket Farm Personal Property" appears in bold-

face. Under the heading 100 half-page lines in smaller print read in part as follows:

"This policy covers all Farm Personal Property * * * usual and incidental to the operation of a farm, except as hereinafter provided * * *. (c) Grain * * *, hay, straw and fodder in stacks are covered against fire only. (d) Grain, threshed seeds, threshed beans, hay, straw, fodder, silage * * * are also covered while removed from the premises * * * (with exceptions). (e) Property insured under Coverage D shall not include * * * Tobacco, cotton, vegetables, root crops, bulbs and fruit."

Defendant had appointed the soliciting agent, Lyman D. Piepho, to promote and develop its business. It had negated his authority to contract or receive any money except first premiums. Piepho attended a school and periodic meetings held by defendant. He was equipped with an underwriting manual, advertising material, and a state license.

Plaintiff, a tenant farmer, raised potatoes only, storing them in a cave until 1964. During that period defendant issued him some policies which are not described, but he had no fire coverage on potatoes. On July 30, 1964, construction of a potato storehouse on the farm was in the final stage.

Plaintiff and his wife had talked with Piepho at the farm on July 23, 1964, about coverage on the storehouse and all personal property. A week later Piepho inspected the storehouse. He informed plaintiff and wife that the Country Squire covered in storage potatoes against fire. During the conversation Piepho displayed defendant's 8-page advertisement which is attractively colored and illustrated. The relevant part reads as follows:

"NOW The Country Squire Policy Provides all the protection you need in one policy * * *. One Policy covers your complete farming operations * * * Coverage D Farm Personal Property The Country Squire Covers All your Farm * * * Personal Property * * *. 80% CO-

INSURANCE CLAUSE. In order to fully protect your property and to enable your company to grant these many extra coverages, it is necessary that you agree to carry insurance to 80% of the sound value of your farm personal property. * * * This applies only to Item 1, Farm Personal Property.

"STOP! for a moment and think of the large investment you have in your farm personal property. YOU CAN'T AFFORD TO PRESUME that you are protected . . . YOU MUST KNOW that your protection has kept pace with your progress!"

In the course of negotiations Piepho produced defendant's form of application. It provides space for an inventory of farm personal property including small grain, corn, soybeans, hay, straw, and silage. In the application plaintiff's property was first valued at $40,000, of which $15,000 was for potatoes. After an explanation of the coinsurance provision Piepho scratched out the item potatoes in order to reduce the total to $25,000. Plaintiff knew, we infer, about the deletion as well as the reduction. A second application was signed in blank by plaintiff, and Piepho filled it out subsequently. It shows values for potato diggers, potato harvester, potato washer, drying fan, and potato sorter. Potatoes are unlisted. The first application was retained by Piepho, and the policy was issued on the second application. Piepho obtained plaintiff's check for the balance of the premium charge at the time of delivery.

Both Piepho and plaintiff in good faith were acting on the misconception that potatoes in storage were covered. The deletion from the application affected total valuation alone, because the inventory was not intended to delimit the subject of insurable interest. Although Piepho had sold 60 Country Squire policies, he admittedly did not know about the exception. At the scene of the fire he said, according to disinterested witnesses, that coverage on the potatoes was ample under the coinsurance clause.

The chief underwriter testified that defendant had not written fire and extended coverage on potatoes. The premium rate was $1.04 or $1.30, depending upon inclusion of an 80% coinsurance clause. Plaintiff's premium rate was $0.30.

In prescribing the standard fire policy, the Legislature did not abrogate the right to reformation in respect to permissible subjects of insurable interest. See, Conte v. Yorkshire Insurance Co., 5 Misc. 2d 670, 163 N. Y. S. 2d 28; Leisen v. St. Paul Fire & Marine Ins. Co., 20 N. D. 316, 127 N. W. 837, 30 L.R.A.N.S. 539; Mercer v. Germania Fire Ins. Co., 88 Or. 410, 171 P. 412; Franklin Fire Ins. Co. v. Bolling, 173 Va. 228, 3 S. E. 2d 182; Welch v. Fire Association, 120 Wis. 456, 98 N. W. 227; Gould v. Pennsylvania Fire Ins. Co., 174 Wis. 422, 183 N. W. 245.

If conduct or knowledge of the insured has not counteracted misbehavior of the soliciting agent, responsibility is often allocated to the insurer. The soliciting agent is deemed to all intents and purposes an agent of the insurance company. §§ 44-103 (8), 44-328, and 44-329, R. R. S. 1943. An insurance policy may be reformed to express the actual agreement between the soliciting agent and the insured in accordance with controlling equities. The single circumstance that the insured failed to examine his policy prior to the loss is ordinarily insufficient for denial of relief. Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126; Davis v. Highway Motor Underwriters, 120 Neb. 734, 235 N. W. 325; Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166. Equity insists, however, upon convincing proof of grounds for reformation. Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873.

Liability of fire insurance companies was recognized without comment on underwriting considerations in situations that might have affected premium charges. State Ins. Co. v. Jordan, 29 Neb. 514, 45 N. W. 792 (loca-

tion of property); Kor v. American Eagle Fire Ins. Co., 104 Neb. 610, 178 N. W. 182 (removal of property); Home Fire Ins. Co. v. Gurney, 56 Neb. 306, 76 N. W. 553 (iron-safe clause); Home Fire Ins. Co. v. Fallon, 45 Neb. 554, 63 N. W. 860 (application misstating average value of grain). A coinsurance clause of a burglary policy was deleted without reference to adequacy of premium in Mogil v. Maryland Casualty Co., *supra*.

We recognize that equity secures the class of policyholders from incursions on the insurance fund. The fact that the risk was underwritten for a fair premium militates against reformation. On the other hand equity secures the individual policyholder from unjust disappointments, considering the structure and function of the system of insurance marketing. Plaintiff in good faith relied on the misrepresentation in the atmosphere of the advertisement. See, Rubinson v. North American Accident Ins. Co., 124 Neb. 269, 246 N. W. 349; Farmers Mutual Automobile Ins. Co. v. Bechard, 80 S. D. 237, 122 N. W. 2d 86, 1 A. L. R. 3d 1124. In the totality of circumstances he had no duty to inquire. He has the controlling equities.

AFFIRMED.

EVANGELICAL LUTHERAN GOOD SAMARITAN SOCIETY, APPELLEE, V. COUNTY OF GAGE, APPELLANT.
151 N. W. 2d 446

Filed June 9, 1967. No. 36484.

1. **Charities: Taxation.** Property owned and used exclusively for religious or charitable purposes when not owned or used for financial gain or profit is exempt from taxation.
2. ———: ———. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.
3. **Charities.** Charity is defined as being something more than mere alms-giving or the relief of poverty and distress, and it has been given a significance broad enough to include practical

enterprises for the good of humanity operated at a moderate cost to those who receive the benefits.

4. ———. Hospitals operated as nonprofit institutions are universally classed as charitable institutions.
5. ———. A nursing home or home for the aged and infirm operated on a nonprofit basis is exempt from taxation as a charitable institution.
6. ———. The fact that patients who are able to pay are required to do so does not deprive a charitable institution of its eleemosynary character.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

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

Baumfalk & Dalke and Hackler, Anderson, Chipman, Speer & Vader, for appellee.

Nelson, Harding, Acklie, Leonard & Tate et al., for amici curiae.

Oscar T. Doerr et al., amici curiae.

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

NEWTON, J.

The question presented here is the eligibility of property owned in Gage County by appellee Evangelical Lutheran Good Samaritan Society for exemption from taxation. The district court found that such property was exempt and an appeal was taken from that decision by Gage County, Nebraska, appellant herein.

The Evangelical Lutheran Good Samaritan Society is a nonprofit corporation organized and existing under the laws of the State of North Dakota, with its principal place of business at Arthur, North Dakota. The articles of incorporation state: "The purposes of this corporation shall be: (a) The ownership, operation and management of Christian Homes for the epileptic, senile, and other defectives; Nursing Homes; Homes for elderly people;

Hospitals; Homes for Senior Citizens; and Schools for Mentally Retarded. (b) To engage in other benevolent work of a charitable and religious nature and to participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of the community."

The society owns and operates a very considerable number of institutions of the nature referred to in its articles of incorporation, located in several states in this general area. Two of these institutions are located in Gage County, one in the city of Wymore and one in the city of Beatrice. The Gage County institutions are the type generally denominated as "nursing homes." The Wymore institution has accommodations for 46 persons and the Beatrice institution, for 61. Any adult 21 or more years of age and in need of help or care is eligible for admission. Practically all of the residents are aged persons who require assistance for their mental and physical well-being, with apparently a few residents who are mentally subnormal. The residents in these institutions are supervised 24 hours a day to see that they do not wander away and to see that they receive necessary care according to their individual needs. Some of the residents are ambulatory; some are in wheelchairs; some are bedfast; and some are even incapable of feeding themselves without assistance. These people are housed, fed, and given any required medication; when necessary, they are assisted in standing, sitting, and moving about. They are also assisted in shaving, bathing, dressing, and in regard to their toilet needs, and when required, the services of doctors are obtained.

The residents of these institutions who are able to do so are required to pay for the services rendered; in other cases, families or relatives of the residents make such payments. In the case of indigent residents who do not have families who can or will contribute, payments are made by the county welfare department. Charges are based on the physical and mental condition of the

individual residents, the degree of care required, and the expense incurred in caring for such individual residents. Payments made by the county welfare department are made upon the basis of statewide rates recommended by the Department of Public Welfare. Some of the private residents are apparently charged somewhat more than actual cost, but others are accepted on a basis of less than cost, depending, apparently, on ability to pay. When a physician's services are required, additional charges are made to the individual resident for such expense. There is evidence in the record of charges made by two or three very small nursing homes located in the county which indicate that although run for profit, these private institutions are charging practically the same rates for their services as those received by the society; however, the evidence does not show the physical or mental condition of the residents of these private institutions.

The two Gage County institutions belonging to the society appear in some years to operate at a loss and in others to show a small profit after all actual operating expenses, with the exception of depreciation, are considered, including contributions made to the home office in Arthur, North Dakota, and to a business office maintained in Sioux Falls, South Dakota, to assist in the payment of the expenses incurred in maintaining those offices. All employees of the two institutions are paid, generally speaking, on a scale approaching that paid by other institutions in the area rendering similar services. Occasionally small donations of goods, services, or cash are received by these institutions. If one of them is unable to meet expenses, the home office is contacted and financial assistance obtained from one of the other institutions operated by the society which happens, at that time, to be in a better financial position. The Gage County institutions, if they happen to have surplus cash at any time, are sometimes called upon to contribute to the assistance of other institutions operated by the so-

ciety which are then unable to meet expenses. The overall picture presented is of a society maintaining a number of institutions of the nature authorized in its articles of incorporation on a nonprofit basis, with each individual unit being available to assist on a financial basis, when necessary, in the operation of the other units.

Regarding religious services, morning and evening devotions are held, grace is said before meals, and thanks, after meals. There are a weekly bible class and weekly church service under the auspices of local pastors of various denominations. Attendance at religious services is on a voluntary basis.

Article VIII, section 2, Constitution of Nebraska, and section 77-202, R. R. S. 1943, exempt from taxation property owned and used exclusively for religious or charitable purposes when it is not owned or used for financial gain or profit. It is contended that the real estate and personal property owned by the society used for the purposes above mentioned and located in Gage County, Nebraska, are exempt under these constitutional and statutory provisions. "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, 178 Neb. 357, 133 N. W. 2d 455. See, also, Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455. In the present case, the primary or dominant use is not one for religious purposes and the property cannot be exempt from taxation on that ground.

This narrows the problem down to the question of whether or not the institutions in question are charitable institutions. These institutions, generally referred to as nursing homes, are in a large measure analogous to hospitals. Hospitals are employed in the treatment of individuals of all ages who become ill and also supply facilities for surgery. Nursing homes do not have surgical facilities and do not provide care for the young, their services being limited to a large extent to the

aged, the infirm, and to individuals who are mentally subnormal, but they provide the same care that hospitals furnish to patients convalescing from surgery or being treated for illnesses not requiring surgery. Formerly all institutions furnishing services of this nature, including both hospitals and nursing homes, were providing care for many patients without compensation and extended charity in the sense of alms-giving or free services to the poor. With the advent of present day social security and welfare programs, this type of charity is not often found because assistance is available to the poor under these programs. Yet, "* * * the courts have defined 'charity' to be something more than mere alms-giving or the relief of poverty and distress, and have given it a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits." Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N. W. 593, 34 A. L. R. 1060. See, also, Young Women's Christian Assn. v. City of Lincoln, 177 Neb. 136, 128 N. W. 2d 600; Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N. W. 2d 455.

Hospitals operated as nonprofit institutions are universally classed as charitable institutions. 15 Am. Jur. 2d, Charities, § 79, p. 85, § 148, p. 156; 14 C. J. S., Charities, § 2e, p. 422, § 16, p. 448; 84 C. J. S., Taxation, § 297d, p. 617; St. Elizabeth Hospital v. Lancaster County, 109 Neb. 104, 189 N. W. 981; Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86.

As heretofore noted, nursing homes for the aged and infirm are analogous to hospitals in that they perform largely the same services available in hospitals although the services available do not cover such a wide area and are more limited as to the types of cases and persons served. They are, however, recognized as charitable institutions when not operated for private gain. Rohlff v. German Old People's Home, 143 Neb. 636, 10 N. W. 2d 686.

" 'The fact that patients who are able to pay are required to do so does not deprive a corporation of its eleemosynary character, * * *.' " Muller v. Nebraska Methodist Hospital, *supra;* Duncan v. Nebraska Sanitarium & Benevolent Assn., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. N. S. 973, Ann. Cas. 1913E 1127; St. Elizabeth Hospital v. Lancaster County, *supra;* 84 C. J. S., Taxation, § 282 (b), p. 545; 15 Am. Jur. 2d, Charities, § 148, p. 156.

In view of the foregoing, it appears that the property of appellee is owned and used for a charitable purpose within the meaning of the Constitution and statutes of Nebraska and in conformity therewith is exempt from taxation. The judgment of the district court should be and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. I appreciate that the issue involved is a close one, but suggest that the majority opinion goes further than we have in the past and opens the avenues of tax exemption that were never intended. If this opinion stands, every nursing home in the state, by incorporating as a nonprofit corporation, can avoid taxation and still drain off all profit in salaries and expenses.

We should not lose sight of the fact that in interpreting and applying constitutional and statutory provisions relating to exemption from taxation, the rule of strict construction applies and the burden is on the taxpayer to show that the property involved is clearly within the claimed exemption.

The constitutional provision involved herein, Article VIII, section 2, provides in part as follows: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

It is to be noted that the Legislature may only provide exemption if the property is owned and used "exclusively" for educational, religious, charitable, or cemetery purposes. The word "exclusively" is one of general understanding.

In Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245, this court said: "Statutes exempting property from taxation are to be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute."

As the majority opinion emphasizes, the primary or dominant use and not an incidental use is controlling to exempt property from taxation. The majority opinion determines that the primary or dominant use herein is not for religious purposes, but does determine it to be charitable. I have no quarrel with the definition of charity therein, but suggest that the intent of the law is not to exempt every nonprofit corporation which may be of some benefit to mankind. It is difficult to see how this case can be distinguished from County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719, in which we denied tax exemption. The corporation involved in that case was a nonprofit corporation, not operating for gain or profit, which had built a housing facility for elderly people, mostly retired teachers.

There can be no doubt that in the instant case, as well as in the OEA case, some of the use and purpose of the organization was charitable, and that all of it is highly worthy and commendable, but it does not necessarily follow that it can be determined that the use may be denominated "exclusively" charitable. In the instant case, all persons entering the homes pay, and most of the private residents are charged somewhat more than the actual cost, while in the OEA case the evidence indicated that the charges to residents were no more than the actual costs involved.

In the instant case, the society makes no contribution

and indigent residents who do not have families who can or will contribute are supported in the home by the county welfare department. In the OEA case, if an occupant became unable to pay in whole or in part, the occupant was permitted to remain, and the deficiency was made up by the Omaha Education Association or by contributions from other sources.

In the instant case, the personnel operating the home are paid at least the going rate in the community for the type of service rendered, and it must be assumed that the same situation was true in the OEA case.

In the instant case, the charges are the same as those made by nursing homes in the vicinity which operate for profit. Tax exemption would make these institutions more competitive than the private operators with whom they compete, and could eliminate those operators. In the OEA case, the charges were set at actual expense, so far as it was possible to do so, and the clientele to be served was limited.

It is to be noted that in the instant case, the institutions expect to and do operate at a profit and are able to forward funds to help other institutions maintained by the Evangelical Lutheran Good Samaritan Society who may need help. In addition, the homes operating in Gage County pay the parent corporation for services furnished to them, including certain bookkeeping services handled from a central office outside Nebraska.

Finally, while these homes are operated by a North Dakota corporation, they are locally built and maintained. The society contributes nothing to their construction, operation, or maintenance. These institutions are primarily homes for the elderly, and any charitable use is incidental. If they are to be tax exempt, every home for the elderly operated by a nonprofit corporation, including the OEA home, is likewise tax exempt.

EUGENIE PRESHO, APPELLANT, V. J. M. MCDONALD CO., A CORPORATION, APPELLEE.

151 N. W. 2d 451

Filed June 9, 1967. No. 36554.

1. **Trial.** A motion for directed verdict or its equivalent 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. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** A person who enters a retail store for the purpose of shopping or of making a purchase is an invitee within the legal meaning of that term.
3. ———. In general, a licensee is one who is privileged to enter or remain upon property by virtue of the possessor's consent, whether express or implied.
4. ———. The owner or occupant of property owes an invitee the duty to observe and exercise for his protection the degree of care, caution, and vigilance which the circumstances justly and reasonably demand in order to protect him against injury or damage.
5. ———. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
6. ———. As a general rule a customer trading in a retail store has the right to rely upon the safety of passage along passageways used by customers and by doing so is not necessarily guilty of contributory negligence as a matter of law.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

Quigley & Quigley, William S. Dill, and Deutsch & Hagen, for appellant.

Robert V. Hoagland, for appellee.

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

SPENCER, J.

This is an action for injuries sustained by plaintiff in defendant's building. The trial court directed a verdict for the defendant at the close of plaintiff's evidence, and plaintiff has perfected an appeal to this court.

A motion for directed verdict or its equivalent must for the purposes 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. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842. We interpret the evidence delineated herein in the light of this rule.

The accident happened about 6:30 p.m., on Saturday, January 13, 1962, in a rear room of defendant's general merchandise store in Valentine, Nebraska. The store is located on the northeast corner of an intersection facing west on the principal street. The room where the accident occurred, which will hereinafter be referred to as the back room, is in the southeast portion of the rear of the store, and no merchandise is displayed or sold therein. The room is actually a storage and cloak room for employees. It does contain a ladies' restroom in one corner, and an office setup in another. The ladies' restroom is used by customers, but the evidence does not indicate it is maintained specifically for them. However, the plaintiff had never used it and did not know it was there until after the accident.

Plaintiff, who had been in the insurance business in Valentine for many years, had been in defendant's store on one or two other occasions on the day in question. She testified that she went into the store at approximately 6:30 p.m. to make a purchase and to get an empty box in which to ship an article she had purchased elsewhere. The employees were busy, and she asked the manager, who was also busy, if she could "have a box

to fit this frame." The frame in question was a wrapped 10 by 10-inch picture she had purchased elsewhere. Plaintiff testified the manager said, " 'Yes, help yourself.' " Plaintiff had obtained boxes there on at least two or three other occasions, and knew they were kept in the back room. Plaintiff went to the back room through the door connecting that area with the store proper. This door was usually open.

Plaintiff entered through the open door, and the next thing she remembers she was trying to pick herself up after hooking her toe on some object which she later determined to be the floor. Exhibit No. 1 is a photograph of the view from the open door into the back room. It shows a coat rack and some ladders against the south wall, and snow shovels directly against the east wall. It also shows a raised area in the floor, about a step inside the door where the cement floor between the door and the balance of the floor had settled. The raised area, looking through the doorway, starts on the north at less than one-eighth of an inch, and increases until it is at least one inch at the south. Anyone entering the door, looking at the floor, could see the raised area. Plaintiff's testimony on cross-examination is as follows: "Q Now, as you went—on this particular afternoon, you were in a hurry, were you, to get a box? A Not any more than usual. Q And as you went out through this door, did you look down as you went through the door? A A person always does. When you're walking you don't hardly look going—without looking where you're going. Q Well, you looked down then, is that correct? A Absolutely. * * * Q And you observed the condition of the floor at that time? A Beg your pardon? Q You observed the condition of the floor at that time? A I couldn't see anything the matter with it, if that's what you meant."

The parties are in disagreement as to whether plaintiff was an invitee or a licensee. The law imposes a

duty of greater care for the protection of an invitee on premises than it does for a licensee.

A person who enters a retail store for the purpose of shopping or of making a purchase is an invitee within the legal meaning of that term. Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

In general, it may be said that a licensee is one who is privileged to enter or remain upon property by virtue of the possessor's consent, whether express or implied. Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776.

The owner or occupant of property owes to an invitee the duty to observe and exercise for his protection the degree of care, caution, and vigilance which the circumstances justly and reasonably demand in order to protect him against injury or damage. Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900.

"The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care." Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900.

In the store proper, merchandise was displayed to attract plaintiff's attention, and she could not be expected to constantly observe the floor as she moved along the aisles. There can be no question that while plaintiff was in the portion of the store where merchandise was displayed and sold, she was an invitee.

"As a general rule a customer trading in a self-service retail store has the right to rely upon the safety of passage along passageways used by customers and by doing so is not necessarily guilty of contributory negligence as a matter of law." Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382.

When plaintiff went into the back room she was not an invitee. She was on an errand personal to herself,

not in any way connected with the business of the defendant. She was after an empty packing box to mail or ship an article she had purchased elsewhere and for which no charge would be made. No merchandise was sold or displayed in the back room to distract her attention. In fact, the nature of the objects visible from the doorway indicated caution. While the testimony indicates that a ladies' restroom was located in this area, this fact was unknown to her and its use was not the purpose of her trip, so on the facts in this case it is immaterial.

The plaintiff's sole allegation of negligence is that the floor in the back room is irregular, and the irregularity is not readily discernible. Exhibit No. 1 would indicate that the irregularity is apparent to one observing the floor through the door entrance. As we said in Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868, 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.

While plaintiff in her brief cites many authorities, she discusses only three of them in her argument. In Haley v. Deer, 135 Neb. 459, 282 N. W. 389, the plaintiff went into a beer tavern to use a pay telephone from which the defendant derived revenue. While there she used a restroom maintained for the convenience of the tavern customers. Plaintiff, as directed by a large sign marked "Ladies' Toilet," went down a narrow hallway and returning missed a turn and fell through a trapdoor. That case is not in any way analogous to the instant one.

In Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382, the plaintiff, while shopping in a retail store, caught her foot in a milk rack which had been left lying on the floor in the aisle in the store proper. That case is readily distinguishable on the facts.

Sears, Roebuck & Co. v. Daniels, 299 F. 2d 154, involved a turned-up corner of a rubber mat between the street doors and the inner doors on which the plaintiff

tripped. An entrance or exit to a store which must be used by customers would usually require a different rule than a storage room.

For the reasons given, the trial court properly directed a verdict for the defendant, and the judgment entered thereon is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent on the ground that the evidence either on its direct elements or in its reasonable implications contains room for fair legal doubt as to whether the status of the plaintiff was that of a licensee or an invitee, and that the question was, therefore, one of fact for the jury.

The majority opinion relies upon the elements of the "economic benefit" test to determine whether plaintiff was an invitee or a licensee. Retatement, Torts 2d, in §§ 330 and 332, pp. 172 and 176, has changed is former position on that issue. Section 332 now reads: "(1) An invitee is either a public invitee or a business visitor. (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." To the same effect, see, also, Prosser on Torts (2d Ed.), § 78, p. 452.

There was evidence here that: "* * * we have a thousand people go back there to our restrooms a month." There was also evidence that the plaintiff had been in the back room to get boxes before; that she had used the back door entrance before; that the public used it on occasion; and there was also evidence that the passageway to the rest room was the area where the plaintiff fell.

A case directly in point, although not cited in the briefs, is Bullock v. Safeway Stores, Inc., 236 F. 2d 29

(8th Circuit 1956). That case also involved a store customer directed to a back storeroom to obtain a carton for which there was no charge. That case held that: "* * * the court could not properly on the evidence as it stood, declare as a matter of law that defendant did not intend to extend to plaintiff an invitation to enter the back room, but only to make an offer to him of permission to enter the room at his own risk, or that defendant had given plaintiff no reason to believe, and plaintiff had no right to believe, that he would be entering the room as part of and under the protection of his business-visitor status."

A portion of the comment on section 332, Restatement, Torts 2d, p. 183, states: "Since the status of the visitor as an invitee may depend upon whether the possessor should have known that the visitor would be led to believe that a particular part of the premises is held open to him, the question is often one of fact for the jury, subject to the normal control which the court exercises over the jury's function in such matters." See, also, Annotation, "Economic benefit" or "public invitation" as test of licensee-invitee status. 95 A. L. R. 2d 992.

SMITH, J., concurs in dissent.

STATE OF NEBRASKA, APPELLEE, V. RANDALL M. SMITH, APPELLANT.

152 N. W. 2d 16

Filed June 23, 1967. No. 36402.

1. **Automobiles: Municipal Corporations.** Section 60-430.05, R. R. S. 1943, authorizes a city or village to enact an ordinance to prohibit the operation of a motor vehicle during any period that the motor vehicle operator's license has been revoked or suspended pursuant to any law of this state, or after such suspension or revocation but before reinstatement of a license or issuance of a new license as permitted under the motor vehicle laws of this state.

2. **Automobiles.** The right to operate a motor vehicle after suspension or revocation is not restored by mere lapse of time. The right to operate thereafter depends upon the receipt of a new license.
3. ———. Under section 60-525, R. S. Supp., 1965, a license to operate a motor vehicle remains suspended and revoked until the operator has complied with the financial responsibility laws of this state and has secured a new license as permitted under the motor vehicle laws of this state.
4. ———. Section 60-418, R. R. S. 1943, prohibits any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in the laws of the State of Nebraska, to operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and if permitted under the motor vehicle laws of this state.
5. ———. A nonresident of this state may operate a motor vehicle upon the public highways of this state during the period within which he may lawfully operate a motor vehicle in this state under the provisions of the general motor vehicle laws of the State of Nebraska.
6. ———. A resident or nonresident whose operator's license or privilege to operate a motor vehicle in this state has been suspended or revoked cannot evade compliance with the statutes of this state by the expedient of securing a license in another state or jurisdiction.
7. **Arrest.** Every temporary restriction of absolute freedom of movement is not an arrest.
8. **Automobiles.** A law enforcement officer has a right to reasonably and temporarily stop vehicles and make prompt inquiries and investigations so that effective prevention of crime and enforcement of law are possible.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Luebs, Tracy & Huebner, for appellant.

Ralph D. Nelson and Fred J. Swihart, for appellee.

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

WHITE, C. J.

Defendant appeals from a conviction and sentence for violation of a Lincoln municipal ordinance prohibiting the operation of a motor verhicle by a person during any period that his motor vehicle operator's license has been revoked or suspended, or after such suspension or revocation but before reinstatement of his license or issuance of a new Nebraska license.

On August 18, 1964, defendant's motor vehicle operator's license was revoked and suspended by the Department of Motor Vehicles for 1 year under the provisions of the "point system" law, section 39-7,128, R. S. Supp., 1965. On August 19, 1964, defendant received a notice of revocation of his license which provided as follows: "Any operating of a motor vehicle by you after the date of this notice, will constitute a violation of Nebraska Law for the duration of the revocation or thereafter, until proof of financial responsibility is furnished, as provided by law." On August 27, 1965, defendant was stopped by a Lincoln police officer for a stop signal violation. Upon inquiry the defendant produced a Missouri driver's license and informed the officer that his Nebraska operator's license had been revoked in August 1964. This prosecution followed. Defendant moved to Kansas City, Missouri, in February 1965, secured a Missouri motor vehicle operator's license, and remained a resident of Missouri until about April 1, 1966.

Defendant contends that the judgment and sentence are violative of the due process clauses of the federal and state Constitutions. Under this generalized attack, defendant includes a number of arguments which we will attempt to assimilate in this opinion. He argues that no authority exists for a city of Lincoln ordinance prohibiting the operation of a vehicle during suspension or revocation or after suspension or revocation but before reinstatement or issuance of a new license. He cites Gembler v. City of Seward, on rehearing, 136 Neb. 916, 288 N. W. 545, a 1939 case which held that a city had

no power to suspend or regulate the license or the privilege of driving a motor vehicle because no power had been conferred upon it by the state. The authority of the city of Lincoln to enact the specific ordinance under which the defendant was prosecuted is contained in section 60-430.05, R. R. S. 1943, enacted in 1959 (Laws 1959, c. 293, § 4, p. 1099), as follows: "Upon conviction of any person in any court within this state of a violation of any city or village ordinance pertaining to the operation of a motor vehicle by such person during any period that his motor vehicle operator's license has been revoked or suspended pursuant to any law of this state, or after such suspension or revocation but before reinstatement of his license or issuance of a new license, the penalty shall be as follows: * * *." The ordinance of the city of Lincoln (section 10.52.040) provides as follows: "It shall be unlawful for any person to operate a motor vehicle upon any street or highway within the city during any period that his motor vehicle operator's license has been suspended or revoked pursuant to any law of the State of Nebraska, or after such suspension or revocation but before reinstatement of his license or issuance of a new Nebraska license." It will be noted that this ordinance is almost verbatim with the authorization provided by the statute. It therefore follows that the city ordinance under which the defendant was prosecuted was a valid ordinance duly authorized by the statute and there is no merit to the contention of the defendant in this respect.

In part of defendant's sentence he was ordered not to operate any motor vehicle for any purpose for a period of 1 year from the date of his final discharge from jail. Defendant argues that this penalty is not authorized by the state's statute. His argument overlooks the provisions of section 60-430.05, R. R. S. 1943, which, as we have pointed out above, not only authorized a city to enact an ordinance prohibiting the operation during suspension or revocation or after such suspension but

before the reinstatement or the issuance of a new license, but directs that the penalty shall be as follows: "(1) For a first such offense such person shall be imprisoned in jail for thirty days, and the court shall, as a part of the judgment of conviction, *order such person not to operate any motor vehicle for any purpose for a period of one year from the date of his final discharge* from the jail; * * *." (Emphasis supplied.) The city ordinance incorporates this exact language, and the sentence imposed upon the defendant is also in identical language. There is no merit to this contention.

Defendant argues that the ordinance and statute are vague and ambiguous; that there is no ascertainable standard of guilt; and that therefore the statute and the ordinance are unconstitutional and invalid. We do not agree. The language of the statute and ordinance is plain and unambiguous and does not require further interpretation. It explicitly warns a person whose license has been revoked or suspended that he cannot drive after such suspension or revocation until his license has been reinstated or he has secured a new license. This language in the statute was designed to deal with the precise period of time at issue in this case. The statute and the notice served on the defendant clearly and unequivocally warn that lapse of time is not enough and that further action is required on his part. The ordinance, following the authority granted in the state statute, prohibits the operation of a motor vehicle until a person has secured the reinstatement of his old license or the issuance of a new Nebraska license. Furthermore we have recently and specifically held that the mere lapse of time after suspension of an operator's license does not restore his right to operate a motor vehicle. In Tyrrell v. State, 173 Neb. 859, 115 N. W. 2d 459, this court stated the law as follows: "In case it shall be urged that the 6-month suspension of the license of the defendant had expired by its terms and for that reason the conviction was invalid, it is pointed out that the right

to operate a motor vehicle after suspension is not restored by mere lapse of time. *The right to operate thereafter depends upon the receipt of a new license.* See § 60-418, R. R. S. 1943." (Emphasis supplied.) It should be pointed out that the purpose of these sections of the statute is to prohibit the operation of a motor vehicle and the issuance of a new license until compliance has been made with the financial responsibility laws of this state. Section 39-7,133, R. R. S. 1943, specifically provides that it shall be unlawful to operate any motor vehicle after revocation of an operator's license and that at the expiration of the period of revocation that, "such person shall give and maintain for three years proof of financial responsibility, as required by section 60-525." Section 60-525, R. S. Supp., 1965, specifically provides that, "* * * such license and registration shall *remain* suspended or revoked and *shall not at any time thereafter be renewed* nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person *until permitted under the motor vehicle laws of this state* and not then unless and until he shall give and shall maintain for three years proof of financial responsibility." (Emphasis supplied.) It is abundantly clear, therefore, that the defendant's privilege to operate a motor vehicle and his license to drive a motor vehicle were suspended and revoked for not only a period of 1 year but until he had secured a new Nebraska license after complying with the financial responsibility requirements of the law. Defendant argues that there is nothing in the order of revocation, on file with the Department of Motor Vehicles, that advised him of these requirements. Not only was the defendant charged with knowledge of the law, but the notice of revocation received by the defendant on August 19, 1964, clearly stated to the defendant that he could not operate a motor vehicle, "for the duration of the revocation or thereafter, until proof of financial responsibility is furnished, as provided by

law." It is clear, therefore, that the defendant was charged with notice, both under the law, and the notice of revocation that he received that he could not resume the operation of his motor vehicle by simply relying upon the mere lapse of time. To hold otherwise would permit the defendant to operate a motor vehicle in violation of the clear and mandatory provisions of the statute and in violation of financial responsibility laws of this state. There is no merit to these contentions.

Perhaps the main thrust of defendant's argument is that, as a matter of law, he was entitled to operate his motor vehicle at the time and place in question by virtue of his Missouri driver's license. It is true, that although his license was suspended and revoked while he was a resident of the State of Nebraska, that the defendant was a resident of the State of Missouri and had obtained a valid Missouri driver's license. Defendant's argument in this respect consists of an involved analysis of sections 60-410, R. S. Supp., 1965, and 60-422 and 60-423, R. R. S. 1943. Defendant's argument in this respect fails to mention or take into account the applicable provisions of section 60-418, R. R. S. 1943, which states as follows: "Any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this state under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and if permitted under this act." As we see it, the language of this statute is clear and unambiguous and requires no interpretation. This statute clearly removes any possible chance that the words "issuance of a new license" as contained in section 60-430.05, R. R. S. 1943, and in the applicable city ordinance here involved, could be interpreted to mean a license or permit from another jurisdiction or state. It specifically prohibits operation by either a resident or nonresident under such

a license or permit both during the period of suspension in this state or after such period of revocation until a new license is obtained, "when and if permitted under this act." Furthermore under section 60-525, R. S. Supp., 1965, a license remains suspended and revoked and could not be renewed "until permitted under the motor vehicle laws of this state" after compliance with the requirements of the financial responsibility laws. To hold otherwise would be to hold that a person could flaunt the motor vehicle laws of the State of Nebraska and the financial responsibility requirements by the simple expedient of securing a license to operate a motor vehicle in another state or jurisdiction. Defendant argues that he was a nonresident at the time of the alleged offense and is exempt from the operation of the ordinance and the statute involved by virtue of the provisions of section 60-410, R. S. Supp., 1965. Defendant attempts to paraphrase this section of the statute without quoting it in full. The applicable portion states as follows: "Nothing herein contained shall prevent a nonresident of this state from operating a motor vehicle upon the public highways of this state during the period within which he may *lawfully* operate such motor vehicle in this state under the provisions of the general motor vehicle laws of this state, * * *." (Emphasis supplied.)

Furthermore, it is noted that this statute was enacted in 1929 (Laws 1929, c. 148, § 11, p. 517). It has remained unamended except for a provision with reference to agricultural employees, not pertinent here. Section 60-418, R. R. S. 1943, was first enacted in 1937 (Laws 1937, c. 141, § 24, p. 520), and was later amended to contain the present language by Laws 1943, c. 135, § 1, p. 465. We see no conflict in the statutes, but if there were, it is elementary that the latest statute would control. It was plainly the intention of the Legislature by the enactment of section 60-418, R. R. S. 1943, to prohibit either a resident or nonresident whose operator's license or privilege to operate a motor vehicle in this state had been

suspended or revoked, to evade compliance with the statutes of this state by the expedient of securing a license in another state or jurisdiction. Defendant was not lawfully operating his vehicle in the State of Nebraska because his Nebraska motor vehicle operator's license and privilege to drive in the State of Nebraska had been suspended and he had not been reinstated or secured a new license on the date of the offense. There is no merit to this contention.

Defendant contends that his constitutional rights were violated when the police officer stopped him and, on inquiry, discovered from the defendant that he did not have a Nebraska driver's license. Every temporary restriction of absolute freedom of movement is not an illegal police action and courts have recognized the right of law enforcement officers reasonably and temporarily to stop vehicles and question occupants, even though the grounds for questioning might not amount to a basis for arrest or search. United States v. Bonanno (1960), 180 F. Supp. 71; Green v. United States (1958), 259 F. 2d 180; Poulas v. United States (1938), 95 F. 2d 412; Weathersbee v. United States (1933), 62 F. 2d 822; cf. Ellis v. United States (1959), 264 F. 2d 372.

We recently stated in State v. Carpenter, *ante* p. 639, 150 N. W. 2d 129, as follows: "Particularly pertinent here is the following from Justice Burton, quoted in United States v. Bonanno, supra: ' "It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible." ' " And it was pointed out in State v. Carpenter, *supra,* as follows: "It is not possible to ignore the fact that police officers are charged with the duty to prevent crime as well as to detect it. Often an immediate inquiry is an indispensable attribute to the prevention and discovery of crime. This is particularly true where a moving vehicle is involved. Then, time is of the essence."

We further point out in this case that the officer

stopped the defendant because of a signal light violation, no objection was made to the reception of this testimony, and that at the time of the temporary detention the defendant had not been arrested. As to the defendant's contention that he was entitled to counsel, the record shows that he was represented by counsel from his arraignment in municipal court and continuously throughout these proceedings. Defendant argues that the acceptance of this evidence is barred by the holding in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. This case is not applicable because, among other reasons, it was a felony case, the defendant was subjected to an in custody interrogation after his arrest and when he was represented by counsel, and specifically requested the presence of his counsel at the interrogation. To hold that a police officer, on making a routine investigation of a traffic offense, inquiring about the status of a driver's license to operate a vehicle, etc., would be required to advise such a driver of a right to counsel before interrogation "would emasculate crime prevention and render peace officers impotent and useless." State v. Carpenter, *supra*. There is no merit to these contentions.

We have examined other contentions made by the defendant and they have either been disposed of by what we have already said or are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent. I find no fault whatever with the majority decision as applied to a Nebraska resident. However, the defendant was a resident of the State of Missouri and had a valid Missouri driver's license, and the specific period of revocation of his Nebraska driver's license had expired.

Section 60-430.05, R. R. S. 1943, refers only to "* * * reinstatement of his license or issuance of a new license, * * *" without reference to the state of issuance, while

the city ordinance under which he was prosecuted, based on that statute, specifically reads: "* * * reinstatement of his license or issuance of a new *Nebraska* license." (Emphasis ours.)

Section 60-418, R. R. S. 1943, set out in full in the majority opinion forbids any resident or nonresident whose license has been suspended or revoked, to "operate a motor vehicle in this state under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation, until a new license is obtained when and if permitted under this act." It will be noted again that this statute specifically refers to both residents and nonresidents and does not refer to a Nebraska license, but only to a license obtained when and if permitted under the Motor Vehicle Operators' License Act.

The defendant's license here was revoked for a period of 1 year under section 39-7,128, R. S. Supp., 1965. The notice of revocation specifically read: "Any operation of a motor vehicle by you after the date of this notice, will constitute a violation of Nebraska Law for the duration of the revocation or thereafter, until proof of financial responsibility is furnished, as provided by law."

Section 39-7,133, R. R. S. 1943, provides: "It shall be unlawful to operate a motor vehicle on the public highways after revocation of an operator's license or privilege revoked under the provisions of sections 39-7,128 to 39-7,133. Any person violating the provisions of this section shall be punished as provided in sections 60-430.01 and 60-430.02. Any license, revoked under the provisions of sections 39-7,128 to 39-7,133, shall remain revoked for one year and at the expiration thereof such person shall give and maintain for three years proof of financial responsibility, as required by section 60-525."

Section 60-531, R. R. S. 1943, provides in part: "The nonresident owner of a motor vehicle not registered in this state may give proof of financial responsibility by filing with the department a written certificate or cer-

tificates of an insurance carrier authorized to transact business in the state in which the motor vehicle or motor vehicles described in such certificate is registered or, if such nonresident does not own a motor vehicle, in the state in which the insured resides, * * *."

It would seem quite clear from this section that while proof of financial responsibility is required of residents and nonresidents alike under the statute, the "new license" referred to in section 60-418, R. R. S. 1943, would necessarily and properly be a license from the state of residence of the individual involved. The fact that an operator's license and the furnishing of proof of financial responsibility are two separate and distinct things is quite apparent from section 39-7,133, R. R. S. 1943, as well as section 60-531, R. R. S. 1943.

Section 60-410, R. S. Supp., 1965, which is part of the same Motor Vehicle Operators' License Act states in part: "Nothing herein contained shall prevent a nonresident of this state from operating a motor vehicle upon the public highways of this state during the period within which he may lawfully operate such motor vehicle in this state under the provisions of the general motor vehicle laws of this state * * * *Provided,* that such nonresident motor vehicle operator is duly licensed under the laws of the state of his residence, or has complied with the laws of the state of his residence relating to the registration or licensing of motor vehicles and conformed to the laws of such state of residence in relation to the operators of motor vehicles; * * *."

It is quite clear that section 60-418, R. R. S. 1943, bars operation of a motor vehicle in Nebraska under any license from any state during the specific period for which the defendant's license has been suspended or revoked in all cases. It also forbids operation after such period of revocation until a new license has been obtained. The state of residence of the defendant at the time a specific period of revocation ended would, or

should be, the state to issue the license "permitted under this act."

The "new license" referred to in section 60-418, R. R. S. 1943, as to a nonresident of Nebraska and after the period for which his Nebraska license was specifically revoked has passed, should be interpreted as a license validly and legally obtained in the state of which the individual is then a resident, and the protection of section 60-410, R. S. Supp., 1965, should be extended to such a nonresident and the validity of such license recognized where proof of financial responsibility has been filed as required.

In this case, there is no proof whatever that the defendant did not file proof of financial responsibility under section 60-531, R. R. S. 1943. The evidence from the Department of Motor Vehicles was only that his Nebraska license had not been reinstated or a new Nebraska license issued as of the date of the arrest. Yet the crime involved a mandatory jail sentence.

Under the majority opinion, the revocation of a Nebraska motor vehicle operator's license for a specific period of 1 year becomes a permanent revocation as to anyone who has become a resident of another state, whether he has furnished evidence of financial responsibility or not and the validity of his new license from the state of his residence provided for by section 60-410, R. S. Supp., 1965, is destroyed. We do not believe the Legislature had any such intention.

Not only did the court refuse to admit the Missouri driver's license into evidence, but it instructed the jury that under the ordinances of the City of Lincoln, it was unlawful for any person to operate a motor vehicle after suspension or revocation and before reinstatement of his license or issuance of a new *Nebraska* license. Such an interpretation would seem to directly involve the due process and the privileges and immunities clauses of the United States Constitution, as to a resident of Missouri.

In any event, under the unusual factual circumstances here, a 30-day jail sentence was unjust and unreasonable.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GERALD ALLEN DECKER, APPELLANT.

152 N. W. 2d 5

Filed June 23, 1967. No. 36424.

1. **Constitutional Law: Criminal Law.** Pretrial interrogation of a criminal suspect by law enforcement officers, without warning him of his constitutional right to remain silent, and without granting a request for counsel, does not constitute prejudicial error in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial.
2. ———: ———. Where a defendant fails to prove allegations of a deprivation of a constitutional right at an evidentiary hearing under the Post Conviction Act, he is entitled to no relief under the terms of such act.
3. **Criminal Law.** A plea of guilty, if understandingly and voluntarily entered, is conclusive. Such a plea, so made, eliminates all questions as to the admissibility of evidence.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

John P. Glynn, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

CARTER, J.

This is a proceeding under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965, by which the defendant, Gerald Allen Decker, asserts that his conviction and sentence to life imprisonment for second

degree murder were invalid and void on constitutional grounds. After an evidentiary hearing, the trial court found that the evidence was insufficient to sustain any relief and relief was denied. Defendant has appealed.

The record discloses that the defendant, on December 14, 1959, gained entry to the home of Edna Zajicek and, by an unprovoked assault with a knife, stabbed her to death. An application was made to the district court for the appointment of counsel prior to his preliminary hearing and Jack Devoe was appointed as his legal counsel. With his legal counsel present, the defendant pleaded guilty to the charge of second degree murder.

On June 17, 1965, the defendant filed a motion to vacate the conviction. On July 7, 1965, John P. Glynn, Jr., a member of the bar, was appointed by the district court to represent the defendant in this post conviction proceeding. On May 26 and May 31, 1966, an extensive evidentiary hearing was held in the district court. The contention of the defendant is that his plea of guilty was coerced and was not voluntary. In this respect the defendant contends that he was handcuffed by officers having him in custody at all times prior to his confession except when he was taken to court. He further contends that the deputy county attorney promised him that he would be out of confinement by the time he was 21 years of age if he pleaded guilty to the charge of second degree murder. He further contends that some police officer, whom he could not name, told him at the home of the murdered woman that if anyone was found dead in the home he would no doubt be electrocuted.

The deputy county attorney and the policemen having the defendant in charge positively deny that the alleged conversations took place. The evidence does show, by failure to deny, that the defendant was handcuffed as a security measure most of the time before he entered his plea of guilty. The evidence does not indicate that the handcuffing was a form of coercion that induced the plea of guilty. The evidence of threats and coercion

was in conflict and, in fact, preponderated in favor of the State. The finding of the trial court that promises, threats, or other coercive statements were not made is clearly sustained by the evidence.

The primary issue here is whether or not the plea of guilty was voluntarily entered. The defendant was a youth of 15½ years who had been a resident of Whitehall, a state children's home, since his second grade in school. Because of his age, the trial court took maximum precautions to determine that the plea of guilty was in fact a voluntary one.

The defendant was accompanied into court at the time of his arraignment by his legal counsel, Jack Devoe, a very capable lawyer. Defendant's counsel advised the court of all that he had done for the defendant. Defendant had been advised of the penalty for second degree murder and every other right, constitutional and otherwise, to which he was entitled. The court interrogated the defendant who stated that he had been advised as his attorney stated and that he understood its meaning. Defendant advised the court that he was entering his plea of his own free will, that no threats or promises had been made to him, and that by pleading guilty he was admitting that he killed Mrs. Zajicek on December 14, 1959. The plea of guilty was accepted and sentence continued until a presentence investigation could be had. The record shows that an exhaustive presentence investigation was made, the report of the probation office consisting of approximately 65 pages. On January 20, 1960, approximately 30 days after the plea of guilty was entered, the defendant was brought before the court for sentence. Defendant was accompanied by his counsel, Jack Devoe, who conceded that the presentence investigation report was accurate and complete. No contention is advanced that it was not true or that it was in any way unfair or biased. That the case was carefully investigated and every right of the defendant protected

cannot be validly questioned. The trial court so found and its finding is correct.

Some contention is here made that defendant's counsel was ineffective in that he did not perform his duty to his client. The record will not bear out this assertion. The crime was a brutal one in which the defendant stabbed Mrs. Zajicek eight or ten times with a knife in causing her death. The record shows that defendant's counsel contacted the defendant's relatives and those having his custody over the years to determine his mentality, his work in school, the possibility of mental disturbances, and his general behavior over the years. The record indicates that he examined into the law dealing with criminals of defendant's age and possible defenses that might exist. No complaint was voiced by Devoe as to the means of taking the confessions of the defendant which were never used against him. While Mr. Devoe is now deceased and is consequently unable to produce evidence of the services rendered by him, the record indicates that he performed his duties in a most commendable manner. There is evidence in the record of his long experience in criminal matters and his energy in protecting the best interests of his clients.

It is evident that the courts involved, the attorneys prosecuting that case, and defense counsel meticulously protected the rights of the defendant, undoubtedly in part, at least, because of his youth. Consequently, we find, as did the trial court, that the defendant's plea of guilty was freely and voluntarily made, that his rights were fully protected, that he understood the seriousness of his crime and the penalty therefor, and that he was represented by competent counsel who saw to it that the case was fairly and impartially handled. We can find no basis for post conviction relief and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CHARLES RETCHLESS, APPELLANT, V. W. W. COOK, SR., ET AL., APPELLEES.

152 N. W. 2d 23

Filed June 23, 1967. No. 36487.

1. **Statutes.** In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
2. ———. All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
3. **Municipal Corporations: Pensions.** Section 35-201, R. S. Supp., 1963, providing that firemen serving 21 years in a paid fire department shall receive a pension, refers to departments where the members devote their entire time to the service, and are paid a regular salary, and excludes part-time firemen who follow other occupations and receive only nominal remuneration for their services as firemen.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Baumfalk, Dalke & Dowding, for appellant.

Arnold E. Wullschleger, for appellees.

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

NEWTON, J.

This is an action brought to determine the eligibility of relator Charles Retchless to receive a fireman's pension from the city of Beatrice. Beatrice is a first-class city and respondents are the mayor and city councilmen of such city. The city refused to grant the requested pension. This action was then filed in the district court for Gage County, Nebraska, and after trial was had therein, the court directed the city officials to grant the requested pension. Motion for new trial was filed

by respondents. The motion was sustained and relator has appealed from the order granting a new trial.

The evidence is almost completely free of contradictions. It discloses that Charles Retchless was appointed a volunteer fireman of the city of Beatrice on December 22, 1942, and served continuously in that capacity until September 1965. Ordinance No. 7-101 of the city of Beatrice provides: "The Fire Department of the City of Beatrice shall consist of a minimum of six full-time paid firemen, including a chief of the Fire Department, one assistant chief and four other firemen, who shall be appointed by the Mayor of said city, with the consent of the council, after receiving recommendations from the Civil Service Commission, and who may be removed or suspended by him, for cause; provided additional members of said department may be appointed, and vacancies in the personnel may be filled, in accordance with rules of Civil Service Commission. Said Department shall also consist of such volunteer firemen as the Mayor may appoint upon the recommendation of the Chief, and upon confirmation by the council." Under this ordinance, it appears that two groups were considered a part of the Beatrice fire department. The first group was composed of the so-called "regular" or "paid" firemen who were full-time firemen under civil service, were forbidden to enter other employment, were appointed as such after making application, and passing civil service tests, on recommendation of the civil service commission, and with the approval of the city council. They are members of a local union called the Beatrice Fire Fighters Association which is affiliated with the state organization. They receive a fixed annual salary, payable monthly, must serve at such times and for such periods as are fixed by state statutes, are not permitted to leave the city even when off duty without reporting such absence in advance, and are compelled to answer calls even when off duty. The second group is comprised of the members of an association designated as the Volun-

teer Fire Department. Members of this group are not under civil service. They obtain membership by applying therefor and by vote of the members of the Volunteer Fire Department. If the vote is favorable, they are then recommended for appointment by the mayor, subject to approval by the city council. This group is a member of the State Volunteer Firemen's Association. The volunteers work with the regular or full-time Beatrice fire department and are subject to the direction of the officers thereof. All of the members hold other positions from which they obtain their livelihood. In the event of a fire, the members of the volunteer association are called or notified thereof but are not compelled to attend and, in practice, never do attend when working at their regular jobs. By agreement, this organization supplies one man each week to serve on night duty with the regular fire department membership from 6 p.m. to 6 a.m. Those undertaking such night duty do so on a 7-day basis. They are not required to accept night duty and many of them do not. The city compensates them in part for their services by paying them $1 per hour for each drill, $1 for the first hour on each call, 50¢ for each subsequent hour, and $25 per week for night duty. The members of this organization furnish their own uniforms, but are supplied with such accessories as coats, boots, and helmets by the city. This organization receives occupation taxes levied by the city under section 35-106, R. R. S. 1943. Relator was a member of this second group but never became a member of the first group.

The resignation of Charles Retchless as a volunteer fireman was accepted effective October 1, 1965, and at that time section 35-201, R. S. Supp., 1963, was in effect. This section provides in part as follows: "All cities of the first class having a paid fire department, * * * shall pension all firemen of the paid fire department, whenever such firemen shall have first served in such fire department for the period of twenty-one years and shall

elect to retire from active service and go upon the retired list; * * *."

The question presented is whether the term "firemen of the paid fire department" includes a person serving in the manner in which relator served, or is limited to regular, salaried, full-time firemen.

In connection with this situation, it may be well to point out that Chapter 35, article 3, R. S. Supp., 1963, prescribes hours of duty of firemen, but this article is applicable only to "firemen employed in the fire department of cities having paid fire departments." Also, Chapter 19, article 18, R. R. S. 1943, providing for civil service commissions, limits the application of such article to cities having a full paid fire or police department or a fire or police department having paid members. It further provides: "Full paid fire or police department or fire or police department having paid members means a fire or police department in which the officers and firemen are paid regularly by the city and devote their whole time to firefighting or law enforcement." § 19-1823, R. R. S. 1943.

" 'In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.' " Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240.

" 'All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. * * * All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.' " Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692.

In recent years various types of pensions have been generally adopted by business and industrial concerns as well as by national, state, and municipal governments.

In most instances, not only the agency which pays the pension, but also the beneficiaries thereof, contribute to the establishment of a fund for the payment of the pension. These pensions are in the nature of "retirement pay" and are generally intended to provide, at least in part, for the livelihood of the recipient after retirement. In this respect, they supplement the social security program. In practice, generally speaking, these pension plans can be participated in only to the extent that such participation has been earned. In the case of public employees who are required to devote their full time to the positions which they hold, they can derive such retirement pay or pensions only from the positions held by them as such public employees. In the case of a part-time public employee whose principal occupation or job is in some other line of endeavor, he may derive such pension or retirement pay in connection with his principal occupation and thus acquire the same benefits that a full-time public employee enjoys under plans such as are set forth in section 35-201, R. S. Supp., 1963. Was it the intention of the Legislature to provide a pension plan for employees who are not otherwise so provided for; or, was it the intention to make it possible for one who, in pursuit of his full-time or basic occupation, became eligible for a pension from the concern for which he worked to also work part-time as a public employee and thus become entitled to a second pension from the governmental unit of which he was a part-time employee? If the latter theory is adopted, it is conceivable that an individual who holds several part-time positions might become entitled to multiple pensions from the governmental agencies for which such services were performed. For example, under the statute in question, such a man might, by working part-time with the fire department and part-time with the police department, become entitled to separate pensions for both services.

The term "paid fire department" has not been interpreted by many other jurisdictions. In the case of Con-

tinental Hose Co. v. City of Fargo, 17 N. D. 5, 114 N. W. 834, the court ruled that a fire department which did have some full-time salaried firemen was a "paid fire department" and then by dictum, which was not pertinent to a decision in the case, intimated that part-time firemen paid on a nominal basis were paid firemen. There are, however, two cases which are almost directly in point with the present case in which statutes similar to the Nebraska statute were construed.

In the case of Seavert v. Cooper, 187 Iowa 1109, 175 N. W. 19, the court stated: "The obvious purpose of the statute is to provide a benefit to firemen who have regularly devoted at least 22 years to the service of the public, to the exclusion of other employment. Great efficiency is required of men in well-organized and equipped fire departments, and this is acquired by experience, drill, and constant devotion to the service. It was not intended that men pursuing other vocations or employment, who are in no sense dependent upon the nominal compensation usually paid, if any, by fire departments consisting of business and professional men and citizens generally, who have united in an organization for the common good and protection of all, should be paid a pension when they have continued in such capacity for 22 years."

In the case of State ex rel. McLaughlin v. Morris, 128 W. Va. 456, 37 S. E. 2d 85, it was stated: "If a statute is without ambiguity and the legislative intent is plain, there is no occasion to construe the statute; but where, as here, a literal application of the language used in the statute would lead to an absurd result, it is our duty to construe the statute so as to avoid such result and adopt a reasonable construction. * * * Applying the foregoing principles, we are unable to attribute to the Legislature an intent to provide a civil service commission for municipalities wherein the officers of an organized fire department are paid nominal salaries and all other members of such department are compensated on an

hourly basis for services actually rendered. If the literal words of the statute should be applied, any municipality in the State that pays the personnel of its fire department any sum whatsoever would be compelled to establish a civil service commission as provided in Section 2, Chapter 60, *id.* To so construe and apply the statute would lead to an absurd result not within the legislative intent and purpose. The provisions of Chapter 60 are intended to provide a civil service commission for the appointment, promotion and removal of firemen, whose only vocation is fire fighting, and for which such persons are paid substantial salaries. The provisions of said chapter do not apply to municipalities having fire departments in which the services of the officers and members are incidental to their regular vocations. It is not to be supposed that the public has more than a passing interest in the proficiency and tenure of public employees whose employment is incidental and occasional."

Consideration of the objects sought to be achieved by the Legislature in section 35-201, R. S. Supp., 1963, and of other statutes on the same general subject, including the definition of a full paid fire department as set out in section 19-1823, R. R. S. 1943, and of the reasoning set forth in the Iowa and West Virginia cases above cited, leads us to the conclusion that relator was not a fireman of a "paid fire department" and is not entitled to a pension.

The order of the district court granting a new trial is correct and should be affirmed.

AFFIRMED.

KENNETH WINCHELL, DOING BUSINESS AS PREMIER MINERAL UPGRADING COMPANY, APPELLANT, V. NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, A CORPORATION, APPELLEE.

152 N. W. 2d 2

Filed June 23, 1967. No. 36505.

1. **Trial: Appeal and Error.** In a jury-waived law action, the judgment of the district court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient, competent evidence to support it.
2. ———: ———. In determining the issue of sufficiency of the evidence to support a judgment, conflicts in the evidence and reasonable inferences therefrom are resolved in favor of the party successful in the district court.
3. **Principal and Agent.** It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, he is liable therefor.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Matthews, Kelley & Cannon, for appellant.

Mattson, Ricketts & Gourlay, for appellee.

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

WHITE, C. J.

This is a jury-waived law action, in which the district court, as the fact finder, found against the plaintiff on the issue of whether the defendant bank, in violation of its agreement and instructions, had negligently transferred bank funds to another bank without restricting the right of withdrawal in plaintiff. On appeal we affirm the judgment.

The judgment of the district court on this issue has the same force as a jury verdict and will not be set aside if there is evidence to support it. Conflicts in the evidence and reasonable inferences therefrom are re-

solved in favor of the defendant. Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

Sometime prior to August 1, 1957, plaintiff and three promoters, Sivils, Eneff, and Thompson, entered into a written partnership agreement concerning the promotion and use of a "uranium upgrading machine." Plaintiff's role was to finance the enterprise. The name used was "Premier Mineral Upgrading Company." Thompson, Eneff, and Sivils were in Craig, Colorado, negotiating for a lease on which to use the machine. On July 31, 1957, Thompson called Winchell in Omaha and told him the right to purchase a lease would expire at midnight August 1, 1957. Winchell agreed he would send the money by telegram and a later phone call supplied the bank's name, the Moffat County State Bank in Craig, Colorado. The next day, August 1, 1957, plaintiff came to the defendant bank in Lincoln, contacted Ted Thompson, a vice president, changed the name of an account he had in the name of "Mineral Upgrading Company" to "Premier Mineral Upgrading Company." Conversation followed as to transfer of funds from this account to the bank in Colorado. Ted Thompson prepared in long hand, on a pad, a telegram, later sent by code which read: "Air mailing to you to-day Bank Draft $15,000.00 Deposit to credit of Premier Upgrading Co Notify C. A. Sivils, Cosgriff Hotel." Ted Thompson testified he prepared the telegram with plaintiff's assistance, showed it to him, asked him whether it was as he wanted it, and the plaintiff stated it was the way he wanted it.

Ted Thompson testified that Winchell placed no restriction on the right to withdrawal; that he transferred the funds as Winchell directed; that he was directed to transfer funds to an account in the Moffat County State Bank; that he was not informed as to whether Winchell had an account in the Moffat County State Bank; that he did not know whether the account was an old or a new one; and that Winchell told him to transfer the funds exactly as the telegram indicated.

On the other hand, Winchell testified that he came to the bank to "transfer some money of this account into a like account in a bank in Craig, Colorado"; that it was to be a new account in the name of Premier Mineral Upgrading Company; that he "wanted the bank account set up in Craig and $15,000 put in it exactly like it was in this account in Lincoln"; that he specifically told Ted Thompson that only he (Winchell) would have the right to withdraw the funds in Colorado; and that the purpose of the transfer of the funds was to show financial responsibility in the company.

Ignoring the obvious conflict in this testimony, plaintiff's testimony is highly equivocal. In this action, he testified that he discussed signature cards with Ted Thompson. In an action in federal court aginst the Colorado bank for permitting an unauthorized withdrawal of the funds by the other three partners, plaintiff testified and admitted that there was no discussion with Ted Thompson about the execution of signature cards and that he knew the transfer was being made without any accompanying signature card. Of course, the telegram itself fully corroborates this.

In this case plaintiff testified he never heard about the telegram until he brought the Colorado law suit and that he never saw a draft of the telegram until then. In the Colorado law suit, he testified, referring to the telegram, that Ted Thompson asked him if they had done exactly what he had instructed and he told them, "Yes."

The telegram was received by the Colorado bank on August 1, 1957. The money arrived by draft 2 or 3 days later. When the telegram arrived, Sivils, Eneff, and Thompson were notified, the Colorado bank honored their signature cards, the money was all withdrawn, they paid for a pick-up truck, and issued a check for $3,600 to the North American Uranium Company as the agreed deposit on the lease.

It is the duty of an agent of limited authority to ad-

here faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, he is liable therefor. Northern Assurance Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226; Omaha National Bank v. Kiper, 60 Neb. 33, 82 N. W. 102.

We have briefly reviewed some of the pertinent testimony. It is amply sufficient to sustain the trial court's findings and judgment herein that the defendant bank did not breach any agreement with the plaintiff and that there was no negligence on the part of the defendant bank in violating, exceeding, or neglecting any instructions of the plaintiff, or in failing to specify any ownership of the fund involved herein in the transmittal thereof.

In conclusion, we note that the plaintiff brought suit against the Colorado bank for permitting unauthorized withdrawal of these funds by the other three partners. In denying recovery, the United States Court of Appeals (Winchell v. Moffat County State Bank, 307 F. 2d 280), found that plaintiff had failed to require the forwarding bank (the defendant herein) to restrict the right of withdrawal; that his testimony on that issue was "equivocal"; and that the "actions, imprudence, and negligence of the plaintiff created the situation" that produced the loss. Although these findings are not binding on this court in this case, they are persuasive and fully support our independent conclusions.

Other defenses as to authorization of the partners to use the money, and the issue of proximate cause, argued by the defendant, appear to have merit, but will not be discussed further as they are not necessary to disposition of this case. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY J. WARNER, APPELLANT.

152 N. W. 2d 30

Filed June 23, 1967. No. 36511.

1. **Constitutional Law: Criminal Law.** Under constitutional provisions requiring a speedy trial, what is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases.
2. ———: ———. The burden of proof is upon the defendant to show that there has been a delay which is unreasonable or beyond the time fixed by statute.
3. ———: ———. The mere fact that 6 months elapses between arrest or indictment and commencement of trial, standing alone, is insufficient to establish a denial of defendant's constitutional right to a speedy trial.
4. **Criminal Law.** It is implicit in a verdict of guilty that the jury resolved all controverted questions of fact in favor of the State and this court will not disturb such a verdict based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt.

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

John W. Gallup and Schrempp, Rosenthal & McLane, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

MCCOWN, J.

The defendant, Harry J. Warner, was found guilty of robbery by a jury and sentenced to 4 years imprisonment.

Zerna Charles Erb, 67, Harry J. Warner, 47, and a woman known as Patricia Lee or Ingram, or Percilla Current, 40, were walking to the Park Bar in Omaha early in the evening of February 22, 1966. All had been drinking for at least several hours. The testimony of the woman, who was the State's only eyewitness, was

that when they reached an alleyway directly adjoining the Park Bar, the defendant Warner hit Erb in the head with a brick; that Erb fell into the alleyway; that the defendant took the billfold out of Erb's pocket and tossed it to her; and that she put it back beside Erb. She also testified that there was $1.25 or $1.35 in the billfold. The defendant and the woman then went into the Park Bar and were still there when they were arrested. Erb's body was found a short time later in the alleyway. There were abrasions on the eyebrow and nose and a bruised area on the chin as well as abrasions on each kneecap. Death, however, was due to a coronary occlusion and was not caused by a blow. A second count in the indictment charging the defendant with unlawfully abandoning a dead body in a place other than a regular burial place was dismissed.

The defendant's testimony as to the general pattern of events was substantially the same as the woman's testimony, with some vital exceptions. He testified that Erb called him a name; that he didn't like it; and that he "gave the old boy a shove, and that is all there is to it." He didn't see Erb fall down, and he "never touched him at all after that." "The billfold was laying on the ground." "I don't know how it got there, but I picked it up and handed it to her, and she looked in it and said, 'There is no money in the billfold.' * * * and she threw the billfold back down there by him."

The testimony of the police was that when they arrived at the scene, the billfold was lying on the ground approximately one foot from the left hand of the deceased Erb, and that it had no money in it. The coat defendant was wearing was removed from him by the police, and the woman testified that spots on it were blood spots, which she saw "get put on there" and that it probably happened when Erb fell against the defendant.

The defendant first contends that he was denied his constitutional right to a speedy trial.

The events on which the prosecution is based occurred February 22, 1966. The defendant was arrested that night. On March 17, 1966, the public defender was appointed to represent the defendant. Defendant's trial commenced August 29, 1966. No request for an early trial was made at any time.

Section 29-1202, R. R. S. 1943, provides for the discharge of any person indicted for any offense and committed to prison who shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense. This, of course, is the maximum time within which a defendant must be tried, and there is no question but that the defendant was tried well within this maximum.

The recent case of State v. Bruns, *ante* p. 67, 146 N. W. 2d 786, considered the issue of whether the defendant was accorded a speedy trial within constitutional provisions, independent of any statutory guide. This court stated: " 'What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases.' * * * And, also, the burden of proof is upon the defendant to show that there has been a delay which is unreasonable or beyond the time fixed by statute." The mere fact that 6 months elapsed between arrest or indictment and commencement of trial, standing alone, is insufficient to establish a denial of defendant's constitutional right to a speedy trial.

Defendant also contends that the evidence was insufficient to support a finding of guilt, because the only eyewitness was perhaps an accomplice; was mentally retarded and a chronic alcoholic; and her testimony was contradictory or inconsistent. This court may not, in a case of this kind, decide conflicts in or weigh the evidence or pass on the credibility of witnesses. It is implicit in a verdict of guilty that the jury resolved all controverted questions of fact in favor of the State and this court will not disturb such a verdict based on evi-

dence unless, as a matter of law, it is insufficient to support a finding of guilt. Clown Horse v. State, 170 Neb. 336, 102 N. W. 2d 625.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF HENRY CARLSON, JR., FOR A WRIT OF HABEAS CORPUS.
HENRY CARLSON, JR., APPELLEE, V. H. R. WIVELL ET AL., APPELLANTS.
152 N. W. 2d 98

Filed June 23, 1967. No. 36518.

1. **Habeas Corpus: Infants.** Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
2. **Parent and Child.** The right of a parent to the custody of minor children is not to be lightly set aside.
3. **Divorce: Parent and Child.** A decree of divorce which awards the custody of a minor child to the mother and in which there is no finding of unfitness of the father does not deprive the father of the natural right of custody of his child except as against the mother.
4. ———: ———. Courts may not properly deprive a parent of custody of his minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
5. ———: ———. In a custody contest between parents, the wishes of a child, who has reached sufficient age and has the ability to express an intelligent preference, are entitled to consideration, but are not controlling.
6. ———: ———. The wish or preference of a child does not in itself outweigh the rights of a parent, nor justify the transfer of custody from a fit, proper, and suitable parent to a third person.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and John W. Sjostrom, for appellants.

Murphy, Pederson & Piccolo and M. T. Woods, for appellee.

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

MCCOWN, J.

This is a habeas corpus action in which a father sought custody of his two minor daughters from the maternal grandparents. The district court found for the father, and the respondent grandparents have appealed.

The applicant, Henry Carlson, Jr., and Emma Lou Wivell, the mother of the children here involved, were married in 1949. Christie Ann Carlson and Linda Lou Carlson were respectively 16 and 14½ years of age at the time of hearing in August 1966. The parents were divorced on June 14, 1956, in Sioux Falls, South Dakota, where they had been residing, and custody of the children was granted to Emma Lou Carlson, the mother. Property allocation and financial arrangements involving trust funds and property were incorporated in the decree. Additional trust funds have also been established for each of the children for future use.

Shortly after the entry of the divorce decree, the mother and children moved to North Platte, Nebraska. They lived in the home of the respondents, the children's maternal grandparents, Herbert R. and Emma Wivell, until October 1959, when the mother and children moved to Lincoln, Nebraska. Thereafter the girls did not live with their grandparents during their mother's lifetime, except for a few weeks in 1960. The mother married George Wilcox in December 1959, and Mr. and Mrs. Wilcox and the children lived in Lincoln until the summer of 1960 when they moved to North Platte. Mr. and Mrs. Wilcox were divorced in 1963.

The mother and children continued to live in their own home in North Platte until the death of the mother on

April 2, 1966, although the children visited frequently in the grandparents' home. The two children then lived with their grandparents until the decree was entered in this action.

Meanwhile, the applicant, Henry Carlson, Jr., on December 22, 1957, married Eleanor Daunis, his present wife. They have two children, aged 7 and 5. They have lived in or near Sioux Falls, South Dakota, since their marriage and presently live just outside that city near Brandon, South Dakota. The applicant visited the children in North Platte several times a year following the divorce. On two occasions he obtained modification of the custody provisions of the divorce decree to permit the children to visit in South Dakota. On December 9, 1960, the decree was modified to give the applicant temporary custody of the children for a period of 3 weeks commencing on the 1st day of August of each year thereafter, and permitting visits for half of the Christmas vacation each year in South Dakota if the children so desired. Thereafter, the girls spent 3 weeks in the summer and a portion of their Christmas vacation in Sioux Falls with the applicant. In the summer of 1965, Linda, the younger, stayed for 5 weeks in Sioux Falls, and Christie, the elder, stayed for 9 weeks. The girls also came to Sioux Falls for Christmas for 6 days.

It is quite apparent from the evidence that both of the children have love and affection for their father and for their grandparents. The girls expressed the desire to remain in North Platte with their grandparents. There are substantial intimations in the record that their attitude toward the father may have been altered, following the death of their mother, by reason of their grandparents' disclosure to them of the grandparents' version of their father's conduct at a period largely antedating the original divorce.

The applicant was the active president of his construction company and was 41 years of age at the time of the hearing. The present Mrs. Carlson was 42 years of

age. Mr. Wivell was retired or semiretired, and was almost 68 years of age. Mrs. Wivell was 70 years of age at the time of hearing. The evidence fully supports the district court's finding that both the applicant and the respondents were fit persons to have the custody of the children.

The district court also found that the applicant had not in any way forfeited the right to perform the duties imposed by the relationship of father, had not abandoned the children, and was not indifferent to their welfare. The court ordered the custody of the children placed in the applicant, Henry Carlson, Jr., subject to reasonable rights of visitation of respondents, and this appeal followed.

Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892.

The right of a parent to the custody of minor children is not to be lightly set aside. Osterholt v. Osterholt, 173 Neb. 683, 114 N. W. 2d 734.

A decree of divorce which awards the custody of a minor child to the mother and in which there is no finding of unfitness of the father does not deprive the father of the natural right of custody of his child except as against the mother. In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885.

Courts may not properly deprive a parent of custody of his minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Ball v. Ball, 180 Neb. 145, 141 N. W. 2d 449.

It is quite apparent here that the children would be well cared for by both of the parties. The respondent grandparents urge that the wish of the children to remain in North Platte should be of paramount import-

ance and sufficient to overcome all other considerations, including the superior rights of a fit, proper, and suitable parent. We cannot agree.

It is only natural that children, particularly of the age of these, would not ordinarily wish to leave the community in which they have spent the greater portion of their lives. In a custody contest between parents, the wishes of a child, who has reached sufficient age and has the ability to express an intelligent preference, are entitled to consideration, but are not controlling. Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445. In a custody contest between a parent and a third person, that rule has even less application. The wish or preference of a child does not in itself outweigh the rights of a parent, nor justify the transfer of custody from a fit, proper, and suitable parent to a third person.

The findings and order of the district court in these proceedings are fully supported by the evidence. The judgment is, therefore, affirmed.

AFFIRMED.

MUNICIPAL UNIVERSITY OF OMAHA, NEBRASKA, A CORPORATION, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF DOUGLAS COUNTY ET AL., APPELLANTS.

151 N. W. 2d 924

Filed June 23, 1967. No. 36545.

1. **Taxation.** The county board of equalization can exercise only such powers as are expressly granted to it by statute and statutes conferring power and authority upon the county board of equalization in these circumstances are strictly construed.
2. ———. The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate per cent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power.
3. **Equity.** An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Donald L. Knowles, Arthur D. O'Leary, James M. Murphy, and Paul F. Peters, for appellants.

Wm. Ross King and Seymour L. Smith, for appellee.

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

SPENCER, J.

Appellee herein, hereinafter referred to as University, secured a permanent injunction enjoining appellants, hereinafter referred to as Board, from reducing the 1967 mill levy of University from 2.0 mills to 1.71 mills, and requiring Board to correct and place upon the official records a levy of 2.0 mills. Appellants perfected an appeal to this court.

The original valuation determined by the county assessor for University was $679,128,415. Subsequently, the State Board of Equalization and Assessment increased that valuation to $798,654,930. Prior to this increase, University certified a tax levy of 2.0 mills on the dollar, which, on the original valuation would have produced $1,316,150. That amount on the increased valuation could be raised by a 1.71 mill levy, so the Board reduced the certified levy to 1.71 mills. This action resulted.

Subsequently, in City of Omaha v. State Board of Equalization & Assessment, *ante* p. 734, 150 N. W. 2d 888, this court reversed the action of the State Board increasing the valuation, so it is obvious that if the reduced mill levy is sustained, University would receive much less than its anticipated revenue, and its operations would be very seriously impaired.

We consider the following issues raised by Board:

"I. The district court erred in holding that there is no statutory power in the County Board of Equalization to reduce a mill levy certified to it.

"II. The District Court erred in enjoining the County Board of Equalization from certifying the levy of the Municipal University of Omaha at any figure other than two mills.

"III. The District Court erred in exercising equitable jurisdiction when the plaintiff had an adequate remedy at law."

The first two assignments of error are answered by State ex rel. City of Omaha v. Lynch, *ante* p. 810, 151 N. W. 2d 278, in which we held: "The country board of equalization can exercise only such powers as are expressly granted to it by statute and statutes conferring power and authority upon the county board of equalization in these circumstances are strictly construed. * * *

" 'The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate per cent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power.' "

In Ratigan v. Davis, 175 Neb. 416, 122 N. W. 2d 12, we determined that the authority to levy a tax for university purposes was deemed to flow directly from the Legislature, and that the board of regents of University was authorized to certify the amount of the levy to the city council of the city of Omaha to be levied upon all tangible property within the district.

In Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87, the power of the board of regents of University to certify the amount of the tax levy for the support of University was challenged as unconstitutional. We there held that although the regents levied the tax, and the functions of the city council were administrative only, the electors of the city having consented to the delegation of the power to tax to the board of regents, the delegation of the power could not be questioned, and the act was constitutional.

There is no question the power to certify the tax levy is granted by the Legislature to the board of regents of

University. University, in full compliance with the law, certified a levy of 2.0 mills. The certification was within the authority granted by the Legislature and there was no power in the Board to act other than in compliance with the certification.

Board's action was premised on the assumption that because the levy would produce revenue in excess of University's requirements, its action was proper. In view of our action in City of Omaha v. State Board of Equalization & Assessment, *ante* p. 734, 150 N. W. 2d 888, it is obvious that a levy of 2.0 mills will not produce revenue in excess of University's requirements. In any event, however, this point is immaterial herein. The relation of revenue to be produced, and the amount of levy duly certified by the board of regents of University is of no concern to Board if within the statutory limit. By virtue of section 14-1317, R. S. Supp., 1965, the board of regents of University is authorized to certify a levy not to exceed 2.0 mills. Said section specifically provides: "If in any year the amount so certified and collected is not needed for the purposes of such university, the balance shall be credited to the sinking fund of such university to be used for additional buildings or other necessary permanent equipment; * * *." From the foregoing, it is obvious that University may levy and collect taxes for purposes other than its day-by-day operation.

Section 14-1317, R. S. Supp., 1965, is further buttressed by section 14-1319, R. R. S. 1943, as follows: "The provisions of sections 14-1301 to 14-1320 and all grants of power, authority or rights herein made to cities adopting the provisions of said sections and to boards of regents created under the provisions thereof shall be liberally construed, * * *."

Board's last assignment is that University had an adequate remedy at law. We do not agree that mandamus would have been as practical and efficient as this equitable action. In Best & Co., Inc. v. City of Omaha, 149

Neb. 868, 33 N. W. 2d 150, we held: "An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Immediate action was imperative to prevent the county clerk from extending the unlawful reduction upon the tax lists. If this action had not been enjoined, the injury to University would have been irreparable when the valuation was decreased. As University argues, Board had to take the action to restore the 2.0 mills in order for the clerk to complete the tax lists and the treasurer to send out the applicable tax notices. Equity was able to provide by decree for the escrow of the .29 percent until the litigation was determined, thus preventing irremediable consequences to University.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALBERT BIRD HEAD, APPELLANT.

151 N. W. 2d 615

Filed June 23, 1967. No. 36546.

1. **Criminal Law.** Prima facie evidence of guilt, as the phrase is used in the second sentence of section 28-522, R. R. S. 1943, does not mean that proof of the basic fact shifts the burden of persuasion to defendant. The jury may, but is not required to, infer guilt from existence of the basic fact.
2. **Trial: Appeal and Error.** Giving an instruction likely to confuse or mislead the jury is error.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Reversed and remanded.

Charles A. Fisher and Charles F. Fisher, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

SMITH, J.

Defendant has been found guilty of stealing an automobile. He assigns error in jury instructions on prima facie evidence of guilt, as the phrase is used in the second sentence of section 28-522, R. R. S. 1943. The instructions read in part as follows:

"* * * the Statutes * * * provide that it shall be unlawful for any person to steal * * * an automobile * * * of any value * * *. The Statutes further provide that the possession of such property without the consent of the owner, and without a certificate of registration issued to the possessor as required by law, shall be prima facie evidence of guilt." (Instruction No. 4.)

"By a 'prima facie case' is meant such a case as would be sufficient to counterbalance the general presumption of innocence and warrant a conviction, if not encountered and controlled or overcome by evidence tending to contradict it and render it improbable, or to prove facts inconsistent with it." (Instruction No. 9.)

The judicial rule in theft cases ordinarily permits an inference of guilt from an unexplained, exclusive, and fairly recent possession after the theft. Palmer v. State, 70 Neb. 136, 97 N. W. 235; Robb v. State, 35 Neb. 285, 53 N. W. 134; Thompson v. The People, 4 Neb. 524; IX Wigmore on Evidence (3d Ed.), § 2513, p. 422. The basic fact in the judicial rule is one of the group composing prima facie evidence within the meaning of the statutory provision. Our interpretation reasonably strengthens the empirical connection between basic fact and inference. The basic fact in the judicial rule was erroneously omitted from the instructions.

The statutory provision does not affect the risk of nonpersuasion. If specific instructions on the inference are given, they ought to dispel any notion that proof of the basic fact shifts the burden of persuasion to defend-

ant. A jury may, but is not required to, infer guilt from existence of the basic fact. Palmer v. State, *supra;* United States v. Gainey, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658; State v. Thomas, 58 Wash. 2d 746, 346 P. 2d 930; State v. Thomas, 63 Wash. 2d 59, 385 P. 2d 532. In the present case the instruction defining prima facie evidence of guilt was beyond ordinary comprehension. Giving an instruction likely to confuse or mislead the jury is error. State v. Miller, 175 Neb. 213, 121 N. W. 2d 39. It was prejudicial here.

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

REVERSED AND REMANDED.

FRED PLISCHKE ET AL., APPELLEES, V. CHARLES ARVENNE JAMESON AND GENE B. JAMESON, EXECUTORS OF THE ESTATE OF CHARLES A. JAMESON, DECEASED, APPELLANTS.
152 N. W. 2d 119

Filed June 23, 1967. No. 36587.

1. **Appeal and Error.** When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the mandate of this court.
2. ———. Where the mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.

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

O. A. Drake, for appellants.

Dier & Ross, for appellees.

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

BOSLAUGH, J.

This is an appeal from the judgment of the district court entered on the mandate of this court after an appeal from an earlier judgment of the district court. The prior appeal is reported in 180 Neb. 803, 146 N. W. 2d 223. The defendant is now deceased and the executors of his estate have been substituted as the defendants in the action.

The defendants contend that the judgment on the mandate fails to conform to the mandate. It is fundamental that the district court must obey and perform the mandate of this court. Jungman v. Coolidge, 158 Neb. 504, 63 N. W. 2d 519.

The mandate made the opinion of this court a part of the mandate and provided that this court found "no error in that part of the judgment of the district court as to the location of the public road and the effect of its vacation as well as quieting of title in the defendant to the area along the east 734 feet of said public road and in this respect said judgment is affirmed." The mandate further provided that this court did find "error in that part of the judgment relating to the width and location of the prescriptive road and in this respect said judgment is reversed and the cause remanded with directions to enter judgment in conformity with the opinion of this court."

Where the mandate incorporates the opinion of the court by reference, they should be construed together to determine the meaning of the mandate. Ruehle v. Ruehle, 169 Neb. 23, 97 N. W. 2d 868.

The opinion in the former appeal stated: "We determine further that title should be quieted in the defendant to all land south of the fence line not actually embraced in the public road or in the prescriptive road as described above. This would include any portion up to 3 feet of the area paralleling the fence line on the south after it leaves the public road."

The judgment on the mandate provides in part that the title to an area 3 feet in width and "north of the fence for the distance of 734 feet west of the center of the section line" should be quieted in the defendant. This part of the judgment is erroneous and should be deleted. There is no basis in this action upon which the defendant could obtain title to land north of the fence line.

The judgment on the mandate further provides in part: "The land over which the prescriptive road runs is quieted in the plaintiffs, subject only to its use for travel by the public." This part of the judgment is erroneous to the extent that it includes any of the area south of the fence. See Woehler v. George, 65 Wash. 2d 519, 398 P. 2d 167. It also should be deleted.

The judgment should be modified by deleting that part of the judgment which quiets title in the defendant to any area north of the fence line, and in the plaintiffs to any area south of the fence line.

The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

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27. The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. Carl R. Anderson & Co. v. Suhr ---------- 474
28. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Carl R. Anderson & Co. v. Suhr ---------- 474
29. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant. The Supreme Court

will not reverse a judgment in a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Gray v. Hartman 590
30. When evidence on material questions of fact is in irreconcilable conflict, the Supreme Court will 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. Cook v. Wilkie 596
31. Error cannot be predicated upon the admission of evidence to which the complaining party has stipulated. Sheets v. Davenport 621
32. In order that assignments of error as to the admission or rejection of evidence may be considered, it is required that appropriate reference be made to the specific evidence against which the complaint is made. Sheets v. Davenport 621
33. Where the trial court refuses to permit counsel in jury summation to use schematic drawings and such drawings are not preserved in the record, no reviewable error is presented. Sheets v. Davenport 621
34. An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. Zimmerman v. Continental Cas. Co. .. 654
35. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not mislead. Zimmerman v. Continental Cas. Co. 654
36. Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused. Yount v. Seager 665
37. It is not error for counsel in opening statements to the jury to suggest flat amounts of recovery for different elements of damage if such amounts and elements bear some real relation to what the party expects to prove by the evidence. Yount v. Seager 665
38. Rule as to consideration of instructions on burden of proof stated. Yount v. Seager 665
39. Rule as to when trial court may set aside verdict of jury as being excessive or inadequate stated. Yount v. Seager 665
40. Where the evidence is not sufficient to sustain a verdict for the contestant as to the due execution of a will, it is error to submit that issue to the jury. Thomas v. Vaughan 673

41. In the absence of a bill of exceptions, no questions requiring the examination of evidence produced in the trial court will be considered on appeal. State ex rel. Hartman v. Weiss ---------- 685
42. When a bill of exceptions has not been filed, the only issue on appeal is the sufficiency of the pleadings to support the judgment of the trial court. State ex rel. Hartman v. Weiss ---------- 685
43. In the absence of a uniform approach to equalization, or a rationalizing of the relationship existing between the various factors on which the State Board has acted, it is impossible for the Supreme Court to ascertain that a constitutionally required uniformity between counties has been attained. County of Keith v. State Board of Equalization & Assessment 754
44. An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue and tends to mislead or confuse the jury is erroneous and prejudicial. Kuffel v. Kuncl ---------- 770
45. In a jury-waived law action, the judgment of the district court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient, competent evidence to support it. Winchell v. National Bank of Commerce Trust & Sav. Assn. ---------- 870
46. In determining the issue of sufficiency of the evidence to support a judgment, conflicts in the evidence and reasonable inferences therefrom are resolved in favor of the party successful in the district court. Winchell v. National Bank of Commerce Trust & Sav. Assn. ---------- 870
47. Giving an instruction likely to confuse or mislead the jury is error. State v. Bird Head ---------- 885
48. When a case is remanded by the Supreme Court to the district court with directions for its disposition, the district court must obey and perform the mandate of the Supreme Court. Plischke v. Jameson -- 887
49. Where the mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon. Plischke v. Jameson ---------- 887

Arrest.

1. A search during informal detention of a person

may be reasonable, although it is made under circumstances that would not justify custody in the tradition of arrest. State v. Huffman ---------- 356
2. Every temporary restriction of absolute freedom of movement is not an arrest. State v. Carpenter 639
State v. Smith ---------- 846

Attorney and Client.
1. As a basis for the allowance of an attorney's fee under the provisions of statute referred to in opinion, the record must show pleading and proof of the existence of the conditions precedent set out in that statute. Andrews v. Wilkie ---------- 398
2. An allowance for attorney's fees as costs is erroneous unless it is permitted by statute or uniform practice. Warren v. Warren ---------- 436
3. Section of statute, which authorizes allowances to the wife in a divorce suit, does not permit an allowance for attorney's fees to grandparents who are parent-surrogates. Warren v. Warren -------- 436
4. In the absence of statutory authorization, the fees and expenses allowed counsel appointed to represent an indigent prisoner under the Post Conviction Act cannot be taxed as costs against the prisoner. State v. Konvalin ---------- 554

Automobiles.
1. Duty to instruct on issue stated where a guest is injured as a result of the collision of the vehicle, in which he was riding, with another vehicle, and the evidence discloses that a jury question is presented as to the negligence of both drivers. Zavoral v. Pacific Intermountain Express ---------- 40
2. It is not necessary that there be direct evidence identifying a defendant as being the driver of an automobile. It is sufficient if the circumstances, when considered together, warrant the inference of fact that the defendant was driving the automobile in question. State v. DiLorenzo ---------- 59
3. In a prosecution for willful reckless driving, the conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others is sufficient to show "willful disregard for the safety of persons or property" under the statute. State v. DiLorenzo ---------- 59
4. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations,

which judgment has been duly certified in regular form and sent to the Director of Motor Vehicles with nothing appearing thereon indicating invalidity, cannot be collaterally attacked. Martindale v. State 64

5. Where reasonable minds may differ on the question of whether a motorist exercised the ordinary care required of him under the circumstances, the issue of negligence is one of fact for the jury. Bartosh v. Schlautman ---------- 130

6. Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Bartosh v. Schlautman ---------- 130

7. Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances. Bartosh v. Schlautman ---------- 130

8. An exception to general rule occurs when the object struck is the same color as the roadway and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Bartosh v. Schlautman ---------- 130

9. The general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision or lights is negligent as a matter of law is not an automatic rule of thumb, nor a rigid formula to be applied regardless of circumstances. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Bartosh v. Schlautman ---------- 130

10. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases. Bartosh v. Schlautman -------- 130

11. A motorist is under a duty not to exceed the maximum speed that is reasonable and prudent under existing conditions. McEntarffer v. Rudolph ----- 243

12. A speed less than the specific maximum prescribed in a regulation is not necessarily reasonable or prudent. McEntarffer v. Rudolph ---------- 243

13. An instruction reciting the provisions of statutes controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question. Dittrick v. Deuel ---------- 428
14. If a graveled road is a part of the state highway system a speed of 60 miles per hour is not violative of the specified maximum speed. Dittrick v. Deuel 428
15. A party is not entitled to an instruction concerning the violation of a statutory rule relating to the lighting of motor vehicles unless the record discloses a causal connection between such alleged violation and the accident or injury for which recovery is sought. Clark v. Smith ---------- 461
16. Where the testimony of a sole or primary witness of necessity involves questions of the speed of vehicles involved in a collision, he may be required on cross-examination to answer direct inquiries as to speed even though no such inquiry is made in the course of his direct examination. Clark v. Smith -- 461
17. Where the right-of-way of vehicles upon a highway is an issue, the trial court must instruct as to the duties of the drivers thereof to remain on the right-hand side of the road if competent evidence places the vehicles in the position of proceeding toward each other in opposite directions. Clark v. Smith 461
18. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence. Zawada v. Anderson ---------- 467
19. A pedestrian crossing at a regular crosswalk with the right-of-way is not, as a matter of law, required to keep a continuous lookout for an approaching vehicle. Zawada v. Anderson ---------- 467
20. A pedestrian crossing at a regular crosswalk and having the right-of-day has a right to assume that his right-of-way will be respected until he has notice or knowledge to the contrary. Zawada v. Anderson ---------- 467
21. 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. However,

the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence. Carl R. Anderson & Co. v. Suhr 474

22. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. But knowledege that the driver has been drinking does not necessarily bar the recovery by a guest. Schaffer v. Bolz -- 509

23. The rule that a guest may be guilty of contributory negligence contemplates a situation where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such an extent that the guest is charged with knowledge of it. Schaffer v. Bolz ---------- 509

24. A family purpose automobile is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family. Schaffer v. Bolz ---------- 509

25. The first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future. Reserve Ins. Co. v. Aguilera ---------- 605

26. Evidence of tire marks at the scene of an accident is admissible in a civil action where sufficient foundation is laid by showing the condition of road was the same as at the time of the accident, had not been changed by weather or traffic, and marks are identified as made by vehicles involved in the accident. Sheets v. Davenport ---------- 621

27. Skilled or expert opinion is not admissible as to the point of impact or collision in a motor vehicle collision case. Sheets v. Davenport ---------- 621

28. In the absence of proof of skid marks made by vehicles involved in a collision and sufficient foundational evidence, expert testimony of speed of the vehicles is inadmissible. Sheets v. Davenport --- 621

29. The speed at which a motor vehicle is being driven under all the circumstances shown in the evidence is an important circumstance in determining questions of negligence on the part of the driver. Carley v. Meinke ---------- 648

30. Evidence as to the drinking of intoxicants within a

reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence. Carley v. Meinke ---------- 648

31. The familiarity of a driver with the road upon which he is driving when an accident occurs is a circumstance to be considered in determining negligence or the degree thereof. Carley v. Meinke ---------- 648

32. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, however, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Carley v. Meinke 648

33. The presence of ice and snow on a street which is reasonably known or anticipated is a condition and not an independent intervening causal factor that relieves a motor vehicle operator from responsibility for the result of his negligence. Kuffel v. Kuncl 770

34. Pedestrians have the right-of-way on a sidewalk and it is incumbent upon one who is driving an automobile across a sidewalk to take particular care to avoid endangering or injuring them Kuffel v. Kuncl ------ 770

35. Under circumstances stated, a motorist on an arterial highway cannot be held to be guilty of negligence or contributory negligence in failing to avoid an accident which from her standpoint was then unavoidable. Steinberg v. Pape ---------- 806

36. Duty of motorist approaching a highway protected by stop signs stated. Nistor v. Therkildsen -------- 817

37. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Nistor v. Therkildsen ---------- 817

38. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Nistor v. Therkildsen -------- 817

39. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Nistor for Therkildsen ---------- 817

40. Motor vehicle statute authorizes a city or village to enact an ordinance to prohibit the operation of a motor vehicle during any period that the motor vehicle operator's license has been revoked or suspended pursuant to any law of this state, or after such

suspension or revocation but before reinstatement of a license or issuance of a new license as permitted under the motor vehicle laws of this state. State v. Smith ---------- 846

41. The right to operate a motor vehicle after suspension or revocation is not restored by mere lapse of time. The right to operate thereafter depends upon the receipt of a new license. State v. Smith ------ 846

42. Under statute referred to in opinion, a license to operate a motor vehicle remains suspended and revoked until the operator has complied with the financial responsibility laws of this state and has secured a new license as permitted under the motor vehicle laws of this state. State v. Smith ---------- 846

43. Effect of operation of motor vehicle under license issued in another state while license issued in this state was suspended stated. State v. Smith ------ 846

44. A nonresident of this state may operate a motor vehicle upon the public highways of this state during the period within which he may lawfully operate a motor vehicle in this state under the provisions of the general motor vehicle laws of the State of Nebraska. State v. Smith ---------- 846

45. A resident or nonresident whose operator's license or privilege to operate a motor vehicle in this state has been suspended or revoked cannot evade compliance with the statutes of this state by the expedient of securing a license in another state or jurisdiction. State v. Smith ---------- 846

46. A law enforcement officer has a right to reasonably and temporarily stop vehicles and make prompt inquiries and investigations so that effective prevention of crime and enforcement of law are possible. State v. Smith ---------- 846

Aviation.

1. The corporate, proprietary, and quasi-private powers of a municipality are matters of purely local concern and, except in conferring power and regulating its exercise, the state has no compulsory power to impose them or to impose taxes for their support on the municipality. The Legislature may, however, authorize the local authority to impose such taxes upon itself. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

2. The construction, operation, and maintenance of an

airport by a municipality or an airport authority is a proprietary function. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

3. The provisions of statute referred to in opinion, providing that an airport authority shall have power to certify to the city the amount of tax not exceeding one mill to be levied by the city on its tangible property for airport purposes, is a levy by local authority for local purposes and does not violate Article VIII, section 7, of the Constitution of Nebraska. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

4. The one mill tax authorized by statute referred to in opinion is included in the terms "any part of the revenue, income, receipts, profits, and other money derived by the authority" contained in statute, and may be pledged for the payment of general obligation bonds of the authority by the terms of the latter act. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

5. The pledge of the taxes authorized by statute referred to in opinion does not violate another statutory provision providing that the bonds of the authority shall not be a debt of the city. Obitz v. Airport Authority of the City of Red Cloud -------- 410

6. The pledge of money to be derived in the future from levies made pursuant to statute referred to in opinion is authorized by another section. The pledge of future taxes under a valid, existing law is no different than the pledging of future revenue and other income. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

Boundaries.

Where one, by mistake as to the boundary line, constructs a fence 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. Cunningham v. Stice ---------- 299

Bribery.

Statute relating to the attempted bribery of a public officer is not invalid as vague and indefinite. State v. Adams ---------- 75

Buildings.

1. 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 defendant is not an insurer of the safety of invitees. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381
2. A change of level at 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. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381
3. The mere fact that an invitee falls at the entrance of a building where a difference in level 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. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381

Burglary.

1. While the mere possession of stolen property standing alone is insufficient to justify a conviction of burglary, such possession of property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged. State v. Solano ---------- 716
2. In order for a defendant's possession of stolen property to be sufficient to support a conviction of burglary, such possession must be recent, and such possession must be coupled with a lack of a satisfactory explanation, or a false explanation or other incriminating circumstances or conduct. State v. Solano ---------- 716
3. Possession of stolen property, coupled with false statements as to the manner in which the property came into defendant's possession, may be sufficient evidence to sustain a conviction of burglary. State v. Solano ---------- 716

Charities.

1. Lariat Boys Ranch, Inc., is determined to be an educational and charitable corporation, and 1,000 acres held to be reasonable and necessary for the purposes of the corporation. Lariat Boys Ranch v. Board of Equalization ---------- 198
2. A charitable gift will not be permitted to fail because

of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent. National Bank of Commerce Trust & Sav. Assn. v. Crowell Memorial Home ---- 341

3. Property owned and used exclusively for religious or charitable purposes when not owned or used for financial gain or profit is exempt from taxation. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---------- 831

4. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---- 831

5. Charity is defined as being something more than mere alms-giving or the relief of poverty and distress. It has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---------- 831

6. Hospitals operated as nonprofit institutions are universally classed as charitable institutions. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---------- 831

7. A nursing home or home for the aged and infirm operated on a nonprofit basis is exempt from taxation as a charitable institution. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---- 831

8. The fact that patients who are able to pay are required to do so does not deprive a charitable institution of its eleemosynary character. Evangelical Lutheran Good Samaritan Soc. v. County of Gage -- 831

Conspiracy.

1. Where there is proof of a conspiracy, the acts and declarations of a conspirator in furtherance of the conspiracy are the acts and declarations of all and may be admitted in evidence against the other conspirators. State v. Adams ---------- 75

2. The fact of the conspiracy may be proved by circumstantial evidence and the order of proof is a matter within the discretion of the trial court. State v. Adams ---------- 75

3. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an un-

lawful or oppressive object or a lawful object by unlawful or oppressive means. Buhrman v. International Harvester Co. ---------- 633

Constitutional Law.

1. The exercise of discretionary power in sentencing codefendants to varying terms of imprisonment within the statutory limits for the crime charged is not a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution. State v. Craig ---------- 8
2. The Post Conviction Act does not require the appointment of counsel in all cases, and where a single question of law is involved none need be appointed on appeal. State v. Craig ---------- 8
3. If the motion of a prisoner and the files and records of the case show to the satisfaction of the district court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule the motion without a hearing. State v. Ronzzo ---------- 16
4. Article I, section 11, of the Constitution, provides that in all criminal prosecutions the accused shall have the right to a speedy public trial. State v. Bruns ---------- 67
5. No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. State v. Bruns ---------- 67
6. The interpretation of the constitutional provision with reference to a speedy trial is for the court to determine, independent of statute. State v. Bruns 67
7. Whether a defendant is accorded a speedy trial, within the meaning of the constitutional provision, must be determined in the light of the circumstances of each particular case as a matter of judicial discretion. State v. Bruns ---------- 67
8. Rules respecting assertion of right to a speedy trial stated. State v. Bruns ---------- 67
9. A tenant on school lands may have a property interest resulting from improvements made prior to September 14, 1953, notwithstanding the unconstitutionality of an appraisal and compensation statute that otherwise would be a source of his interest. Banks v. State ---------- 106
10. The guidelines laid down in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, are available only to persons whose trials had begun

on or after June 13, 1966, and the rules in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, apply to all cases tried after June 22, 1964. State v. Bundy ---------- 160

11. At a trial occurring prior to June 13, 1966, it is not error to admit into evidence statements made by an accused during custodial interrogation by the police where the voluntariness thereof is not challenged and there is no evidence that prior to the statements the defendant had requested and been denied an opportunity to consult with counsel. State v. Bundy ---------- 160

12. Except in the exercise of its appellate jurisdiction, the Supreme Court is a court of limited and enumerated powers as provided by Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205

13. An action by the occupant of an executive state office to contest the election of his successor is not an action in quo warranto within the meaning of Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205

14. The purported grant of power to the Supreme Court by Election Contest Act to take original jurisdiction of election contests is inhibited by Article V, section 2, of the Constitution of Nebraska, defining the original jurisdiction of the Supreme Court. Sorensen v. Swanson ---------- 205

15. The amendment of Article IV, section 4, of the Constitution of Nebraska, made in 1960 as follows: "The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law" does not purport to be and is not amendatory of the limited original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205

16. When an amendment to the Constitution is legally adopted, it becomes a part of that instrument, and its application to subsequent transactions must be considered precisely as though it had been originally adopted as a part thereof in its amended form. Sorensen v. Swanson ---------- 205

17. The limits of the original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska, may not be increased

or extended by the consent of the parties or legislative enactment. Sorensen v. Swanson ---------- 205

18. The provisions of Election Contest Act purporting to invest the Supreme Court with original jurisdiction to hear and determine election contests are unconstitutional and void in that they contravene Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205

19. The Constitution of Nebraska and legislative acts pursuant thereto are in no sense a grant of power, but are limitations of the power of eminent domain. The Legislature may limit the sovereign power of eminent domain, but it lacks the power to extend it. Burger v. City of Beatrice ---------- 213

20. A use under the power of eminent domain must be a public use, and whether or not a use is public or private is a judicial question and not a legislative one. Burger v. City of Beatrice ---------- 213

21. Under the provisions of Article I, section 25, Constitution of Nebraska, every citizen has a right to the acquisition, ownership, possession, enjoyment, or descent of property. Burger v. City of Beatrice 213

22. The private property of a citizen may be taken from him by the sovereign power of eminent domain only when it is taken for a public purpose. It cannot be taken for a private use. Burger v. City of Beatrice ---------- 213

23. The delegation of legislative power to a city to annex lands by ordinance does not require the giving of notice and a failure to give notice is not a denial of due process of law. Williams v. County of Buffalo ---------- 233

24. A delegation of legislative power to the courts is violative of Article II, section 1, of the Constitution of Nebraska. Williams v. County of Buffalo ------ 233

25. The failure of the district court to appoint legal counsel to perfect and conduct an appeal in a criminal action, without a request having been made therefor, is not a denial of equal protection and due process of law. State v. Dabney ---------- 263

26. Where no controverted material issues of fact are presented, and the court is satisfied that the prisoner is entitled to no relief, no evidentiary hearing is required under the provisions of the Post Conviction Act. State v. Dabney ---------- 263

27. It is the duty of this court to give a statute an in-

terpretation which meets constitutional requirements if it can reasonably be done. Heywood v. Brainard 294
28. It is a fundamental requirement of due process of law that a statute be reasonably clear and definite. Heywood v. Brainard ---------- 294
29. Section of Motor Vehicle Act held unconstitutional. Heywood v. Brainard ---------- 294
30. The legislative function in transfers of land among school districts is unaffected by constitutional guaranties of procedural due process. School Dist. No. 23 v. School Dist. No. 11 ---------- 305
31. In adopting the constitutional provision creating the State Railway Commission, it was made an independent part of the Constitution of Nebraska and not as an amendment to the executive, legislative, or judicial articles thereof. Swanson v. Sorensen -- 312
32. Wayne R. Swanson is determined to be the duly elected and qualified Treasurer of the State of Nebraska. Swanson v. Sorensen ---------- 312
33. The purpose of the constitutional provision requiring that no bill shall contain more than one subject and that the same shall be clearly expressed in the title is to prevent surreptitious legislation and to provide that notice of the subject matter of the proposed law, through the title to the bill, is given to members of the Legislature and the public. State v. Levell -- 401
34. The provisions of statute referred to in opinion, providing that an airport authority shall have power to certify to the city the amount of tax not exceeding one mill to be levied by the city on its tangible property for airport purposes, is a levy by local authority for local purposes and does not violate Article VIII, section 7, of the Constitution of Nebraska. Obitz v. Airport Authority of the City of Red Cloud ---------- 410
35. The tax levied pursuant to statute referred to in opinion is not a violation of Article XIII, section 2, of the Constitution of Nebraska, prohibiting donations by a city for works of internal improvement without having been submitted to the qualified electors of the city at an election held by authority of law. Obitz v. Airport Authority of the City of Red Cloud ---------- 410
36. Article in statutes relating to airports does not violate Article III, section 14, of the Constitution of Nebraska, in that it amends certain sections of the Municipal Airports Act, without specifying the sec-

tions amended and without repealing the sections amended. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

37. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. State v. Warner 538

38. Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel. State v. Konvalin ---------- 554

39. The Nebraska Bill of Rights guarantees due process of law and a right to be heard in the court of last resort. Neither guarantee is violated by a statute that authorizes administrative action to be reviewed by the district court in error proceedings alone. Emry v. Lake ---------- 568

40. Acts occurring outside the courtroom and without the knowledge of the court or jury cannot be considered to have prejudiced the defendant's constitutional right to a fair trial. State v. Newman -- 588

41. Any person charged with a criminal offense in the State of Nebraska is guaranteed, under the Constitution of the United States and of this state, due process of law, which includes the right to trial by jury and the right to defend in person or by counsel. State v. Carpenter ---------- 639

42. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived. State v. Carpenter ---------- 639

43. The purpose of the Post Conviction Act is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Constitutions have been denied or infringed so as to render the judgment and sentence void or voidable. State v. Hizel ---------- 680

44. Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request. State v. Williams ------ 692

45. Under the circumstances set forth in opinion, to apply the time limitations of the jurisdictional requirements for appeal would be an unconstitutional deprivation of the defendant's right of appeal. The jurisdictional statute must be interpreted within the

framework of the germane constitutional provisions, both state and federal. State v. Williams ---------- 692

46. Under the particular circumstances, an overnight notice, and a hearing based on new evidence which the county has no reasonable opportunity to challenge or even to examine, does not meet the requirements of due process. City of Omaha v. State Board of Equalization & Assessment ---------- 734

47. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, is not applicable to searches and seizures under the Fourth Amendment to the Constitution of the United States. State v. Forney -- 757

48. The purpose of the constitutional provision as to a home rule charter is to render a city independent of state legislation as to all subjects which are of strictly municipal concern. State ex rel. City of Omaha v. Lynch ---------- 810

49. Pretrial interrogation of a criminal suspect by law enforcement officers, without warning him of his constitutional right to remain silent, and without granting a request for counsel, does not constitute prejudicial error in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial. State v. Decker -------- 859

50. Where a defendant fails to prove allegations of a deprivation of a constitutional right at an evidentiary hearing under the Post Conviction Act, he is entitled to no relief under the terms of such act. State v. Decker ---------- 859

51. Under constitutional provisions requiring a speedy trial, what is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases. State v. Warner ---------- 874

52. The burden of proof is upon the defendant to show that there has been a delay which is unreasonable or beyond the time fixed by statute. State v. Warner ---------- 874

53. The mere fact that 6 months elapses between arrest or indictment and commencement of trial, standing alone, is insufficient to establish a denial of defendant's constitutional right to a speedy trial. State v. Warner ---------- 874

Continuances.

A motion for continuance is addressed to the sound

discretion of the trial court and, in the absence of an abuse of discretion, the denial of a continuance is not error. State v. Martinez ---------- 392

Contracts.

1. If a party to a contract proposes a modification, mere silence of the other party leaves the contract without modification. Elgin Mills, Inc. v. Melcher 17
2. Without a consideration, a purported agreement in a warehouse receipt does not modify a prior contract. Elgin Mills, Inc. v. Melcher ---------- 17
3. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract and ordinarily such a construction should be enforced. Lane v. Ogallala Livestock Commission Co. ---------- 172
   Cook v. Wilkie ---------- 596
4. An action for damages for the breach of a contract of employment may be brought immediately after the contract has been breached, and the employee may recover his full damages even though the term of the contract of employment has not yet expired. Sullivan v. David City Bank ---------- 395
5. The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. Sullivan v. David City Bank -- 395
6. The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Andrews v. Wilkie ---------- 398
7. The express agreement of the parties in terms or effect may be to pay what the services rendered are reasonably worth, and such an agreement will be implied where there is no agreement as to the amount of compensation. Andrews v. Wilkie ------ 398
8. Recitals contained in a contract are not strictly any part of its contractual provisions although they may be looked to in determining its proper construction or the intention of the parties. A recital may be varied or explained, but not so as to vary or defeat the instrument. As to such latter purpose, in the absence of fraud, the person executing the contract is estopped from contradicting the recital. Strickland v. Omaha Nat. Bank ---------- 478

9. An antenuptial contract is valid if the formalities of the statute are met and if it is fair and fairly made by persons legally qualified to contract. Strickland v. Omaha Nat. Bank ---------- 478
10. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured. Strickland v. Omaha Nat. Bank ---------- 478
11. A court, when called upon to consider the validity of an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding the particular case, and enforce or annul the agreement according to the facts disclosed. Strickland v. Omaha Nat. Bank -------- 478
12. Ordinarily the burden of proof to show the invalidity of an antenuptial contract is on the party alleging it, but if the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband, or his representatives, to prove the validity of the contract. Strickland v. Omaha Nat. Bank ---------- 478
13. Due to the confidential relationship existing between prospective spouses, the courts scrutinize antenuptial contracts with care, the relationship being one of mutual trust and confidence. Strickland v. Omaha Nat. Bank ---------- 478
14. While a disclosure by the prospective husband of his property should be full, fair, and open, a failure to divulge does not necessarily mean that the agreement will be condemned. The test of adequacy may still remain, and if it is met by a showing that it was fairly and honestly made under all the circumstances, the agreement may be enforced. Strickland v. Omaha Nat. Bank ---------- 478
15. The basic issue where a complete disclosure is not made is fraud or overreaching, not the absence of disclosure. Strickland v. Omaha Nat. Bank ------ 478
16. Rule as to the construction and validity of antenuptial contract stated. Strickland v. Omaha Nat. Bank ---------- 478
17. In the absence of fraud or overreaching, or of unfairness or unreasonableness of such a degree as to void the contract, a man and woman, anticipating marriage, are as free to enter into an antenuptial contract as any other contract. Strickland v. Omaha Nat. Bank ---------- 478

18. A valid antenuptial agreement is not affected by a party thereto giving by a last will something out of his estate to the other party to the agreement. It does not amount to a waiver of the antenuptial agreement by the testator, nor give to the wife the right to elect under the statute in lieu of the provisions of the will. Strickland v. Omaha Nat. Bank 478
19. Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out rather than defeat the purpose for which they were executed. General Motors Acceptance Corp. v. Blanco ---------- 562
20. In the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. General Motors Acceptance Corp. v. Blanco ---------- 562
21. Where a contract for the construction of a sewer provides that the contractor shall protect existing property and repair damage resulting from the construction, a property owner whose property is damaged as a result of the construction may sue the contractor directly on the contract to recover his damages. Lundt v. Parsons Constr. Co. ---------- 609
22. Where the language is plain and unambiguous, the court will not read an ambiguity into plain language in order to construe it against the one who prepared the contract. Cordes v. Prudential Ins. Co. 794
23. The construction of a written contract is ordinarily a question of law for the court. Cordes v. Prudential Ins. Co. ---------- 794

Conversion.

"Conversion" is any unauthorized act which deprives the owner of his property. Raff v. Farm Bureau Ins. Co. ---------- 444

Corporations.

1. Prior to amendment of the Nebraska Business Corporation Act a domestic corporation under the act might change registered agents without recording a statement of change in the office of the county clerk. Busboom v. Gregory ---------- 246
2. The basis of judicial jurisdiction over unwilling foreign corporations is largely statutory. Busboom v. Gregory ---------- 246
3. When the defendant is a foreign corporation, having

a managing agent in this state, the service may be upon such agent. Busboom v. Gregory ---------- 246

4. A basis of jurisdiction over a foreign corporation exists if the corporation is doing business in Nebraska. It also exists if: (1) The cause of action arose out of an act that the corporation caused to be done in Nebraska or elsewhere with consequences in Nebraska, and (2) the act established such a relationship of the corporation to Nebraska that exercise of jurisdiction is reasonable. Busboom v. Gregory ---------- 246

5. A contract for sale or a sale of securities in violation of the provisions of the Blue-Sky Law is not void, but voidable by the purchaser, and the purchaser's remedies embrace enforcement or rescission, whichever is appropriate. Loewenstein v. Midwestern Inv. Co. ---------- 547

6. In the absence of intervening rights of third persons or the purchaser's duty to insist on compliance with the securities regulations, the doctrine of equitable estoppel cannot be invoked by the seller of stock or other securities to defeat the purchaser's claim. Loewenstein v. Midwestern Inv. Co. -------- 547

7. An officer or director of a seller who knew, or, in the exercise of reasonable care could have known, the existence of the facts by reason of which civil liability existed, may be individually liable with the seller to a purchaser of securities under the provisions of sections of the Blue-Sky Law. Loewenstein v. Midwestern Inv. Co. ---------- 547

Counties.

1. A county is not required to keep its highways in condition fit for travel for their entire statutory width; its duty being discharged if a width sufficient for travel is kept in proper condition. Farmers Co-op Co. v. County of Dodge ---------- 432

2. A county's duty is discharged if the traveled portion of a road is of a width sufficient for travel and maintained in a proper condition, and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of the roadway. Farmers Co-op Co. v. County of Dodge 432

3. Plaintiff must prove, even if a defect in the traveled portion of the roadway existed, that the county had actual notice of such defect or that it existed for such a length of time that with reasonable dili-

gence it could or should have been discovered by the county. Farmers Co-op Co. v. County of Dodge 432
4. A county board may not delegate its powers involving the exercise of judgment and discretion, but duties which are purely ministerial and executive may be delegated. Bowley v. City of Omaha ---------- 515
5. A statute grants powers to counties to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks for such purposes. Bowley v. City of Omaha ---------- 515

Courts.
1. The municipal court of the City of Omaha has criminal jurisdiction over territory coextensive with the boundaries of the justice of the peace district in which such court is located. State v. DiLorenzo ---- 59
2. Rule stated where cases are interwoven and interdependent in child custody case. Hubbard v. Loewenstein ---------- 96
3. Courts are without authority to interfere with the findings and orders of the State Railway Commission, administrative or legislative in character, except when they exceed its jurisdiction or are arbitrary. Neylon v. Petersen & Petersen, Inc. ------- 143
4. Except in the exercise of its appellate jurisdiction, the Supreme Court is a court of limited and enumerated powers as provided by Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson 205
5. The limits of the original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska, may not be increased or extended by the consent of the parties or legislative enactment. Sorensen v. Swanson -------- 205
6. A delegation of legislative power to the courts is violative of Article II, section 1, of the Constitution of Nebraska. Williams v. County of Buffalo ------ 233
7. Constables shall be ministerial officers of the courts held by justices of the peace in criminal cases, within their respective counties, and it shall be their duty to apprehend and bring to justice felons and disturbers of the peace, to suppress riots, and to keep and preserve the peace within their respective counties. They shall have power and they are hereby authorized to execute all writs and process in criminal cases throughout the county in which they may reside and where they were elected or appointed. State v. Carpenter ---------- 639

8. If the exercise of a power by the governing authority of a municipal corporation is based upon evidence sufficient to sustain it, the conclusion thus reached is final and the courts are without authority to interfere. Goldsberry v. City of Omaha -- 823

Covenants.

1. Restrictions as to the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties. Lund v. Orr ---------- 361
2. Where the original purpose and intention of the parties who created the restriction, pursuant to a general scheme, has been destroyed by a change of condition of the surrounding neighborhood, and the restriction is no longer a substantial benefit to the residents, the restriction will not be enforced. Lund v. Orr ---------- 361
3. A restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Lund v. Orr ---------- 361
4. The benefit which is to be received from a restrictive covenant of the nature involved in this case has reference to the physical use or enjoyment of the land protected by the covenant. Lund v. Orr -- 361

Criminal Law.

1. The exercise of discretionary power in sentencing codefendants to varying terms of imprisonment within the statutory limits for the crime charged is not a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution. State v. Craig ---------- 8
2. The Post Conviction Act does not require the appointment of counsel in all cases, and where a single question of law is involved none need be appointed on appeal. State v. Craig ---------- 8
3. If the motion of a prisoner and the files and records of the case show to the satisfaction of the district court that the prisoner is entitled to no relief under

the Post Conviction Act, the court may overrule the motion without a hearing. State v. Ronzzo ------ 16

4. Under the Post Conviction Act, it is within the discretion of the district court as to whether counsel shall be appointed to represent a defendant on appeal to the Supreme Court, and, in the absence of a showing as to abuse of this discretion the failure to appoint counsel on appeal is not error. State v. Burnside ---------- 20
State v. Hizel ---------- 680

5. When a defendant in a criminal action has been properly tried and convicted of a felony criminal charge, the fact that the information improperly contained another count charging the defendant as a habitual criminal and that he was sentenced thereon will not invalidate the finding of guilty on the felony criminal charge. State v. Burnside ---- 20

6. An unauthorized or erroneous sentence does not void a lawful conviction. State v. Burnside ------ 20

7. A sentence imposed within the limits prescribed by the statute will not be altered or reduced unless it appears that there was an abuse of discretion on the part of the trial court. State v. Burnside ---- 20

8. Error in the proceedings of a trial will not be presumed but must affirmatively appear from an inspection of the record. State v. Stroh ---------- 24

9. Errors in the rulings on the admissibility of evidence, which do not injuriously affect the substantial rights of an accused, are not grounds for reversal. State v. Stroh ---------- 24

10. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Stroh ---------- 24
State v. Redden ---------- 423

11. It is not necessary that there be direct evidence identifying a defendant as being the driver of an automobile. It is sufficient if the circumstances, when considered together, warrant the inference of fact that the defendant was driving the automobile in question. State v. DiLorenzo ---------- 59

12. In a prosecution for willful reckless driving, the conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others is sufficient to show "willful dis-

regard for the safety of persons or property" under the statute. State v. DiLorenzo ---------- 59

13. Where a statute states the elements of a crime, it is generally sufficient in a complaint to describe such crime in the language of the statute. State v. DiLorenzo ---------- 59

14. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations, which judgment has been duly certified in regular form and sent to the Director of Motor Vehicles with nothing appearing thereon indicating invalidity, cannot be collaterally attacked. Martindale v. State ---------- 64

15. The rule requiring that a cautionary instruction as to the weight to be given to the testimony of informers, detectives, or other persons employed to hunt up testimony against an accused is not applicable to public officers who are performing a public duty required of them by statute. State v. Bruns ---------- 67

16. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Adams -- 75
State v. Martinez ---------- 392

17. An allegation in a plea in abatement that members of the negro race were excluded from serving on the grand jury is not sufficient as against a demurrer unless intentional or systematic discrimination against the members of the defendant's race is alleged. State v. Adams ---------- 75

18. The only objection to the grand jury which can be made by a plea in abatement is to show that the jurors lacked the positive qualifications demanded by law. State v. Adams ---------- 75

19. The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. State v. Adams ---------- 75

20. An instruction that the jury cannot draw any inference from the fact that a defendant did not testify is not erroneous. State v. Adams ---------- 75

21. As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the jury was sworn but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial

rights of the accused were materially affected by the fact that the juror served in the case. State v. Adams ---------- 75

22. A defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts. State v. Abboud 84

23. The trial court is invested with a broad discretion in ruling upon a discovery motion in a criminal case. State v. Novak ---------- 90

24. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. State v. Knecht -- 149

25. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. State v. Knecht ---------- 149

26. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. State v. Knecht 149

27. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. State v. Knecht ---------- 149
State v. Bundy ---------- 160

28. It is only when there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Knecht --------- 149
State v. Redden ---------- 423

29. Rule stated as to the admissibility in evidence of statements of codefendants. State v. Knecht ---- 149

30. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Knecht ---------- 149

31. The Supreme Court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that it can say, as a matter of law, that

it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Bundy ---------- 160
State v. Redden ---------- 423
32. 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 cannot be accounted for upon any 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. Bundy ---------- 160
33. The guidelines laid down in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, are available only to persons whose trials had begun on or after June 13, 1966, and the rules in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, apply to all cases tried after June 22, 1964. State v. Bundy ---------- 160
34. At a trial occurring prior to June 13, 1966, it is not error to admit into evidence statements made by an accused during custodial interrogation by the police where the voluntariness thereof is not challenged and there is no evidence that prior to the statements the defendant had requested and been denied an opportunity to consult with counsel. State v. Bundy ---------- 160
35. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of improper admission or rejection of evidence, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. State v. Bundy ---------- 160
36. The habitual criminal statute does not confine the proof on the issue of defendant being a habitual criminal wholly to the documents therein mentioned. State v. Bundy ---------- 160
37. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and for that reason not admissible. State v. Bundy 160
38. If a plea of guilty has been received by the court without observance of the precautions and solemnities required by law, the court should permit the plea to be withdrawn. State v. Pitzel ---------- 176
39. Abandonment is an actual, willful desertion, followed

by the willful neglect or refusal to contribute to the support of the wife. State v. Pitzel ---------- 176
40. Where an order of the court imposes restraint on a parent to the extent that such parent is restrained from coming on to the premises of the other or on the premises of any issue of said parents there is no illegal abandonment while such order is in effect. State v. Pitzel ---------- 176
41. The fact that an appeal in a criminal action has not been docketed in the Supreme Court is not a jurisdictional defect. State v. Carr ---------- 251
42. The remedy under the Post Conviction Act is cumulative and is not intended to be concurrent with any other remedy. State v. Carr ---------- 251
State v. Dabney ---------- 263
43. The failure of the district court to appoint legal counsel to perfect and conduct an appeal in a criminal action, without a request having been made therefor, is not a denial of equal protection and due process of law. State v. Dabney ---------- 263
44. The want of effective counsel is not measured alone by the result obtained and where, by the examination of the evidence and trial proceedings, and the statements of the defendant contained therein, it appears that the claim is not based on fact, the claim cannot be sustained. State v. Dabney ---------- 263
45. Where the finding of a small knife at the scene of an alleged crime has been admitted by the prosecution, the inability to produce it in evidence because it has become lost is not ordinarily prejudicial to the rights of the defendant, particularly when its loss is explained. State v. Dabney ---------- 263
46. Where no controverted material issues of fact are presented, and the court is satisfied that the prisoner is entitled to no relief, no evidentiary hearing is required under the provisions of the Post Conviction Act. State v. Dabney ---------- 263
47. The basic requirement for certainty of a criminal statute demands that it give persons of ordinary intelligence reasonable notice as to what conduct is forbidden by the statute and not require them to speculate on its meaning. Heywood v. Brainard 294
48. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. State v. Sagaser ---------- 329
49. Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must

relate directly to the guilt of the accused beyond a reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Faircloth -- 333

50. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the fact that some unfavorable circumstances are not satisfactorily explained. State v. Faircloth ---------- 333

51. Law with respect to unlawful entrapment stated. State v. Ransburg ---------- 352

52. The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment. State v. Ransburg -------- 352

53. The post conviction remedy is not available for reconsideration of matters that were determined by the Supreme Court unless a miscarriage of justice is shown. State v. Sheldon ---------- 360

54. An accused who pleads the general issue without questioning a defective verification of the charge waives the defect. State v. Gilman ---------- 390

55. The action of the district court in imposing sentence and denying probation in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Gilman ---- 390

56. One who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abettor, or procurer. State v. Redden ---------- 423

57. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. State v. Warner 538

58. Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel. State v. Konvalin ---------- 554

59. The want of effective counsel is not measured alone by the result obtained. Where an examination of the evidence and trial proceedings shows that the claim is not based on fact, the claim will not be sustained. State v. Konvalin ---------- 554

60. In the absence of statutory authorization, the fees and expenses allowed counsel appointed to represent an indigent prisoner under the Post Conviction Act cannot be taxed as costs against the prisoner. State v. Konvalin ---------- 554
61. A defendant who has taken an appeal from his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure. State v. Newman 588
62. Acts occurring outside the courtroom and without the knowledge of the court or jury cannot be considered to have prejudiced the defendant's constitutional right to a fair trial. State v. Newman -- 588
63. In the Narcotic Drug Act the section exempting transactions by a transferor of medicinal preparations has no application to the section that prohibits attempted obtainment by misrepresentation. State v. Goodwin ---------- 616
64. Circumstances surrounding a confession of a defendant held in police custody may be consistent with his right to counsel in spite of absence of his lawyer and prior filing of the information. State v. O'Kelly ---------- 618
65. Unless a miscarriage of justice is shown, the post conviction remedy is not available for reconsideration of questions that were determined by this court. State v. O'Kelly ---------- 618
66. Any person charged with a criminal offense in the State of Nebraska is guaranteed, under the Constitution of the United States and of this state, due process of law, which includes the right to trial by jury and the right to defend in person or by counsel. State v. Carpenter ---------- 639
67. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived. State v. Carpenter ---------- 639
68. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. State v. Carpenter ---------- 639
69. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Carpenter ---------- 639
70. The purpose of the Post Conviction Act is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Constitutions have been denied or infringed so as

to render the judgment and sentence void or voidable. State v. Hizel ---------- 680

71. The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Hizel ---------- 680

72. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel ---------- 680

73. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the trial. Maddox v. Sigler ---------- 690

74. Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request. State v. Williams ---- 692

75. When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it cannot be inferred from defendant's failure to specifically request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel. State v. Williams ---------- 692

76. Under the circumstances set forth in opinion, to apply the time limitations of the jurisdictional requirements for appeal would be an unconstitutional deprivation of the defendant's right of appeal. The jurisdictional statute must be interpreted within the framework of the germane constitutional provisions, both state and federal. State v. Williams -- 692

77. Where the defendant has invoked appellate jurisdiction in the original criminal case as well as in the post conviction proceeding, the post conviction remedy is cumulative and is not intended to be concurrent with any other remedy. It cannot serve the purpose of an appeal to secure a review of the conviction. State v. Williams ---------- 692

78. When, after conviction, an indigent defendant has requested his court-appointed trial counsel or the public defender to appeal and, for any reason, such counsel does not wish to proceed with the appeal, he must immediately, in writing filed with the court, request the right to withdraw and advise the

trial court of the indigent defendant's desire to appeal and to have counsel on appeal. This rule will be in effect on and after May 10, 1967. State v. Williams ---------- 692

79. A charge that one accused of a crime is a habitual criminal is not the charge of a distinct offense or crime but is rather a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. State v. Solano ---------- 716

80. When the Supreme Court puts a burden on the State to affirmatively prove the voluntariness of consent, it adequately protects the rights of the defendant. State v. Forney ---------- 757

81. Pretrial interrogation of a criminal suspect by law enforcement officers, without warning him of his constitutional right to remain silent, and without granting a request for counsel, does not constitute prejudicial error in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial. State v. Decker ---- 859

82. Where a defendant fails to prove allegations of a deprivation of a constitutional right at an evidentiary hearing under the Post Conviction Act, he is entitled to no relief under the terms of such act. State v. Decker ---------- 859

83. A plea of guilty, if understandingly and voluntarily entered, is conclusive. Such a plea, so made, eliminates all questions as to the admissibility of evidence. State v. Decker ---------- 859

84. Under constitutional provisions requiring a speedy trial, what is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases. State v. Warner ---------- 874

85. The burden of proof is upon the defendant to show that there has been a delay which is unreasonable or beyond the time fixed by statute. State v. Warner 874

86. The mere fact that 6 months elapses between arrest or indictment and commencement of trial, standing alone, is insufficient to establish a denial of defendant's constitutional right to a speedy trial. State v. Warner ---------- 874

87. It is implicit in a verdict of guilty that the jury resolved all controverted questions of fact in favor of the State. The Supreme Court will not disturb

such a verdict based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt. State v. Warner ---------- 874

88. Prima facie evidence of guilt, as the phrase is used in the second sentence of statute referred to in opinion, does not mean that proof of the basic fact shifts the burden of persuasion to defendant. The jury may, but is not required to, infer guilt from existence of the basic fact. State v. Bird Head ---- 885

Damages.

1. The proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment. Sullivan v. David City Bank ---------- 395
2. An action for damages for the breach of a contract of employment may be brought immediately after the contract has been breached, and the employee may recover his full damages even though the term of the contract of employment has not yet expired. Sullivan v. David City Bank ---------- 395
3. The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. Sullivan v. David City Bank ---------- 395
4. The burden is upon the employer to prove that the employee obtained other employment or, with reasonable diligence, might have obtained other employment. Sullivan v. David City Bank ---------- 395
5. In the absence of proof that the employee obtained other employment or, with reasonable diligence, might have obtained other employment, the measure of damages is the contract price. Sullivan v. David City Bank ---------- 395
6. If a defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, it is not error for the trial court to fail to instruct thereon. Zawada v. Anderson ---------- 467
7. The amount of damages for future disability and pain and suffering is not based on any legal rule or formula for measuring them and rests largely in the sound discretion of the jury. It will not be set aside unless so clearly exorbitant as to indicate passion and prejudice or disregard of the evidence

or controlling rules of law by the jury. Zawada v. Anderson ---------- 467

8. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury which saw the witnesses and heard the evidence. Zawada v. Anderson ---------- 467

9. 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. However, the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence. Carl R. Anderson & Co. v. Suhr 474

10. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established. Carl R. Anderson & Co. v. Suhr ---------- 474

11. Damages for disabling effect of an injury, past and prospective, are recoverable under the general ad damnum clause. Grass v. Valley Feed & Grain -- 505

12. Where the issue of liability has been determined fairly but there has been error in the determination of damages which requires that the verdict be set aside, the new trial may be limited to the issue of damages alone. But where it appears that the verdict was the result of a compromise, the new trial should be upon all issues. Schaffer v. Bolz -------- 509

13. Where a contract for the construction of a sewer provides that the contractor shall protect existing property and repair damage resulting from the construction, a property owner whose property is damaged as a result of the construction may sue the contractor directly on the contract to recover his damages. Lundt v. Parsons Constr. Co. ---------- 609

14. Testimony as to the rental value of construction equipment is admissible as evidence of the reasonable value of the use of such equipment. Lundt v. Parsons Constr. Co. ---------- 609

15. Direct expert evidence is not always essential to establish the permanency or future effects of an injury. The need for future medical services and

the reasonable value thereof may be inferred from proof of past medical services and their value. Yount v. Seager ---------- 665

16. Rule as to when trial court may set aside verdict of jury as being excessive or inadequate stated. Yount v. Seager ---------- 665

17. General and special benefits resulting from public improvements are defined. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

18. Where land is taken for public use, the owner is entitled to the fair market value of the land taken, and special benefits cannot be set off against such value but may be against incidental damages to the rest of the tract. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

19. Special benefits, to have any standing in court, must be genuine and capable of estimation in money value. They must add to the present fair market value of the remaining land with reference to all the uses to which it is reasonably adapted, and for which it is available. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

20. In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained. Richardson v. Big Indian Creek Watershed Conservancy Dist. -- 776

21. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

22. When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

Death.

The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force. It is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the sub-

ject, and disappears when evidence is produced. Sheets v. Davenport ---------- 621

Declaratory Judgments.

Ordinarily, an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law. Murphy v. Holt County Committee of Reorganization -------- 182

Deeds.

1. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing. Conry v. Langdon ---------- 53
2. One attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made may be such as to cast upon the grantee the burden of going forward with the evidence. Conry v. Langdon ---------- 53
3. The undue influence which will void a deed is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control of the will of the donor. Conry v. Langdon ---------- 53
4. A deed of conveyance does not of itself create privity between the grantor and grantee as to land not within the calls of the deed, but which have been occupied by the grantor in connection therewith. Bryan v. Reifschneider ---------- 787
5. The rule that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument. If land be actually occupied beyond the calls of the deed, hostile to the true owner, the deed does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. Bryan v. Reifschneider ---------- 787

6. If, in connection with the conveyance of lands, there are circumstances showing an intent to transfer the possession of other adjacent land to the grantee which was occupied by the grantor, even though not covered by the calls of the deed, there is created such a privity of possession as to permit a tacking of possession for the purpose of establishing title by adverse possession. Bryan v. Reifschneider -- 787
7. The taking of possession of contiguous lands, some of which are not within the calls of the deed, which have been used by the grantor as a unit as is apparent by reason of the location of fences, buildings, trees, roads, and the like, and the transfer of possession pursuant to a deed has evidentiary value as to the existence of privity of possession. Bryan v. Reifschneider ---------- 787

Depositions.

A deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved. Forman v. Andersen ---------- 528

Descent and Distribution.

1. A man or woman may bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made. Caprette v. Spieth ---------- 11
2. A widow may by the provisions of an antenuptial contract waive her right to allowances from the estate of her husband even though the contract may not in express terms mention such right. Caprette v. Spieth ---------- 11

Dismissal and Nonsuit.

1. A plaintiff may dismiss his action as a matter of right at any time before final submission of the case. Gebhart v. Tri-State G. & T. Assn. -------- 457
2. In the absence of a cross-petition filed by another party, a dismissal of plaintiff's cause of action dismisses the entire cause. Gebhart v. Tri-State G. & T. Assn. ---------- 457

Divorce.

1. Condonation is ordinarily complete if there is a resumption of marital relations after alleged breach of marital duty. Gartside v. Gartside ---------- 46
2. Condonation is forgiveness for the past upon condition that the wrong shall not be repeated, It is dependent upon future conduct, and a repetition of the offense revives the wrong condoned. Gartside v. Gartside ---------- 46
3. Factors to be considered in an award of alimony stated. Gartside v. Gartside ---------- 46
4. In a divorce suit a good reason for modification of a decree that awarded custody of minors to their grandparents is changed circumstances that substantially affect the welfare of the minors. Warren v. Warren ---------- 436
5. Section of statute, which authorizes allowances to the wife in a divorce suit, does not permit an allowance for attorney's fees to grandparents who are parent-surrogates. Warren v. Warren ------- 436
6. Where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. Effect of violation of this rule stated. Prell v. Prell ---------- 504
7. The determination of the trial court with respect to child support will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Prell v. Prell ---------- 504
8. Intervention, as a general rule, is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected. Kula v. Kula ---------- 531
9. The rule for determining alimony or the division of property in a divorce action stated. Kula v. Kula 531
10. In making a division of property in a divorce action, it is the duty of the court to make a fair and just award, taking into consideration the nature of the property and the abilities of the parties in putting it to its best use. Kula v. Kula ---------- 531
11. Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed, unless by changed circumstances it is af-

firmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. State ex rel. Speal v. Eggers ---------- 558

12. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. State ex rel. Speal v. Eggers ---- 558

13. Rule for trial de novo on appeal to Supreme Court in divorce case stated. Franks v. Franks -------- 710

14. The fruits of an independent investigation by the trial court of the issues between the parties, when there is no provision of law providing for such an investigation, may not be considered upon trial de novo on appeal. Franks v. Franks ---------- 710

15. Generally, a property settlement agreement in a divorce proceeding will be respected by the courts as presumably fair and valid. Franks v. Franks -- 710

16. A decree of divorce which awards the custody of a minor child to the mother and in which there is no finding of unfitness of the father does not deprive the father of the natural right of custody of his child except as against the mother. Carlson v. Wivell ---------- 877

17. Courts may not properly deprive a parent of custody of his minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Carlson v. Wivell ---------- 877

18. In a custody contest between parents, the wishes of a child, who has reached sufficient age and has the ability to express an intelligent preference, are entitled to consideration, but are not controlling. Carlson v. Wivell ---------- 877

19. The wish or preference of a child does not in itself outweigh the rights of a parent, nor justify the transfer of custody from a fit, proper, and suitable parent to a third person. Carlson v. Wivell ------- 877

Domicile.

1. A state has judicial jurisdiction over an individual who is domiciled in the state. Mounts v. Mounts -- 542

2. A domicile once established continues until it is superseded by a new domicile. Mounts v. Mounts 542

Duress.

1. A plaintiff is not regarded as in pari delicto with the defendant if, even though he knew or had reason to know that the bargaining was illegal or immoral, he was induced to participate in it by fraud or duress or by the use of the influence derived from superior knowledge, mental power, or economic position. Loewenstein v. Midwestern Inv. Co. 547
2. To constitute duress, there must be an application of such pressure or constraint as compels a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demands of another. Buhrman v. International Harvester Co. 633

Easements.

1. Ordinarily a purchaser of real estate is charged with notice of an easement only where its existence is apparent from an inspection of the premises or where he is charged with notice from the recording laws. Wilbur v. Schweitzer Excavating Co. 317
2. The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Scoville v. Fisher 496
3. Possession must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. Scoville v. Fisher 496
4. A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. Scoville v. Fisher 496
5. To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. Scoville v. Fisher 496
6. The general rule is that the use of a way common to the public is not "exclusive" within the meaning of that term; such use is regarded as negativing a presumption of grant to any individual user. Scoville v. Fisher 496

7. While the term "exclusive" does not mean that the easement must be used by one person only, it does mean that the use is not dependent upon a similar right in others and that the use must be exclusive as against the community or public at large. Scoville v. Fisher ---------- 496

Elections.

1. An adequate remedy has been provided for the settlement of the rights of parties in election cases by either contest or quo warranto and these remedies are exclusive. Murphy v. Holt County Committee of Reorganization ---------- 182
2. Absentee voting is a privilege granted an elector, and is not an absolute right. Mommsen v. School Dist. No. 25 ---------- 187
3. Laws regulating the privilege of absentee voting have generally received a strict construction. Mommsen v. School Dist. No. 25 ---------- 187
4. It is mandatory that ballots, including those sent to absent voters, be endorsed on their back by the proper official and any ballot not so endorsed is void and must be rejected. Mommsen v. School Dist. No. 25 ---------- 187
5. The purported grant of power to the Supreme Court by Election Contest Act to take original jurisdiction of election contests is inhibited by Article V, section 2, of the Constitution of Nebraska, defining the original jurisdiction of the Supreme Court. Sorensen v. Swanson ---------- 205
6. The amendment of Article IV, section 4, of the Constitution of Nebraska, made in 1960 as follows: "The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law" does not purport to be and is not amendatory of the limited original jurisdiction of the Supreme Court as fixed by Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---- 205
7. The provisions of Election Contest Act purporting to invest the Supreme Court with original jurisdiction to hear and determine election contests are unconstitutional and void in that they contravene Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205
8. A party disputing the results of an election upon the basis that illegal votes were cast or legal votes rejected has the burden of showing not only that such

votes were sufficient in number to change the result of the election, but that a change actually resulted therefrom. Plouzek v. Saline County Reorganization Committee ---------- 440

9. Electors whose legal votes were rejected may testify as to how they would have voted. Plouzek v. Saline County Reorganization Committee ---------- 440

Electricity.

Ordinarily, a municipality which operates a system for the sale of electrical energy at retail should have the right to serve new customers in its zoning area at retail. Upon expansion of its corporate limits, such a municipality is entitled to modify its retail service area to include extensions of its zoning area. City of Schuyler v. Cornhusker P. P. Dist. ---------- 704

Eminent Domain.

1. An injunction suit is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. Burger v. City of Beatrice ---------- 213
2. The Constitution of Nebraska and legislative acts pursuant thereto are in no sense a grant of power, but are limitations of the power of eminent domain. The Legislature may limit the sovereign power of eminent domain, but it lacks the power to extend it. Burger v. City of Beatrice ---------- 213
3. A use under the power of eminent domain must be a public use, and whether or not a use is public or private is a judicial question and not a legislative one. Burger v. City of Beatrice ---------- 213
4. The production and distribution of water for the inhabitants of a city is for a public purpose within the meaning of the power of eminent domain. Burger v. City of Beatrice ---------- 213
5. The private property of a citizen may be taken from him by the sovereign power of eminent domain only when it is taken for a public purpose. It cannot be taken for a private use. Burger v. City of Beatrice ---------- 213
6. The sale of water by a city outside its corporate limits to a private person, corporation, or industry for his or its own private purpose is not a public use within the meaning of the doctrine of eminent domain. Burger v. City of Beatrice ---------- 213
7. The character of the use, and not its extent, deter-

mines the question of public use. Where there is simply a public interest as distinguished from a public use, the power of eminent domain cannot be exercised. In determining whether or not the exercise of the power of eminent domain exists under the evidence, the courts look to the substance rather than to the form, to the end rather than to the means. Burger v. City of Beatrice ---------- 213

8. When the purposes for the taking of private property by the exercise of the power of eminent domain are in part public and part private, and the two are not severable, the right to proceed by condemnation must be denied. Burger v. City of Beatrice ---- 213

9. When the private and public purposes in a condemnation proceeding are severable, the court may proceed as to the public purpose and deny the right to condemn as to the private purpose. Burger v. City of Beatrice ---------- 213

10. When a petition in condemnation is accompanied by a plat or map, the plat or map should be used as an aid in the interpretation of the petition. State v. Day ---------- 308

11. The power of eminent domain is an attribute of sovereignty inherent in the state, and only those agencies to whom the Legislature has delegated the power can exercise the right. It must be exercised only on the occasion and in the mode or manner and by the agency prescribed by the Legislature. Bowley v. City of Omaha ---------- 515

12. General and special benefits resulting from public improvements are defined. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

13. The burden of proving special benefits is on the condemner. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

14. Where land is taken for public use, the owner is entitled to the fair market value of the land taken, and special benefits cannot be set off against such value but may be against incidental damages to the rest of the tract. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

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which it is available. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

16. In a condemnation proceeding it is conclusively presumed that the owner damaged by the taking received, or was afforded opportunity to receive, full compensation for damages sustained. Richardson v. Big Indian Creek Watershed Conservancy Dist. -- 776

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18. When property is taken by eminent domain the compensation of the owner is measured on the basis of the actual legal rights acquired by the condemner and not by the use he actually makes of them. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

Equity.

1. Rule for trial of equity case de novo in the Supreme Court stated. Randall v. Liakos ---------- 326
   Webb v. Lambley ---------- 385

2. A proper basis for equity jurisdiction is a suit for an accounting, where both parties asked for a determination of the amount due resulting from a large number of interrelating transactions taking place over a period of many years and where both parties asked for equitable relief. Cook v. Wilkie -------- 596

3. The basis for equity jurisdiction in an action for an accounting is the inadequacy of the remedy at law. Cook v. Wilkie ---------- 596

4. An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Municipal University of Omaha v. County Board ---------- 881

Estoppel.

In the absence of intervening rights of third persons or the purchaser's duty to insist on compliance with the securities regulations, the doctrine of equitable estoppel cannot be invoked by the seller of stock or other securities to defeat the purchaser's claim. Loewenstein v. Midwestern Inv. Co. ---------- 547

Evidence.

1. The parol evidence rule does not exclude evidence that no contract was made. Elgin Mills, Inc. v. Melcher ---------- 17
2. The trial court is necessarily granted a considerable amount of discretion with relation to the admissibility of evidence. State v. Stroh ---------- 24
3. Errors in the rulings on the admissibility of evidence, which do not injuriously affect the substantial rights of an accused, are not grounds for reversal. State v. Stroh ---------- 24
4. A witness who testifies from an independent recollection may refresh his recollection by referring to an original memorandum or a copy prepared by himself or another. State v. Adams ---------- 75
5. The manner in which a witness may be examined is within the sound discretion of the court. State v. Adams ---------- 75
6. Where one party to a conversation testifies as to the conversation, a recording of the conversation made with the consent of the witness may be admitted into evidence. State v. Abboud ---------- 84
7. Where 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 other. Hubbard v. Loewenstein ---------- 96
8. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. State v. Knecht ---------- 149
9. Rule stated as to the admissibility in evidence of statements of codefendants. State v. Knecht ------ 149
10. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Knecht ---------- 149
11. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of improper admission or rejection of evidence, if the Supreme Court, after an examination

of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. State v. Bundy. ---------- 160

12. The habitual criminal statute does not confine the proof on the issue of defendant being a habitual criminal wholly to the documents therein mentioned. State v. Bundy ---------- 160

13. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and for that reason not admissible. State v. Bundy 160

14. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented, the Supreme Court will presume the common law or statutes of such other jurisdiction to be the same as ours. State v. Bundy ---------- 160

15. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. Wilbur v. Schweitzer Excavating Co. ---------- 317

16. Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must relate directly to the guilt of the accused beyond a reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Faircloth -- 333

17. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the fact that some unfavorable circumstances are not satisfactorily explained. State v. Faircloth ---------- 333

18. To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. State v. Faircloth ---------- 333

19. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotic drug at the place where it was found. But mere

presence at a place where a narcotic drug is found is not sufficient. State v. Faircloth ---------- 333

20. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. State v. Faircloth 333

21. A ruling admitting an exhibit in evidence over objection to its authentication will not be overturned except for a clear abuse of discretion. State v. Huffman ---------- 356

22. The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case. A duty is imposed upon the Supreme Court on review of the findings made by the trial court to give consideration to the fact that the trial court did view the premises, providing the record contains competent evidence to support the findings. Webb v. Lambley ---------- 385

23. The scope of the cross-examination of a witness rests largely in the discretion of the trial court. State v. Martinez ---------- 392

24. The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Andrews v. Wilkie ---------- 398

25. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Raff v. Farm Bureau Ins. Co. ------ 444

26. Where the testimony of a sole or primary witness of necessity involves questions of the speed of vehicles involved in a collision, he may be required on cross-examination to answer direct inquiries as to speed even though no such inquiry is made in the course of his direct examination. Clark v. Smith ---------- 461

27. The introduction in evidence of a map, chart, or diagram illustrating the scene of a transaction and the relative location of objects rests in the sound discretion of the court, and if they are reasonably accurate and correct are admissible in evidence. Zawada v. Anderson ---------- 467

28. In a suit between a wife, as the surviving spouse to an antenuptial contract entered into by her and her deceased husband, and the legatees, devisees, or beneficiaries under the will of her deceased husband, the wife has a direct legal interest in the result of

the action and is incompetent as a witness under the statute. Strickland v. Omaha Nat. Bank ------ 478

29. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Dike v. Betz ------ 580

30. The presumption in an action for wrongful death that a decedent exercised reasonable care for his own safety has no probative force. It is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Sheets v. Davenport ---------- 621

31. A jury should not be instructed about the presumption that a decedent exercised reasonable care. Sheets v. Davenport ---------- 621

32. In proving an admission against interest contained in a pleading, a party is only required to offer so much of the pleading as is necessary to show the admission. Sheets v. Davenport ---------- 621

33. Admissions are words or conduct of a party opponent offered as evidence against him. Sheets v. Davenport ---------- 621

34. An admission against interest is admissible when it contravenes a position taken upon trial by the party making the admission. Sheets v. Davenport 621

35. Where an admission against interest contained in a pleading is introduced in evidence, the party affected may offer other parts of his pleadings which tend to explain or destroy the admission. This right does not entitle him to offer self-serving statements unrelated to the subject matter of the admission. Sheets v. Davenport ---------- 621

36. Error cannot be predicated upon the admission of evidence to which the complaining party has stipulated. Sheets v. Davenport ---------- 621

37. One who has no direct legal interest in the result of a civil action, wherein the adverse party is the representative of a deceased person, is not incompetent to testify as a witness under the dead man's statute. Sheets v. Davenport ---------- 621

38. Evidence of tire marks at the scene of an accident is admissible in a civil action where sufficient foundation is laid by showing the condition of road was the same as at the time of the accident, had not been changed by weather or traffic, and marks are identi-

fied as made by vehicles involved in the accident. Sheets v. Davenport ---------- 621

39. Skilled or expert opinion is not admissible as to the point of impact or collision in a motor vehicle collision case. Sheets v. Davenport ---------- 621

40. In the absence of proof of skid marks made by vehicles involved in a collision and sufficient foundational evidence, expert testimony of speed of the vehicles is inadmissible. Sheets v. Davenport ------ 621

41. The question of the necessity of expert evidence to warrant submission to the jury of the issue as to the permanency of an injury or as to future pain or suffering depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective. Yount v. Seager ---------- 665

42. Direct expert evidence is not always essential to establish the permanency or future effects of an injury. The need for future medical services and the reasonable value thereof may be inferred from proof of past medical services and their value. Yount v. Seager ---------- 665

43. Circumstantial evidence is not sufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom. Norcross v. Gingery ---------- 783

44. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover. Norcross v. Gingery ---------- 783

Fences.

Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another. Webb v. Lambley -- 385

Fraud.

1. It is not necessary that parties must have discussed or considered subject of termites before purchaser may predicate fraud upon representation of vendor that buildings are in good, sound condition when, in fact they are infested by termites, Maser v. Lind 365

2. An action for fraud will not lie where exercise of ordinary prudence will prevent deception, but the

rule has no application where the alleged fraud relates to latent damaged condition of buildings not discoverable by exercise of ordinary prudence. Maser v. Lind ---------- 365

3. Where one unfamiliar with termites examines buildings and, without fault on his part, is unable to and does not discover termite infestation, he is entitled to purchase in reliance upon representation by vendor that buildings are in good, sound condition. Maser v. Lind ---------- 365

4. The good faith of persons making false statements is immaterial. Maser v. Lind ---------- 365

5. A misrepresentation of the condition of buildings is not always remedial and may constitute a mere expression of opinion, depending upon circumstances; but may be actionable if made and relied upon as a positive statement of an existing fact where purchaser by the exercise of ordinary prudence is unable to discover the true damaged condition. Maser v. Lind ---------- 365

6. A plaintiff is not regarded as in pari delicto with the defendant if, even though he knew or had reason to know that the bargaining was illegal or immoral, he was induced to participate in it by fraud or duress or by the use of influence derived from superior knowledge, mental power, or economic position. Loewenstein v. Midwestern Inv. Co. ---------- 547

7. Essential elements of fraud stated. Buhrman v. International Harvester Co. ---------- 633

8. Under the particular facts of this case, the issues of whether the insured's misrepresentations or false statements in the application for insurance were made knowingly with intent to deceive and the company was thereby deceived to its injury were for the jury. Zimmerman v. Continental Cas. Co. ---------- 654

9. Effect of fraudulent representations in application for accident insurance stated. Zimmerman v. Continental Cas. Co. ---------- 654

Gas.

In the absence of knowledge either actual or constructive there is no duty on the part of a general contractor or an excavator employed by him to ascertain the existence of a gas service pipeline running across vacant private property. Wilbur v. Schweitzer Excavating Co. ---------- 317

Gifts.

1. A gift for a public purpose may be tendered to a city upon conditions or reservations so long as those conditions or reservations do not unreasonably interfere with the municipal use and enjoyment of the property. Bowley v. City of Omaha ---------- 515
2. A statute empowers cities of the metropolitan class to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks in such purposes. Bowley v. City of Omaha 515
3. A statute grants powers to counties to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks for such purposes. Bowley v. City of Omaha ---------- 515
4. A municipal corporation may accept funds conditionally or with reservations for purposes germane to the objects of the corporation so long as the conditions do not unreasonably interfere with public use and enjoyment. When accepted a trust is imposed upon the municipality to perform in accordance with the conditions. Bowley v. City of Omaha ---------- 515
5. Where one advances property or money to another, when the parties are closely related and there is no evidence of intent to create any special relationship, the presumption of gift arises and the donor obtains no right to a lien upon the property of the donee. Kula v. Kula ---------- 531

Grand Juries.

1. An allegation in a plea in abatement that members of the negro race were excluded from serving on the grand jury is not sufficient as against a demurrer unless intentional or systematic discrimination against the members of the defendant's race is alleged. State v. Adams ---------- 75
2. The only objection to the grand jury which can be made by a plea in abatement is to show that the jurors lacked the positive qualifications demanded by law. State v. Adams ---------- 75
   State v. Abboud ---------- 84
3. As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the jury was sworn but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of

the accused were materially affected by the fact that the juror served in the case. State v. Adams ----- 75
4. Where a sufficient number of qualified jurors cannot be obtained from the first panel drawn from a grand jury list, successive lists and panels should be drawn until a sufficient number of qualified jurors has been obtained. State v. Abboud ---------- 84
5. An indictment is valid where the person indicted was called as a witness before the grand jury if the witness claimed and was granted his privilege against self-incrimination. State v. Abboud ---------- 84
6. The trial court may in its discretion require that an oath of secrecy be administered to the witnesses before a grand jury. State v. Abboud ---------- 84
7. There was no prejudice to a substantial right of a defendant charged by indictment who was called as a witness before the grand jury and denied the right to have his counsel present in the grand jury room, where the defendant claimed his privilege against self-incrimination and the privilege was sustained by the trial court. State v. Novak ----- 90

Habeas Corpus.

1. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. Gray v. Hartman ------ 590
2. The desires of a child of 15 years of age should be given important, though not controlling, consideration in the determination as to whom her custody should be awarded. Gray v. Hartman ---------- 590
3. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Carlson v. Wivell ---- 877

Highways.

1. It is the continuing duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public that the highway is dangerous to travel. Carson v. Dobson Bros. Constr. Co. ----- 287
2. If a graveled road is a part of the state highway system a speed of 60 miles per hour is not violative of the specified maximum speed. Dittrick v. Deuel 428
3. A county is not required to keep its highways in con-

dition fit for travel for their entire statutory width; its duty being discharged if a width sufficient for travel is kept in proper condition. Farmers Co-op Co. v. County of Dodge ---------- 432

4. A county's duty is discharged if the traveled portion of a road is of a width sufficient for travel and maintained in a proper condition, and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of such roadway. Farmers Co-op Co. v. County of Dodge 432

5. Plaintiff must prove, even if a defect in the traveled portion of the roadway existed, that the county had actual notice of such defect or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. Farmers Co-op Co. v. County of Dodge -- 432

6. Duty of motorist approaching a highway protected by stop signs stated. Nistor v. Therkildsen -------- 817

7. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. Nistor v. Therkildsen ---------- 817

8. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. Nistor v. Therkildsen ---------- 817

9. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. Nistor v. Therkildsen ---------- 817

Husband & Wife.

1. A man or woman may bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Such contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made. Caprette v. Spieth ---------- 11

2. Antenuptial contracts should be construed according to the intentions of the parties and the conditions

and circumstances attending their execution. Caprette v. Spieth ---------- 11

3. When each party to a legally executed antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or his representatives to sustain the contract. Caprette v. Spieth 11

4. A widow may by the provisions of an antenuptial contract waive her right to allowances from the estate of her husband even though the contract may not in express terms mention such right. Caprette v. Spieth ---------- 11

5. In a suit between a wife, as the surviving spouse to an antenuptial contract entered into by her and her deceased husband, and the legatees, devisees, or beneficiaries under the will of her deceased husband, the wife has a direct legal interest in the result of the action and is incompetent as a witness under the statute. Strickland v. Omaha Nat. Bank 478

6. An antenuptial contract is valid if the formalities of the statute are met and if it is fair and fairly made by persons legally qualified to contract. Strickland v. Omaha Nat. Bank ---------- 478

7. The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured. Strickland v. Omaha Nat. Bank ---------- 478

8. A court, when called upon to consider the validity of an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding the particular case, and enforce or annul the agreement according to the facts disclosed. Strickland v. Omaha Nat. Bank ---------- 478

9. Ordinarily the burden of proof to show the invalidity of an antenuptial contract is on the party alleging it, but if the contract is unjust and unreasonable to the prospective wife on its face, a presumption of fraud arises, the burden shifts, and it is incumbent on the husband, or his representatives, to prove the validity of the contract. Strickland v. Omaha Nat. Bank ---------- 478

10. Due to the confidential relationship existing between prospective spouses, the courts scrutinize antenuptial contracts with care, the relationship being one of mutual trust and confidence. Strickland v. Omaha Nat. Bank ---------- 478

11. While a disclosure by the prospective husband of his property should be full, fair, and open, a failure to divulge does not necessarily mean that the agreement will be condemned. The test of adequacy may still remain, and if it is met by a showing that it was fairly and honestly made under all the circumstances, the agreement may be enforced. Strickland v. Omaha Nat. Bank ---------- 478
12. The basic issue where a complete disclosure is not made is fraud or overreaching, not the absence of disclosure. Strickland v. Omaha Nat. Bank ------ 478
13. Rule as to the construction and validity of antenuptial contract stated. Strickland v. Omaha Nat. Bank ---------- 478
14. In the absence of fraud or overreaching, or of unfairness or unreasonableness of such a degree as to void the contract, a man and woman, anticipating marriage, are as free to enter into an antenuptial contract as any other contract. Strickland v. Omaha Nat. Bank ---------- 478
15. A valid antenuptial agreement is not affected by a party thereto giving by a last will something out of his estate to the other party to the agreement. It does not amount to a waiver of the antenuptial agreement by the testator, nor give to the wife the right to elect under the statute in lieu of the provisions of the will. Strickland v. Omaha Nat. Bank 478
16. Either a husband or wife may be a witness against the other in any action brought by either husband or wife against a third person, relating to the marriage relationship between such husband and wife, or the interruption of or interference with such relationship. Forman v. Andersen ---------- 528

Improvements.

1. Statutes referred to in opinion concerning lease of school lands mean this: If improvements made by a tenant fall within the enumeration of those to be appraised and outside of the enumeration of those to be approved, they are compensable without administrative approval. Banks v. State -------- 106
2. Statutes referred to in opinion concerning sale of school lands mean this: In event of such sale to a third person a tenant has a right to compensation resulting from improvements compensable under the lease statutes. Banks v. State ---------- 106
3. The value of a tenant's property interest resulting

from improvements on school land is required to be determined prior to sale of the land. Banks v. State 106

Indemnity.

Under the collateral source rule or doctrine, the fact that the party seeking recovery has been wholly or partially indemnified for loss by insurance cannot be set up by the wrongdoer in mitigation of damages, where the wrongdoer did not contribute to the procurement of the insurance. Huenink v. Collins ------ 195

Indictments and Informations.

1. When a defendant in a criminal action has been properly tried and convicted of a felony criminal charge, the fact that the information improperly contained another count charging the defendant as a habitual criminal and that he was sentenced thereon will not invalidate the finding of guilty on the felony criminal charge. State v. Burnside ---- 20
2. An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. State v. Adams -------- 75
3. It is generally sufficient to allege the crime in the language of the statute. It is not necessary to state the detailed particulars of the crime in the meticulous manner prescribed by the common law. State v. Adams ---------- 75
4. Where a statutory crime may be committed by any of several methods, an indictment may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other. State v. Novak -- 90
5. An information must (1) inform the accused of the nature and cause of the accusation and (2) be reasonably definite as part of the prospective record for a defense of double jeopardy. State v. Huffman 356
6. An information charging an offense in substantially the words of the statute is generally sufficient. State v. Levell ---------- 401

Infants.

1. Jurisdiction in proceedings to declare children neglected or dependent under statute referred to in

opinion does not depend upon the domicile of the parents. Hubbard v. Loewenstein ---------- 96
2. Rule stated where cases are interwoven and interdependent in child custody case. Hubbard v. Loewenstein ---------- 96
3. After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court. Gray v. Hartman ---- 590
4. The desires of a child of 15 years of age should be given important, though not controlling, consideration in the determination as to whom her custody should be awarded. Gray v. Hartman ------- 590
5. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Carlson v. Wivell ---- 877

Injunction.

An injunction suit is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. Burger v. City of Beatrice ---------- 213

Insurance.

1. Under the collateral source rule or doctrine, the fact that the party seeking recovery has been wholly or partially indemnified for loss by insurance cannot be set up by the wrongdoer in mitigation of damages, where the wrongdoer did not contribute to the procurement of the insurance. Huenink v. Collins ---------- 195
2. Where the "excess" insurance provisions of two policies of insurance are mutually repugnant, the general coverage of each policy applies, and each company is obligated to share in the loss. State Farm Mut. Auto. Ins. Co. v. Union Ins. Co. ---- 253
3. "Escape," as used in a theft policy pertaining to livestock, must be construed to mean straying from or leaving the place of confinement. Raff v. Farm Bureau Ins. Co. ---------- 444
4. "Mysterious disappearance," under the terms of a theft policy, means disappearance under unknown, puzzling, and baffling circumstances, which arouse wonder, curiousity, or speculation, or under cir-

cumstances which are difficult or hard to explain. Raff v. Farm Bureau Ins. Co. ---------- 444

5. The first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future. Reserve Ins. Co. v. Aguilera 605

6. The general rule is that under a simple loss payable clause in a policy of insurance issued to a mortgagor and payable to the mortgagee, as his interest may appear, the mortgagee is simply an appointee of the insurance fund whose right of recovery is no greater than the right of the mortgagor. Reserve Ins. Co. v. Aguilera ---------- 605

7. Statute referred to in opinion was not repealed by implication but was to be read in pari materia with another statute. Zimmerman v. Continental Cas. Co. ---------- 654

8. Under the particular facts of this case, the issues of whether the insured's misrepresentations or false statements in the application for insurance were made knowingly with intent to deceive and the company was thereby deceived to its injury were for the jury. Zimmerman v. Continental Cas. Co. ---------- 654

9. Effect of fraudulent representations in application for accident insurance stated. Zimmerman v. Continental Cas. Co. ---------- 654

10. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Cordes v. Prudential Ins. Co. ---------- 794

11. In construing an insurance contract, the court must give effect to the instrument as a whole, and, if possible, to every part thereof. Cordes v. Prudential Ins. Co. ---------- 794

12. In prescribing the standard form of fire insurance policy, the Legislature did not abrogate the right to reformation in respect to permissible subjects of insurable interest. Heikes v. Farm Bureau Ins. Co. 827

13. A soliciting agent of an insurance company is deemed to all intents and purposes an agent of the company. Heikes v. Farm Bureau Ins. Co. ---------- 827

14. Coverage provisions of an insurance policy may be reformed to express the actual agreement between the insured and the soliciting agent in accordance

with controlling equities. Heikes v. Farm Bureau Ins. Co. ---------- 827

15. An insurance policy is not reformable unless a ground for reformation is proved convincingly. Heikes v. Farm Bureau Ins. Co. ---------- 827

Interest.

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. Lundt v. Parsons Constr. Co. ---------- 609

Intoxicating Liquors.

1. The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, as specified, is vested exclusively in the Liquor Control Commission. City of Lincoln v. Nebraska Liquor Control Commission ------ 277
2. The Liquor Control Act not only contains a grant of power to cities and villages to regulate the business of beer licensees, but prescribes that the exercise of the authority granted be by ordinance, and the designated manner of the execution of the power is exclusive. City of Lincoln v. Nebraska Liquor Control Commission ---------- 277
3. The purpose of specified section of the Liquor Control Act is to furnish a short procedure for a change of location in the business of a liquor licensee when neither the Liquor Control Commission nor the municipality involved objects thereto and the section does not preclude an application for a new license at another location. City of Lincoln v. Nebraska Liquor Control Commission ---------- 277
4. The Liquor Control Commission has a broad discretion in determining whether or not applications for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion. City of Lincoln v. Nebraska Liquor Control Commission ---- 277

Judges.

A proper administration of the law demands not only that judges refrain from actual bias, but also that they avoid all appearances of unfairness or impropriety. Franks v. Franks ---------- 710

Judgments.

1. The Summary Judgment Act authorizes an interlocutory summary adjudication of liability alone although there is a genuine issue of damages. Hart v. Ronspies ---------- 38
2. An interlocutory summary adjudication of liability alone is not appealable. Hart v. Ronspies -------- 38

Juries.

1. A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. State v. Adams. ---------- 75
2. 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 cannot be accounted for upon any 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. Bundy ---------- 160
3. Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the sound discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, Yount v. Seager ---------- 665

Larceny.

Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft. Coomes v. Drinkwalter ---------- 450

Licenses.

One holding a license issued by the Nebraska Collection Agency Board who fails within 45 days after the close of each calendar month to report and pay to his client the net proceeds of all collections made during the preceding calendar month and due to such client is in violation of the intent and purposes expressed in the collection agency act, and is guilty of conduct justifying a revocation of his license. State ex rel. Hartman v. Weiss ---------- 685

Livestock.

1. Livestock brand statutes were enacted for the protection of the owners of the brands and the brand

upon cattle is prima facie evidence of title. Coomes v. Drinkwalter ---------- 450
2. In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. Coomes v. Drinkwalter ---------- 450

Mandamus.

Factors governing the determination of the issuance of a writ of mandamus stated. State ex rel. City of Omaha v. Lynch ---------- 810

Marriage.

1. A marriage is presumed valid, and the burden of proof is upon the party seeking annulment. Homan v. Homan ---------- 259
2. A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. Homan v. Homan ---------- 259
3. Mere weakness or imbecility of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his free and intelligent consent to it. Homan v. Homan ---------- 259
4. Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to avoid all contracts by destroying the power to consent. Homan v. Homan ---------- 259
5. A marriage is valid if the party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates. Homan v. Homan ---------- 259

Master and Servant.

1. The proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment. Sullivan v. David City Bank ---------- 395
2. The burden is upon the employer to prove that the employee obtained other employment or, with reason-

able diligence, might have obtained other employment. Sullivan v. David City Bank ---------- 395

3. In the absence of proof that the employee obtained other employment or, with reasonable diligence, might have obtained other employment, the measure of damages is the contract price. Sullivan v. David City Bank ---------- 395

4. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. Barton v. Hobbs ---------- 763

5. The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. Barton v. Hobbs 763

6. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person. Barton v. Hobbs ---------- 763

7. Whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. Barton v. Hobbs ---------- 763

8. An employee 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 chargeable with negligence or contributory negligence. Barton v. Hobbs ---- 763

9. An employee assumes risks not ordinarily incident to his employment, provided he knows them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger. Barton v. Hobbs ---------- 763

10. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, questions of contributory negligence and assumption of risk are for the determination of a jury. Barton v. Hobbs ---------- 763

Motor Carriers.

1. A long-continued operation, under color of authority to transport commodities generally, and the knowledge of the State Railway Commission of such transportation, support a conclusion that the original certificate intended to grant authority for the transportation of commodities generally. Rapid Film Service, Inc. v. Bee Line Motor Freight ---------- 1
2. The State Railway Commission may clarify or interpret a certificate of public convenience and necessity if it is indefinite, ambiguous, or uncertain in its terms or provisions. Neylon v. Petersen & Petersen, Inc. ---------- 143
3. The words "and occasionally to and from various points within the State of Nebraska at large" contained in the route termination clause of a certificate of public convenience and necessity, mean that, in addition to the general authority granted, occasional routings between the stated points of origin to and from other points in the state at large are authorized. Neylon v. Petersen & Petersen, Inc. ---------- 143
4. The refusal of the State Railway Commission to clarify or interpret a certificate of public convenience and necessity on the ground that no actual injury was alleged which authorized the intervention of the commission is not a determination on the merits, and will not support a claim of previous determination. Neylon v. Petersen & Petersen, Inc. 143
5. Freight rates and classifications that are properly found to be reasonably useful in the public interest are necessary within the meaning of statute referred to in opinion. Ready Mix, Inc. v. Nebraska Railroads ---------- 697

Municipal Corporations.

1. A municipal corporation possesses, and can exercise, the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Jacobs v. City of Omaha ---------- 101
2. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such

doubt must be resolved against the grant. Jacobs v. City of Omaha ---------- 101
3. The application of the provisions of the Omaha municipal code to the 3-mile zone area can be fairly implied from the power granted to the city of Omaha by statute. Jacobs v. City of Omaha ---- 101
4. A city in engaging in the production and distribution of water for the benefit of its inhabitants is engaged in a proprietary capacity rather than a governmental one. When engaging in an ordinary business enterprise, a city is bound by all the rules of substantive law and procedure applicable to any other private corporation or person engaged in a like enterprise. Burger v. City of Beatrice ------ 213
5. When a city engages in a public utility business, it must provide water service to all inhabitants alike who desire it at the same rate for the same service. Burger v. City of Beatrice ---------- 213
6. The production and distribution of water for the inhabitants of a city is for a public purpose within the meaning of the power of eminent domain. Burger v. City of Beatrice ---------- 213
7. The power of a city of the first class to contract for the sale of water outside the city's corporate limits is contractual and permissive and in no sense mandatory or the result of a duty imposed by legislative action or otherwise. Burger v. City of Beatrice ---------- 213
8. Contracts for the sale of water outside the corporate limits of a city, as authorized by legislative enactment, are contractual and not for a municipal public purpose. Burger v. City of Beatrice ---------- 213
9. The sale of water by a city outside its corporate limits to a private person, corporation, or industry for his or its own private purpose is not a public use within the meaning of the doctrine of eminent domain. Burger v. City of Beatrice ---------- 213
10. Annexation of territory by a city of the first class pursuant to statute is a legislative matter. Williams v. County of Buffalo ---------- 233
11. In the annexing of property to a city of the first class by ordinance, pursuant to the power delegated by statute, it is for the mayor and city council, and not the courts, to determine what lands are to be annexed. Williams v. County of Buffalo ---------- 233
12. The power delegated to cities of the first class to annex lands by ordinance is to be construed

strictly, and a failure to comply with conditions prescribed or limitations imposed, will ordinarily invalidate the ordinance. Williams v. County of Buffalo ---------- 233

13. The delegation of legislative power to a city to annex lands by ordinance does not require the giving of notice and a failure to give notice is not a denial of due process of law. Williams v. County of Buffalo 233

14. Where a city has been delegated authority to annex property by ordinance, and the delegated authority has been illegally exercised, the remedy is by an action for an injunction or quo warranto, and not by direct review. Williams v. County of Buffalo 233

15. Where legislative power to annex territory to a city has been delegated by statute to the mayor and council, an appeal from the passage of the ordinance annexing described tracts cannot be made the means of transferring such legislative power to the district court. Williams v. County of Buffalo -------- 233

16. The Liquor Control Act not only contains a grant of power to cities and villages to regulate the business of beer licensees, but prescribes that the exercise of the authority granted be by ordinance, and the designated manner of the execution of the power is exclusive. City of Lincoln v. Nebraska Liquor Control Commission ---------- 277

17. The purpose of specified section of the Liquor Control Act is to furnish a short procedure for a change of location in the business of a liquor licensee when neither the Liquor Control Commission nor the municipality involved objects thereto and the section does not preclude an application for a new license at another location. City of Lincoln v. Nebraska Liquor Control Commission ---------- 277

18. When a traveler on a public street is warned by proper devices or barricades of an obstruction or excavation and he voluntarily elects to continue, without knowledge of the conditions existing around the obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar recovery. Carson v. Dobson Bros. Constr. Co. 287

19. The powers granted to a municipal corporation can be divided into two general classes; the one including those which are legislative, public, and governmental, and import sovereignty, and the other including those which are corporate, proprietary, and quasi-private,

conferred for the private advantage of the municipality. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

20. The general governmental powers of a municipality are subject to the complete control of the state and no discretionary power is lodged in the municipality in regard to such powers as to whether or not they will be complied with. In levying taxes for such purposes of general concern, the legislative act is compulsory and the consent of the municipality or its inhabitants is immaterial. Obitz v. Airport Authority of the City of Red Cloud ------ 410

21. The corporate, proprietary, and quasi-private powers of a municipality are matters of purely local concern and, except in conferring power and regulating its exercise, the state has no compulsory power to impose them or to impose taxes for their support on the municipality. The Legislature may, however, authorize the local authority to impose such taxes upon itself. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

22. The construction, operation, and maintenance of an airport by a municipality or an airport authority is a proprietary function. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

23. The one mill tax authorized by statute referred to in opinion is included in the terms "any part of the revenue, income, receipts, profits, and other money derived by the authority" contained in the statute, and may be pledged for the payment of general obligation bonds of the authority by the terms of the latter act. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

24. The pledge of the taxes authorized by statute referred to in opinion does not violate another statutory provision providing that the bonds of the authority shall not be a debt of the city. Obitz v. Airport Authority of the City of Red Cloud ------ 410

25. The pledge of money to be derived in the future from levies made pursuant to statute referred to in opinion is authorized by another section. The pledge of future taxes under a valid, existing law is no different than the pledging of future revenue and other income. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

26. A city has no right or power to enter into contracts which curtail or prohibit the exercise of its

legislative or administrative authority. Bowley v. City of Omaha ---------- 515
27. A gift for a public purpose may be tendered to a city upon conditions or reservations so long as those conditions or reservations do not unreasonably interfere with the municipal use and enjoyment of the property. Bowley v. City of Omaha ---------- 515
28. A statute empowers cities of the metropolitan class to acquire real estate by gift, purchase, bequest, or condemnation for public purposes, and includes parks in such purposes. Bowley v. City of Omaha 515
29. A municipal corporation may accept funds conditionally or with reservations for purposes germane to the objects of the corporation so long as the conditions do not unreasonably interfere with public use and enjoyment. When accepted, a trust is imposed upon the municipality to perform in accordance with the conditions. Bowley v. City of Omaha 515
30. A plat of dedication is a mere offer to dedicate which must be accepted before the dedication is complete. City of Ord v. Zlomke ---------- 573
31. Effect of vacation of plat of addition to a city of the second class stated. City of Ord v. Zlomke ---- 573
32. Only those property owners whose property abuts upon the vacated part of the street need join in the deed of vacation. City of Ord v. Zlomke ---------- 573
33. The policemen of a second-class city have power to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as a sheriff or constable, and keep them in the city jail or other place, to prevent their escape, until trial can be had before the proper officer. State v. Carpenter ---------- 639
34. A municipal corporation may be estopped by its official acquiescence in, and approval of, acts originally unauthorized. City of Schuyler v. Cornhusker P. P. Dist. ---------- 704
35. Ordinarily, a municipality which operates a system for the sale of electrical energy at retail should have the right to serve new customers in its zoning area at retail. Upon expansion of its corporate limits, such a municipality is entitled to modify its retail service area to include extensions of its zoning area. City of Schuyler v. Cornhusker P. P. Dist. -------- 704
36. The purpose of the constitutional provision as to a home rule charter is to render a city independent of state legislation as to all subjects which are of

strictly municipal concern. State ex rel. City of Omaha v. Lynch ---------- 810

37. A city of the metropolitan class has the power to remove or order the removal of a dangerous building which has become a nuisance because of its condition. Goldsberry v. City of Omaha ---------- 823

38. If the exercise of a power by the governing authority of a municipal corporation is based upon evidence sufficient to sustain it, the conclusion thus reached is final and the courts are without authority to interfere. Goldsberry v. City of Omaha ---------- 823

39. Motor vehicle statute authorizes a city or village to enact an ordinance to prohibit the operation of a motor vehicle during any period that the motor vehicle operator's license has been revoked or suspended pursuant to any law of this state, or after such suspension or revocation but before reinstatement of a license or issuance of a new license as permitted under the motor vehicle laws of this state. State v. Smith ---------- 846

40. Statute referred to in opinion, providing that firemen serving 21 years in a paid fire department shall receive a pension, refers to departments where the members devote their entire time to the service, and are paid a regular salary, and excludes part-time firemen who follow other occupations and receive only nominal remuneration for their services as firemen. State ex rel. Retchless v. Cook ------ 863

Narcotics.

1. To prove unlawful possession of a narcotic drug, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a narcotic. State v. Faircloth ---------- 333

2. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotic drug at the place where it was found. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Faircloth ---------- 333

3. Joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. State v. Faircloth 333

4. In the Narcotic Drug Act the section exempting transactions by a transferor of medicinal preparations has no application to the section that prohibts attempted obtainment by misrepresentation. State v. Goodwin ---------- 616

Negligence.

1. Two prerequisites for a permissive inference from res ipsa loquitur are: The events indicate that the injury would not have occurred in the absence of negligence and that defendant was the negligent person. Pfeifer v. Konat ---------- 30
2. Duty to instruct on issue stated where a guest is injured as a result of the collision of the vehicle, in which he was riding, with another vehicle, and the evidence discloses that a jury question is presented as to the negligence of both drivers. Zavoral v. Pacific Intermountain Express ---------- 40
3. Where reasonable minds may differ on the question of whether a motorist exercised the ordinary care required of him under the circumstances, the issue of negligence is one of fact for the jury. Bartosh v. Schlautman ---------- 130
4. Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Bartosh v. Schlautman ---------- 130
5. Exceptions to the general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision is negligent as a matter of law embrace those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances. Bartosh v. Schlautman ---------- 130
6. An exception to general rule occurs when the object struck is the same color as the roadway and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Bartosh v. Schlautman ---------- 130
7. The general rule that a motorist who cannot stop his automobile in time to avoid a collision with an object within the range of his vision or lights is negligent as a matter of law is not an automatic rule of thumb, nor a rigid formula to be applied regardless of circumstances. The applicability of the

rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Bartosh v. Schlautman ---------- 130

8. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases. Bartosh v. Schlautman ----- 130

9. When a traveler on a public street is warned by proper devices or barricades of an obstruction or excavation and he voluntarily elects to continue, without knowledge of the conditions existing around the obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar recovery. Carson v. Dobson Bros. Constr. Co. 287

10. In order to constitute actionable negligence there must be a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and damage resulting therefrom. Wilbur v. Schweitzer Excavating Co. -- 317

11. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. Wilbur v. Schweitzer Excavating Co. ---------- 317

12. In the absence of knowledge either actual or constructive there is no duty on the part of a general contractor or an excavator employed by him to ascertain the existence of a gas service pipeline running across vacant private property. Wilbur v. Schweitzer Excavating Co. ---------- 317

13. 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 defendant is not an insurer of the safety of invitees. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381

14. A change of level at 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. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381

15. The mere fact that an invitee falls at the entrance of a building where a difference in level 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. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381

16. 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. Under the facts here, the plaintiff failed to establish negligence on the part of the defendant. Beck v. Ideal Super Markets of Nebraska, Inc. ---------- 381

17. The failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger or to misjudge its speed does not ordinarily constitute contributory negligence as a matter of law. It is no more than evidence from which a jury may find contributory negligence. Zawada v. Anderson ---------- 467

18. A pedestrian crossing at a regular crosswalk with the right-of-way is not, as a matter of law, required to keep a continuous lookout for an approaching vehicle. Zawada v. Anderson ---------- 467

19. A pedestrian crossing at a regular crosswalk and having the right-of-way has a right to assume that his right-of-way will be respected until he has notice or knowledge to the contrary. Zawada v. Anderson ---------- 467

20. A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. But knowledge that the driver has been drinking does not necessarily bar the recovery by a guest. Schaffer v. Bolz ---- 509

21. The rule that a guest may be guilty of contributory negligence contemplates a situation where the driver is really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such an extent that the guest is charged with knowledge of it. Schaffer v. Bolz ---------- 509

22. Whether or not gross negligence exists must be determined from the facts and circumstances of each particular case. Carley v. Meinke ---------- 648

23. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, when considered together, they may constitute evidence of gross negligence. In such a case, whether

or not gross negligence exists is for the jury. Carley v. Meinke ---------- 648
24. The speed at which a motor vehicle is being driven under all the circumstances shown in the evidence is an important circumstance in determining questions of negligence on the part of the driver. Carley v. Meinke ---------- 648
25. Evidence as to the drinking of intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence. Carley v. Meinke ---------- 648
26. The familiarity of a driver with the road upon which he is driving when an accident occurs is a circumstance to be considered in determining negligence or the degree thereof. Carley v. Meinke ---------- 648
27. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, however, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Carley v. Meinke -- 648
28. An employee 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 chargeable with negligence or contributory negligence. Barton v. Hobbs -------- 763
29. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, questions of contributory negligence and assumption of risk are for the determination of a jury. Barton v. Hobbs ---------- 763
30. The presence of ice and snow on a street which is reasonably known or anticipated is a condition and not an independent intervening causal factor that relieves a motor vehicle operator from responsibility for the result of his negligence. Kuffel v. Kuncl 770
31. Pedestrians have the right-of-way on a sidewalk and it is incumbent upon one who is driving an automobile across a sidewalk to take particular care to avoid endangering or injuring them. Kuffel v. Kuncl 770
32. Under circumstances stated, a motorist on an arterial highway cannot be held to be guilty of negligence or contributory negligence in failing to avoid an accident which from her standpoint was then unavoidable. Steinberg v. Pape ---------- 806
33. If a motorist entering an intersection looks for

approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. Nistor v. Therkildsen ---------- 817

34. A person who enters a retail store for the purpose of shopping or of making a purchase is an invitee within the legal meaning of that term. Presho v. J. M. McDonald Co. ---------- 840

35. In general, a licensee is one who is privileged to enter or remain upon property by virtue of the possessor's consent, whether express or implied. Presho v. J. M. McDonald Co. ---------- 840

36. The owner or occupant of property owes an invitee the duty to observe and exercise for his protection the degree of care, caution, and vigilance which the circumstances justly and reasonably demand in order to protect him against injury or damage. Presho v. J. M. McDonald Co. ---------- 840

37. Duty owed by owner or occupant of property to licensee stated. Presho v. J. M. McDonald Co. ---- 840

38. As a general rule a customer trading in a retail store has the right to rely upon the safety of passage along passageways used by customers and by doing so is not necessarily guilty of contributory negligence as a matter of law. Presho v. J. M. McDonald Co. ---------- 840

New Trial.

A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. State v. Adams ---------- 75

Notice.

1. Notice of hearing issued by the State Board of Equalization and Assessment should specify the proposed adjustment in percentage amounts. City of Omaha v. State Board of Equalization & Assessment 734

2. A county is entitled to reasonable notice and hearing when a proposed decrease in valuation suddenly becomes a substantial increase, and the entire thrust of the hearing reverses direction after the original hearing has apparently been concluded. City of Omaha v. State Board of Equalization & Assessment 734

Nuisances.

A city of the metropolitan class has the power to remove or order the removal of a dangerous build-

ing which has become a nuisance because of its condition. Goldsberry v. City of Omaha ---------- 823

Officers.

1. The policemen of a second-class city have power to arrest all offenders against the laws of the state or of the city, by day or by night, in the same manner as a sheriff or constable, and keep them in the city jail or other place, to prevent their escape, until trial can be had before the proper officer. State v. Carpenter ---------- 639
2. Constables shall be ministerial officers of the courts held by justices of the peace in criminal cases, within their respective counties, and it shall be their duty to apprehend and bring to justice felons and disturbers of the peace, to suppress riots, and to keep and preserve the peace within their respective counties. They shall have power and they are hereby authorized to execute all writs and process in criminal cases throughout the county in which they may reside and where they were elected or appointed. State v. Carpenter ---------- 639

Parent and Child.

1. Jurisdiction in proceedings to declare children neglected or dependent under statute referred to in opinion does not depend upon the domicile of the parents. Hubbard v. Loewenstein ---------- 96
2. Abandonment is an actual, willful desertion, followed by the willful neglect or refusal to contribute to the support of the wife. State v. Pitzel -------- 176
3. Where an order of the court imposes restraint on a parent to the extent that such parent is restrained from coming on to the premises of the other or on the premises of any issue of said parents there is no illegal abandonment while such order is in effect. State v. Pitzel ---------- 176
4. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited. Gray v. Hartman ---------- 590
5. The indifference of a parent for a child's welfare over a long period of time, and the willingness that others should assume the obligations of parents in his stead, with the development of the ties and affections that naturally flow therefrom, is a material element in determining whether a parent has

forfeited or abandoned his natural right to the custody of the child. Gray v. Hartman ---------- 590

6. The right of a parent to the custody of minor children is not to be lightly set aside. Carlson v. Wivell ---------- 877

7. A decree of divorce which awards the custody of a minor child to the mother and in which there is no finding of unfitness of the father does not deprive the father of the natural right of custody of his child except as against the mother. Carlson v. Wivell ---------- 877

8. Courts may not properly deprive a parent of custody of his minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. Carlson v. Wivell ---------- 877

9. In a custody contest between parents, the wishes of a chill, who has reached sufficient age and has the ability to express an intelligent preference, are entitled to consideration, but are not controlling. Carlson v. Wivell ---------- 877

10. The wish or preference of a child does not in itself outweigh the rights of a parent, nor justify the transfer of custody from a fit, proper, and suitable parent to a third person. Carlson v. Wivell ------ 877

Parties.

Intervention, as a general rule, is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected. Kula v. Kula ---------- 531

Partnership.

Property may be shown to be partnership property by proof of an intent to devote it to partnership purposes. Norcross v. Gingery ---------- 783

Payment.

The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Department of Banking v. Lawhead --------- 722

Pensions.

Statute referred to in opinion, providing that firemen serving 21 years in a paid fire department shall

receive a pension, refers to departments where the members devote their entire time to the service, and are paid a regular salary, and excludes part-time firemen who follow other occupations and receive only nominal remuneration for their services as firemen. State ex rel. Retchless v. Cook ------ 863

Pleading.

1. A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Martindale v. State ---------- 64
2. Amendments to the pleadings during or after trial may be permitted by the court within its sound discretion and error may not be predicated thereon in the absence of a showing of prejudice. Zawada v. Anderson ---------- 467
3. Damages for disabling effect of an injury, past and prospective, are recoverable under the general ad damnum clause. Grass v. Valley Feed & Grain ---- 505
4. Tested by general demurrer, a petition for an extra-ordinary remedy is strictly construed. Emry v. Lake ---------- 568
5. In proving an admission against interest contained in a pleading, a party is only required to offer so much of the pleading as is necessary to show the admission. Sheets v. Davenport ---------- 621

Principal and Agent.

It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, he is liable therefor. Winchell v. National Bank of Commerce Trust & Sav. Assn. 870

Process.

1. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. Busboon v. Gregory ---------- 246
2. A basis of jurisdiction over a foreign corporation exists if the corporation is doing business in Nebraska. It also exists if: (1) The cause of action arose out of an act that the corporation caused to be done in Nebraska or elsewhere with consequences in Nebraska, and (2) the act established such a

relationship of the corporation to Nebraska that exercise of jurisdiction is reasonable. Busboom v. Gregory ---------- 246

Property.

Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another. Webb v. Lambley ---------- 385

Public Lands.

1. A tenant on school lands may have a property interest resulting from improvements made prior to September 14, 1953, notwithstanding the unconstitutionality of an appraisal and compensation statute that otherwise would be a source of his interest. Banks v. State ---------- 106
2. Statutes referred to in opinion concerning lease of school lands means this: If improvements made by a tenant fall within the enumeration of those to be appraised and outside of the enumeration of those to be approved, they are compensable without administrative approval. Banks v. State ---------- 106
3. Statutes referred to in opinion concerning sale of school lands mean this: In event of such sale to a third person a tenant has a right to compensation resulting from improvements compensable under the lease statutes. Banks v. State ---------- 106
4. The value of a tenant's property interest resulting from improvements on school land is required to be determined prior to sale of the land. Banks v. State 106

Public Service Commissions.

1. The State Railway Commission has the right to interpret its certificates of public convenience and necessity. The Supreme Court should review or interfere with such an interpretation made by the commission only when it is necessary to keep it within its jurisdiction and to protect legal and constitutional rights, and when the order is arbitrary and unreasonable. Rapid Film Service, Inc. v. Bee Line Motor Freight ---------- 1
2. The State Railway Commission and the Supreme Court, on review, cannot go behind the grandfather certificate to show that truck operations prior to the issuance of the certificate were different than

those authorized by the certificate. Rapid Film Service, Inc. v. Bee Line Motor Freight ---------- 1

3. A long-continued operation, under color of authority to transport commodities generally, and the knowledge of the State Railway Commission of such transportation, support a conclusion that the original certificate intended to grant authority for the transportation of commodities generally. Rapid Film Service, Inc. v. Bee Line Motor Freight ---------- 1

4. The State Railway Commission may clarify or interpret a certificate of public convenience and necessity if it is indefinite, ambiguous, or uncertain in its terms or provisions. Neylon v. Petersen & Petersen, Inc. ---------- 143

5. The words "and occasionally to and from various points within the State of Nebraska at large" contained in the route termination clause of a certificate of public convenience and necessity, mean that, in addition to the general authority granted, occasional routings between the stated points of origin to and from other points in the state at large are authorized. Neylon v. Petersen & Petersen, Inc. 143

6. The refusal of the State Railway Commission to clarify or interpret a certificate of public convenience and necessity on the ground that no actual injury was alleged which authorized the intervention of the commission is not a determination on the merits, and will not support a claim of previous determination. Neylon v. Petersen & Petersen, Inc. 143

7. Courts are without authority to interfere with the findings and orders of the State Railway Commission, administrative or legislative in character, except when they exceed its jurisdiction or are arbitrary. Neylon v. Petersen & Petersen, Inc. ---------- 143

8. An order of the State Railway Commission which is sustained by the evidence is not unreasonable or arbitrary and will be affirmed upon review. Parsons v. Nebraska State Railway Commission ---------- 185

9. The refusal of the State Railway Commission to hear any argument at all prior to entry of a rate order was not arbitrary under the circumstances. Ready Mix, Inc. v. Nebraska Railroads ---------- 697

10. To obtain a certificate of convenience and necessity to invade the service area of another common carrier telephone company, the applicant must establish and the State Railway Commission must find compliance

with statute referred to in opinion. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. ---------- 799

11. When the evidence sustains a compliance with statute, and a valid basis for denial of the application is not disclosed, it is the duty of the State Railway Commission to grant the application and its denial is arbitrary and unreasonable. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. ---------- 799

12. While the authority to issue or deny a certificate of convenience and necessity under statute rests with the State Railway Commission, it may not whimsically grant or deny the application, and it is its duty to act in accordance with the best interests of all parties concerned if in accordance with the public interest. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. ---------- 799

Public Utilities.

1. A city in engaging in the production and distribution of water for the benefit of its inhabitants is engaged in a proprietary capacity rather than a governmental one. When engaging in an ordinary business enterprise, a city is bound by all the rules of substantive law and procedure applicable to any other private corporation or person engaged in a like enterprise. Burger v. City of Beatrice ---------- 213

2. When a city engages in a public utility business, it must provide water service to all inhabitants alike who desire it at the same rate for the same service. Burger v. City of Beatrice ---------- 213

3. The power of a city of the first class to contract for the sale of water outside the city's corporate limits is contractual and permissive and in no sense mandatory or the result of a duty imposed by legislative action or otherwise. Burger v. City of Beatrice 213

4. Contracts for the sale of water outside the corporate limits of a city, as authorized by legislative enactment, are contractual and not for a municipal public purpose. Burger v. City of Beatrice ---------- 213

Quo Warranto.

1. An action in quo warranto is a proper remedy to determine the validity of the organization of a school district. Murphy v. Holt County Committee of Reorganization ---------- 182

2. An adequate remedy has been provided for the settlement of the rights of parties in election cases

by either contest or quo warranto and these remedies are exclusive. Murphy v. Holt County Committee of Reorganization ---------- 182

3. Quo warranto, or a proceeding in the nature thereof, lies only against one who is in possession and user of office, or who has been admitted thereto. Sorensen v. Swanson ---------- 205

4. An action by the occupant of an executive state office to contest the election of his successor is not an action in quo warranto within the meaning of Article V, section 2, of the Constitution of Nebraska. Sorensen v. Swanson ---------- 205

5. Where a city has been delegated authority to annex property by ordinance, and the delegated authority has been illegally exercised, the remedy is by an action for an injunction or quo warranto, and not by direct review. Williams v. County of Buffalo ---- 233

Railroads.

Freight rates and classifications that are properly found to be reasonably useful in the public interest are necessary within the meaning of statute referred to in opinion. Ready Mix, Inc. v. Nebraska Railroads 697

Reformation of Instruments.

1. Coverage provisions of an insurance policy may be reformed to express the actual agreement between the insured and the soliciting agent in accordance with controlling equities. Heikes v. Farm Bureau Ins. Co. ---------- 827

2. An insurance policy is not reformable unless a ground for reformation is proved convincingly. Heikes v. Farm Bureau Ins. Co. ---------- 827

Replevin.

1. In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. Coomes v. Drinkwalter ---------- 450

2. The gist of a replevin action is the right to possession of the property. General Motors Acceptance Corp. v. Blanco ---------- 562

Rescission.

A contract for sale or a sale of securities in violation of the provisions of the Blue-Sky Law is not void, but voidable by the purchaser, and the purchaser's remedies embrace enforcement or rescission, whichever is appropriate. Loewenstein v. Midwestern Inv. Co. ---------- 547

Schools and School Districts.

1. Board to board petitions are available for changes affecting Class III, IV, V, and VI school districts and districts embracing cities and incorporated villages. Languis v. De Boer ---------- 32
2. The state is supreme in the creation and control of school districts and may, if it thinks proper, modify or withdraw any of their powers or destroy such school districts without the consent of the legal voters or even over their protests. Languis v. De Boer ---------- 32
3. Any person adversely affected by the changes made by the county superintendent pursuant to the act relating to reorganization of school districts, may proceed either by appeal or by error. Languis v. De Boer ---------- 32
4. Where both appeal and error proceedings are employed, the trial judge should consolidate the cases and try the consolidated case de novo as on appeal. Languis v. De Boer ---------- 32
5. An action in quo warranto is a proper remedy to determine the validity of the organization of a school district. Murphy v. Holt County Committee of Reorganization ---------- 182
6. The legislative function in transfers of land among school districts is unaffected by constitutional guaranties of procedural due process. School Dist. No. 23 v. School Dist. No. 11 ---------- 305
7. The proviso contained in statute relating to school districts providing "that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years," does not provide an independent and sole ground for transferring land from one school district to another. Johnson v. School Dist. of Wakefield ---------- 372
8. A county school district reorganization committee is the real party in interest in a contest over a reor-

ganization plan submitted by it. Plouzek v. Saline County Reorganization Committee ---------- 440

Searches and Seizures.

1. A search during informal detention of a person may be reasonable, although it is made under circumtances that would not justify custody in the tradition of arrest. State v. Huffman ---------- 356
2. It is not a search to observe that which is open and patent either in daylight or in artificial light. State v. Carpenter ---------- 639
3. If, without a search and without an unlawful entry contraband is seen, the police are not required to close their eyes, walk away, and leave the article where they see it. State v. Carpenter ---------- 639
4. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694, is not applicable to searches and seizures under the Fourth Amendment to the Constitution of the United States. State v. Forney -- 757
5. When the Supreme Court puts a burden on the State to affirmatively prove the voluntariness of consent, it adequately protects the rights of the defendant. State v. Forney ---------- 757
6. There is no illegal search and seizure of objects found in defendant's automobile, even if defendant was not under arrest, and even if the officers did not have a search warrant, if the defendant freely and intelligently gave his consent to the officers making the search. State v. Forney ---------- 757
7. A consent is not voluntary if it is the result of duress or coercion, either actual or implied. State v. Forney ---------- 757
8. Affirmative consent may be established by acts entirely aside from the use of words. State v. Forney 757

Sheriffs and Constables.

Under the statutory provision for a commission on money received and disbursed by the sheriff on order of sale, redemption precludes the commission. Muinch v. Hull ---------- 571

States.

The state is supreme in the creation and control of school districts and may, if it thinks proper, modify or withdraw any of their powers or destroy such

school districts without the consent of the legal voters or even over their protests. Languis v. De Boer ---------- 32

Statutes.

1. In construing a statute, effect must be given if possible to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. Languis v. DeBoer ---- 32
   Heywood v. Brainard ---------- 294
2. Where a statute states the elements of a crime, it is generally sufficient in a complaint to describe such crime in the language of the statute. State v. DiLorenzo ---------- 59
3. The remedy under the Post Conviction Act is cumulative and is not intended to be concurrent with any other remedy. State v. Dabney ---------- 263
4. It is the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Heywood v. Brainard 294
5. The word "otherwise" is defined as follows: "In a different manner; in another way, or in other ways." Heywood v. Brainard ---------- 294
6. It is a fundamental requirement of due process of law that a statute be reasonably clear and definite. Heywood v. Brainard ---------- 294
7. Section of Motor Vehicle Act held unconstitutional. Heywood v. Brainard ---------- 294
8. In the interpretation or construction of statutes, ascertainment of the intention of the Legislature is the end or purpose to be accomplished. Johnson v. School Dist. of Wakefield ---------- 372
9. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Johnson v. School Dist. of Wakefield ---------- 372
   State ex rel. Retchless v. Cook ---------- 863
10. It is the office and function of a proviso contained in a statute to limit and qualify the preceding language of the statute and not to enlarge its effect. Johnson v. School Dist. of Wakefield ---------- 372
11. The office of a proviso in a statute stated. Johnson v. School Dist. of Wakefield ---------- 372
12. Ordinarily, if words used in a legislative act had, at

the time used, received a settled construction, it is presumed that the Legislature adopted them in that sense. State v. Levell ---------- 401
13. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto. State v. Levell ---------- 401
14. In determining the meaning of a legislative act, resort may be made to the title. State v. Levell -- 401
15. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. State v. Levell ---------- 401
16. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. State v. Levell ---------- 401
17. When language of a statute is unambiguous, there is no necessity for construction; courts have no jurisdiction to change the language of the statute. State v. Levell ---------- 401
18. Article in statutes relating to airports does not violate Article III, section 14, of the Constitution of Nebraska, in that it amends certain sections of the Municial Airports Act, without specifying the sections amended and without repealing the sections amended. Obitz v. Airport Authority of the City of Red Cloud ---------- 410
19. Livestock brand statutes were enacted for the protection of the owners of the brands and the brand upon cattle is prima facie evidence of title. Coomes v. Drinkwalter ---------- 450
20. Statute referred to in opinion was not repealed by implication but was to be read in pari materia with another statute. Zimmerman v. Continental Cas. Co. ---------- 654
21. When a statute which is penal in nature is required to be strictly construed, it should be given a sensible construction. State ex rel. Hartman v. Weiss 685
22. A guide to the meaning of a statute is found in the evil which it is designed to remedy. State ex rel. Hartman v. Weiss ---------- 685
23. Statutes comprising a single legislative act must be construed as a whole. The intent of the Legislature as deduced from the whole will prevail over that of a particular part considered separately. State ex rel. Hartman v. Weiss ---------- 685
24. One holding a license issued by the Nebraska Col-

lection Agency Board who fails within 45 days after the close of each calendar month to report and pay to his client the net proceeds of all collections made during the preceding calendar month and due to such client is in violation of the intent and purposes expressed in the collection agency act, and is guilty of conduct justifying a revocation of his license. State ex rel. Hartman v. Weiss ---------- 685

25. All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. State ex rel. Retchless v. Cook ---------- 863

Streets.

1. A plat of dedication is a mere offer to dedicate which must be accepted before the dedication is complete. City of Ord v. Zlomke ---------- 573
2. Effect of vacation of plat of addition to a city of the second class stated. City of Ord v. Zlomke ---- 573
3. Only those property owners whose property abuts upon the vacated part of the street need join in the deed of vacation. City of Ord v. Zlomke ---------- 573

Taxation.

1. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Lariat Boys Ranch v. Board of Equalization ---------- 198
   Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---------- 831
2. It is the use of property as distinguished from the use of income from property that is the governing consideration as to whether it is exempt from taxation. Lariat Boys Ranch v. Board of Equalization 198
3. Lariat Boys Ranch, Inc., is determined to be an educational and charitable corporation, and 1,000 acres held to be reasonable and necessary for the purposes of the corporation. Lariat Boys Ranch v. Board of Equalization ---------- 198
4. The general governmental powers of a municipality are subject to the complete control of the State and no discretionary power is lodged in the municipality in regard to such powers as to whether or not they will be complied with. In levying taxes for

such purposes of general concern, the legislative act is compulsory and the consent of the municipality or its inhabitants is immaterial. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

5. The tax levied pursuant to statute referred to in opinion is not violative of Article XIII, section 2, of the Constitution of Nebraska, prohibiting donations by a city for works of internal improvement without having been submitted to the qualified electors of the city at an election held by authority of law. Obitz v. Airport Authority of the City of Red Cloud ---------- 410

6. Formulas or standards are merely methods for determining the ultimate fact of valuation for purposes of taxation. There are no settled and infallible rules for determining actual value. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492

7. The value of the property of a telephone utility as returned to the State Railway Commission for rate-making purposes may be considered in arriving at actual value for taxing purposes. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492

8. There is a presumption that the county board of equalization properly performed its official duties in determining actual value for tax purposes. The burden is on the taxpayer to establish that the valuation for tax purposes is excessive. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492

9. The use of a formula or standard in determining the actual value of the tangible personal property of a telephone company is not improper in the absence of evidence that it was arbitrary, capricious, or unreasonable. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492

10. For the purpose of determining sales-assessment ratios, sales occurring in recent years adjusted to allow for any fluctuations in actual values occurring subsequent to such sales may be considered. Hanna v. State Board of Equalization & Assessment ---------- 725

11. It is the duty of the State Board of Equalization and Assessment to give effect to the requirement that taxes be levied uniformly and proportionately upon all tangible property and to properly equalize between counties to that end. Hanna v. State Board of Equalization & Assessment ---------- 725

12. In the absence of a uniform approach to equalization, or a rationalizing of the relationship existing be-

tween the various factors on which the State Board of Equalization and Assessment has acted, it is impossible for the Supreme Court to ascertain that a constitutionally required uniformity between counties has been attained. Hanna v. State Board of Equalization & Assessment ---------- 725

13. Sales-assessment ratios revealed by the record indicate varying discrepancies in the assessed value adopted for the various counties. In the absence of a reasonable explanation of such discrepancies, the actions of the State Board of Equalization and Assessment cannot be sustained. Hanna v. State Board of Equalization & Assessment ---------- 725
County of Keith v. State Board of Equalization & Assessment ---------- 754

14. Notice of hearing issued by the State Board of Equalization and Assessment should specify the proposed adjustment in percentage amounts. City of Omaha v. State Board of Equalization & Assessment ---------- 734

15. A county is entitled to reasonable notice and hearing when a proposed decrease in valuation suddenly becomes a substantial increase, and the entire thrust of the hearing reverses direction after the original hearing has apparently been concluded. City of Omaha v. State Board of Equalization & Assessment ---------- 734

16. Under the particular circumstances, an overnight notice, and a hearing based on new evidence which the county has no reasonable opportunity to challenge or even to examine, does not meet the requirements of due process. City of Omaha v. State Board of Equalization & Assessment ---------- 734

17. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property. This judgment and discretion is not unlimited. If its exercise is to be properly presented for judicial review, at a minimum, the evidence upon which the State Board relies and the method by which it reached the determinations made must be shown. City of Omaha v. State Board of Equalization & Assessment ------ 734

18. Substantial compliance with the requirements of equalization and uniformity is all that is required. City of Omaha v. State Board of Equalization & Assessment ---------- 734

19. If findings by the State Board of Equalization and

Assessment are inadequate, the resulting order is arbitrary. County of Lancaster v. State Board of Equalization & Assessment ---------- 738
County of Box Butte v. State Board of Equalization & Assessment ---------- 742
20. The decision of the State Board of Equalization and Assessment ordering Douglas County to increase its assessed valuation of urban and suburban property 24 percent was arbitrary and unreasonable. Novak v. State Board of Equalization & Assessment ---- 741
Northwestern Bell Tel. Co. v. State Board of Equalization & Assessment ---------- 748
Brandeis Inv. Co. v. State Board of Equalization & Assessment ---------- 750
21. An order of the State Board of Equalization and Assessment which is not sustained by the record of the proceedings before the board is arbitrary and will be reversed. County of Lincoln v. State Board of Equalization & Assessment ---------- 744
22. Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Brandeis Inv. Co. v. State Board of Equalization & Assessment 750
23. An administrative record must show some basis on which a finding may be premised. Brandeis Inv. Co. v. State Board of Equalization & Assessment 750
24. It is the duty of the State Board of Equalization and Assessment to give effect to the requirement that taxes be levied uniformly and proportionately upon all tangible property and to properly equalize between counties to that end. County of Keith v. State Board of Equalization & Assessment -------- 754
25. In the absence of a uniform approach to equalization, or a rationalizing of the relationship existing between the various factors on which the State Board has acted, it is impossible for the Supreme Court to ascertain that a constitutionally required uniformity between counties has been attained. County of Keith v. State Board of Equalization & Assessment 754
26. The county board of equalization can exercise only such powers as are expressly granted to it by statute. Statutes conferring power and authority upon the county board of equalization in these circumstances are strictly construed. State ex rel. City of Omaha v. Lynch ---------- 810
Municipal University of Omaha v. County Board -- 881

27. The levy of a tax is not a judicial function, nor is it merely the ministerial action of ascertaining the rate per cent; but it is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power. State ex rel. City of Omaha v. Lynch ---------- 810
Municipal University of Omaha v. County Board -- 881
28. The Legislature did not intend to grant to a county board of equalization any legislative power with respect to a city tax levy, nor to divide such power, or permit a dual exercise of it. State ex rel. City of Omaha v. Lynch ---------- 810
29. The duties of the county board in making a tax levy for a home rule charter city under statute referred to in opinion are intended to be ministerial. The Legislature did not intend that the county board act as a quasi judicial body to review and determine questions of legality or procedural budgetary requirements of a home rule city. State ex rel. City of Omaha v. Lynch ---------- 810
30. In determining the rate of a tax levy, complete accuracy cannot be attained. The true test is that there shall be reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions. State ex rel. City of Omaha v. Lynch ---------- 810
31. The levying body has considerable discretion in fixing the tax amount, and the exercise of this discretion will not be disturbed in the absence of an abuse thereof. State ex rel. City of Omaha v. Lynch 810
32. Under circumstances stated, illegality or arbitrary and unreasonable action in setting the tax levy must be clearly demonstrated to warrant judicial interference with legislative power. State ex rel. City of Omaha v. Lynch ---------- 810
33. The county board of equalization ordinarily has no standing to question the legality or illegality of a tax levy made by a political subdivision to which the Legislature has entrusted the legislative power. State ex rel. City of Omaha v. Lynch ---------- 810
34. Property owned and used exclusively for religious or charitable purposes when not owned or used for financial gain or profit is exempt from taxation. Evangelical Lutheran Good Samaritan Soc. v. County of Gage ---------- 831

Telecommunications.

1. The value of the property of a telephone utility as returned to the State Railway Commission for rate-making purposes may be considered in arriving at actual value for taxing purposes. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492
2. The use of a formula or standard in determining the actual value of the tangible personal property of a telephone company is not improper in the absence of evidence that it was arbitrary, capricious, or unreasonable. Rodeo Tel. Membership Corp. v. County of Greeley ---------- 492
3. A telephone company must obtain a certificate of convenience and necessity before it may invade the service area of another telephone company. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. -- 799
4. To obtain a certificate of convenience and necessity to invade the service area of another common carrier telephone company, the applicant must establish and the State Railway Commission must find compliance with statute referred to in opinion. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. -- 799
5. When the evidence sustains a compliance with statute, and a valid basis for denial of the application is not disclosed, it is the duty of the State Railway Commission to grant the application and its denial is arbitrary and unreasonable. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. ---------- 799
6. While the authority to issue or deny a certificate of convenience and necessity under statute rests with the State Railway Commission, it may not whimsically grant or deny the application, and it is its duty to act in accordance with the best interests of all parties concerned if in accordance with the public interest. Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co. ---------- 799

Torts.

One who causes intended or unintended harm to another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm. Buhrman v. International Harvester Co. 633

Trial.

1. The Summary Judgment Act authorizes an interlocutory summary adjudication of liability alone al-

though there is a genuine issue of damages. Hart v. Ronspies ---------- 38

2. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. Zavoral v. Pacific Intermountain Express ---------- 40

3. The rule requiring that a cautionary instruction as to the weight to be given to the testimony of informers, detectives, or other persons employed to hunt up testimony against an accused is not applicable to public officers who are performing a public duty required of them by statute. State v. Bruns -- 67

4. The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. State v. Adams ---------- 75

5. An instruction that the jury cannot draw any inference from the fact that a defendant did not testify is not erroneous. State v. Adams ---------- 75

6. Instructions to the jury should be considered and construed as a whole. State v. Abboud ---------- 84

7. Where 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 other. Hubbard v. Loewenstein ---------- 96

8. It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved. Bartosh v. Schlautman ---------- 130

9. In testing the sufficiency of the 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 be reasonably deduced therefrom. Bartosh v. Schlautman ---------- 130

10. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. State v. Knecht ------ 149

11. The Supreme Court in a criminal action will not interfere with a verdict of guilty based upon con-

flicting evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Bundy ---------- 160

12. Where no motion for mistrial because of alleged misconduct of counsel during final arguments is made, the issue is not before the Supreme Court for consideration. Huenink v. Collins ---------- 195

13. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Fellows v. Buffalo County ---------- 269

14. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong. John Deere Co. of Moline v. Ramacciotti Equipment Co. ---------- 273
Carl R. Anderson & Co. v. Suhr ---------- 474
Winchell v. National Bank of Commerce Trust & Sav. Assn. ---------- 870

15. Rule for consideration of equity case on appeal to the Supreme Court stated. Randall v. Liakos ---------- 326

16. The scope of the cross-examination of a witness rests largely in the discretion of the trial court. State v. Martinez ---------- 392

17. The verdict of a jury will not be disturbed unless it is clearly wrong. Andrews v. Wilkie ---------- 398

18. Instructions should be considered together in order that they may be properly understood and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside. Dittrick v. Deuel ---------- 428

19. An instruction reciting the provisions of statutes controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question. Dittrick v. Deuel ---------- 428

20. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Dittrick v. Deuel ---------- 428

21. Circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each

other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Raff v. Farm Bureau Ins. Co. -------- 444

22. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Raff v. Farm Bureau Ins Co. ------ 444

23. In every jury trial, before the case is submitted there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Raff v. Farm Bureau Ins. Co. ---------- 444

24. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial. Coomes v. Drinkwalter ---------- 450

25. A party is not entitled to an instruction concerning the violation of a statutory rule relating to the lighting of motor vehicles unless the record discloses a causal connection between such alleged violation and the accident or injury for which recovery is sought. Clark v. Smith ---------- 461

26. Rule as to change in testimony, both of parties to suit and nonparties, stated. Clark v. Smith ------ 461

27. Where the right-of-way of vehicles upon a highway is an issue, the trial court must instruct as to the duties of the drivers thereof to remain on the right-hand side of the road if competent evidence places the vehicles in the position of proceeding toward each other in opposite directions. Clark v. Smith ---------- 461

28. Instructions should be considered together and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Zawada v. Anderson ---------- 467

29. If a defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, it is not error for the trial court to fail to instruct thereon. Zawada v. Anderson ---------- 467

30. The introduction in evidence of a map, chart, or diagram illustrating the scene of a transaction and the relative location of objects rests in the sound discretion of the court, and if they are reasonably

accurate and correct are admissible in evidence. Zawada v. Anderson ---------- 467

31. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy; and it is sufficient if the are so established. Carl R. Anderson & Co. v. Suhr ---------- 474

32. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not. Grass v. Valley Feed & Grain ---------- 505

33. Where the issue of liability has been determined fairly but there has been error in the determination of damages which requires that the verdict be set aside, the new trial may be limited to the issue of damages alone. But where it appears that the verdict was the result of a compromise, the new trial should be upon all issues. Schaffer v. Bolz ------ 509

34. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Dike v. Betz ------ 580

35. The Supreme Court will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of the others. Dike v. Betz ---------- 580

36. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant. The Supreme Court will not reverse a judgment in a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Gray v. Hartman ------ 590

37. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. Lundt v. Parsons Constr. Co. ---------- 609

Winchell v. National Bank of Commerce Trust & Sav. Assn. ---------- 870

38. A verdict which is excessive because of the erroneous inclusion of interest may be cured by remittitur

if the amount is subject to exact determination. Lundt v. Parsons Constr. Co. ---------- 609
39. A jury should not be instructed about the presumption that a decedent exercised reasonable care. Sheets v. Davenport ---------- 621
40. Where an admission against interest contained in a pleading is introduced in evidence, the party affected may offer other parts of his pleadings which tend to explain or destroy the admission. This right does not entitle him to offer self-serving statements unrelated to the subject matter of the admission. Sheets v. Davenport ---------- 621
41. A jury should not be informed or instructed about a covenant not to sue. Sheets v. Davenport ---------- 621
42. Nature and effect of pretrial order stated. Sheets v. Davenport ---------- 621
43. In its discretion, a trial court may permit counsel in jury summation to use schematic drawings not in evidence by way of illustration or elucidation of evidence, provided the jury is sufficiently informed and understands they are employed for such purposes and are not to be regarded as evidence. Sheets v. Davenport ---------- 621
44. Where the trial court refuses to permit counsel in jury summation to use schematic drawings and such drawings are not preserved in the record, no reviewable error is presented. Sheets v. Davenport 621
45. Rule for consideration of motion for directed verdict stated. Carley v. Meinke ---------- 648
Presho v. J. M. McDonald Co. ---------- 840
46. A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon. Zimmerman v. Continental Cas. Co. ---------- 654
47. An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. Zimmerman v. Continental Cas. Co. --- 654
48. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not mislead. Zimmerman v. Continental Cas. Co. ---------- 654
49. It is not error for counsel in opening statements to the jury to suggest flat amounts of recovery for different elements of damage if such amounts and elements bear some real relation to what the party expects to prove by the evidence. Yount v. Seager 665
50. Rule as to consideration of instructions on burden of proof stated. Yount v. Seager ---------- 665

51. The question of the necessity of expert evidence to warrant submission to the jury of the issue as to the permanency of an injury or as to future pain or suffering depends, in a large measure, upon the character of the injury involved, whether it is subjective or objective. Yount v. Seager ---------- 665

52. Where the evidence presents a jury question as to whether a testator was subject to undue influence, the opportunity to exercise it existed, there was a disposition to exercise it for an improper purpose, and the result appears to be the effect of such influence, the issue should be submitted to the jury. Thomas v. Vaughan ---------- 673

53. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. Department of Banking v. Lawhead ---------- 722

54. Whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. Barton v. Hobbs ---------- 763

55. An instruction which conflicts with propositions of law properly and correctly stated in another instruction in the same charge on a vital issue and tends to mislead or confuse the jury is erroneous and prejudicial. Kuffel v. Kuncl ---------- 770

56. The burden of proving special benefits is on the condemner. Richardson v. Big Indian Creek Watershed Conservancy Dist. ---------- 776

57. Circumstantial evidence is not sufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom. Norcross v. Gingery ---------- 783

58. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover. Norcross v. Gingery ---------- 783

59. The construction of a written contract is ordinarily

a question of law for the court. Cordes v. Prudential Ins. Co. ---------- 794
60. Giving an instruction likely to confuse or mislead the jury is error. State v. Bird Head ---------- 885

Trusts.
1. The burden of establishing a resulting trust is upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing. Kula v. Kula ---------- 531
2. Ordinarily a trust will not be impressed where the transaction is as consistent with another relationship as with that of a trust. Kula v. Kula ---------- 531

Vendor and Purchaser.
1. Ordinarily a purchaser of real estate is charged with notice of an easement only where its existence is apparent from an inspection of the premises or where he is charged with notice from the recording laws. Wilbur v. Schweitzer Excavating Co. ---------- 317
2. It is not necessary that parties must have discussed or considered subject of termites before purchaser may predicate fraud upon representation of vendor that buildings are in good, sound condition when, in fact, they are infested by termites. Maser v. Lind -- 365
3. Where one unfamiliar with termites examines buildings and, without fault on his part, is unable to and does not discover termite infestation, he is entitled to purchase in reliance upon representation by vendor that buildings are in good, sound condition. Maser v. Lind ---------- 365

Warehousemen.
Without a consideration, a purported agreement in a warehouse receipt does not modify a prior contract. Elgin Mills, Inc. v. Melcher ---------- 17

Waters.
One who builds a structure in a watercourse is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried therein, and what private proprietors may not do, neither may the public authorities, except in the exercise of eminent domain. Fellows v. Buffalo County ---------- 269

Wills.
1. The basic object of construction of a will is to

ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law. National Bank of Commerce Trust & Sav. Assn. v. Crowell Memorial Home ---------- 341

2. A charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent. National Bank of Commerce Trust & Sav. Assn. v. Crowell Memorial Home ---- 341

3. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by a reasonable construction it can be avoided. National Bank of Commerce Trust & Sav. Assn. v. Crowell Memorial Home ---------- 341

4. Where the evidence is not sufficient to sustain a verdict for the contestant as to the due execution of a will, it is error to submit that issue to the jury. Thomas v. Vaughan ---------- 673

5. A presumption of due execution arises from the presence of an attestation clause to a will which recites the facts necessary to its valid execution. Thomas v. Vaughan ---------- 673

6. A testator who, at the time of the execution of the will, knows the extent and character of his property, the natural objects of his bounty, and the proposed disposition of his property, is mentally competent to make a will. Thomas v. Vaughan ---------- 673

7. A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. Thomas v. Vaughan ---------- 673

8. It must appear that a witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances testified to are sufficient upon which to base an opinion. Thomas v. Vaughan ---------- 673

9. It is a matter within the sound discretion of the trial court as to whether a nonexpert witness is qualified to express an opinion as to testamentary capacity. Thomas v. Vaughan ---------- 673

10. Where the evidence presents a jury question as to

whether a testator was subject to undue influence, the opportunity to exercise it existed, there was a disposition to exercise it for an improper purpose, and the result appears to be the effect of such influence, the issue should be submitted to the jury. Thomas v. Vaughan ---------- 673

Witnesses.

1. A witness who testifies from an independent recollection may refresh his recollection by referring to an original memorandum or a copy prepared by himself or another. State v. Adams ---------- 75
2. The manner in which a witness may be examined is within the sound discretion of the court. State v. Adams ---------- 75
3. An indictment is valid where the person indicted was called as a witness before the grand jury if the witness claimed and was granted his privilege against self-incrimination. State v. Abboud ---------- 84
4. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. State v. Knecht ---------- 149
   State v. Bundy ---------- 160
5. Either a husband or wife may be a witness against the other in any action brought by either husband or wife against a third person, relating to the marriage relationship between such husband and wife, or the interruption of or interference with such relationship. Forman v. Andersen ---------- 528
6. The Supreme Court will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Dike v. Betz ---------- 580
7. One who has no direct legal interest in the result of a civil action, wherein the adverse party is the representative of a deceased person, is not incompetent to testify as a witness under the dead man's statute. Sheets v. Davenport ---------- 621
8. A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. Thomas v. Vaughan ---------- 673

9. It must appear that a witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances testified to are sufficient upon which to base an opinion. Thomas v. Vaughan ---------- 673
10. It is a matter within the sound discretion of the trial court as to whether a nonexpert witness is qualified to express an opinion as to testamentary capacity. Thomas v. Vaughan ---------- 673

Words and Phrases.

The word "and" is a conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first and in interpreting the effect or the use of the word "and" the word "or" can be substituted therefor. Rapid Film Service, Inc. v. Bee Line Motor Freight ---------- 1

Workmen's Compensation.

1. Awards of workmen's compensation cannot be based on speculation or conjectural evidence, but must be based on sufficient evidence showing that the disability was the result of an accident arising out of and in the course of the employment. Kastanek v. Wilding ---------- 348
2. The burden of proof in a workmen's compensation case is on the plaintiff to prove an accident arising out of and in the course of the employment. Kastanek v. Wilding ---------- 348
3. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. Where causation is not established by a preponderance of the evidence the plaintiff cannot recover. Kastanek v. Wilding ---------- 348
4. To entitle a claimant under the Workmen's Compensation Act to recover, he must establish by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Dike v. Betz ---------- 580

Zoning.

The application of the provisions of the Omaha municipal code to the 3-mile zone area can be fairly implied from the power granted to the city of Omaha by statute. Jacobs v. City of Omaha ---------- 101